

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 921 OF 2016

Moiddin Rajeso Sayyad Petitioner

Vs.

Haroon Isaq Mujawar & Ors. Respondents

Mr. N.R. Bubna for Petitioner

Mr. Dushyant S. Pagare for Respondent No. 1

Coram : NITIN W. SAMBRE, J.

Date : 12TH MARCH, 2021

P.C.:

1. Application, Exhibit 52 preferred by Defendant No. 3 i.e. the Respondent herein, objecting the maintainability of counterclaim is allowed vide order impugned dated 5th March, 2014. As such, this petition.

2. It appears that the trial Court while dealing with the issue of maintainability of the counterclaim under the provisions of Order VIII, Rule 6-A to 6-F of C.P.C., has noticed that, in the suit no relief, claimed against Defendant No.3. It has further noticed that the counterclaim is preferred even before filing of written statement by Defendant No. 3. As

such it is held that same is not maintainable, as the remedy of filing separate suit is available to the Petitioner.

3. I have perused the respective pleadings of the parties including that of counterclaim.

4. The Petitioner-Defendant has right in law to direct counterclaim against the Plaintiff. However in given set of facts and circumstances same is very much permissible to be brought in action against both, i.e. plaintiff and co-defendant, as could be inferred from the judgment of the Apex Court in the matter of *Rohit Singh and Others Vs. State of Bihar (Now State of Jharkhand) and Others*, reported in **(2006) 12 Supreme Court Cases, page 734**. Paragraph 21 of the said judgment reads thus :

“21. Normally, a counterclaim, though based on a different cause of action than the one put in suit by the plaintiff could be made. But it appears to us that a counterclaim has necessarily to be directed against the Plaintiff in the suit, though incidentally or along with it, it may also claim relief against the co-defendants in the suit. But a counterclaim directed solely against the co-defendants cannot be maintained. By filing a counterclaim, the litigation

cannot be converted into some sort of an interpleader suit. Here, Defendants 3 to 17 had no claim as against the Plaintiff except that they were denying the right put forward by the Plaintiff and the validity of the document relied on by the Plaintiff and were asserting a right in themselves. They had no case even that the Plaintiff was trying to interfere with their claimed possession. Their whole case was directed against Defendant Nos. 1 and 2 in the suit and they were trying to put forward a claim as against the State and were challenging the claim of the State that the land involved was a notified forest in the possession of the State. Such a counterclaim, in our view, should not have been entertained by the trial Court.”.

5. The fact remains that the counterclaim preferred by the Petitioner is in relation to the claim put forth by the original Plaintiff who is real brother of Defendant No. 3. The counterclaim is based on the title claimed to have been vested in the Petitioner by virtue of sale-deed executed by father of Plaintiff and Defendant No. 3. As such the plaintiff and Defendant No.3 are sailing in the same boat when it comes to adjudication of the counterclaim.

6. In the aforesaid background, the observations that the cause of action is altogether different and the Petitioner-Defendant should file a separate suit against Defendant cannot be sustained. Once, it is held by Apex Court that even for a different cause of action, counterclaim is maintainable as reflected in the judgment of the Apex Court in the matter of Rohit Singh (supra), it has to be held that the counterclaim at the behest of Petitioner is maintainable against Co-Defendant also.

7. That being so, order impugned dated 5th March, 2014 passed below Exhibit 52 by the Court of Civil Judge, Junior Division, Ichlkaranji is hereby quashed and set aside.

8. Application, Exhibit 52 stands rejected. The Petition stands allowed in above terms.

9. It is open for the Defendant No. 3 to file his written statement to the counterclaim.

10. Since the suit is pending for more than five years, the hearing is expedited as jointly prayed.

11. As a consequence of above observations, the order passed below Exhibit 80 dated 7th September, 2015 is also set aside. The said Application, Exhibit 80 also stands rejected.

(NITIN W. SAMBRE, J.)