

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7077 OF 2016
ALONG WITH
INTERIM APPLICATION NO.3460 OF 2021**

Rakesh Rajendrakumar Agarwal .. Petitioner

Vs.

Shakuntala Ishwarlal Dalal & Ors. .. Respondents

...

Mr. Prasad Dhakephalkar, senior counsel with Mr. Amol Mhatre and Mr. Sameer Mhatre for the petitioner/applicant.

Ms. S.P. Trivedi i/b M/s. A. Bharat & Co. for respondent No.10.

Mr. Sandeep Mahadik i/b Mr. Jayesh Joshi for respondent No.15.

Mr. Mohit Goyal i/b Wadia Ghandy & Co. for respondent No.16.

Mr. M.M. Vashi, senior counsel with Mr. A.A. Siddique for respondent No.17.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 24TH NOVEMBER, 2021.

P.C:-

1. By the present writ petition, the petitioner has assailed the

AJN

order passed by the learned Joint Civil Judge, Senior Division, Vasai on Ex-97 in Special Civil Suit No.90 of 2010. Under the impugned order, the application moved by defendant No.5 in the suit for excluding the counter-claim filed by defendant No.9 at Ex-88 came to be rejected.

2. Heard Mr. P.K. Dhakephalkar, learned senior counsel appearing for the petitioner and Mr. M.M. Vashi, learned counsel appearing for respondent No.17, the contesting respondent. Respondent Nos.10, 15 and 16 are represented by respective counsel, who are also heard.

3. Rule. By consent of the parties, Rule made returnable forthwith.

4. The petitioner is original defendant No.5 in Special Civil Suit No.90 of 2010 filed by respondent Nos.1 to 9 in the Court of Civil Judge, Senior Division, Vasai against the defendants alleging that they have illegally dealt with the property of the original owners being respondent Nos.1 to 9. The suit was filed with respect to various properties situated at Vasai and which were particularly set out in paragraph No.1 of the plaint. It was pleaded that the plaintiffs are the owners of the property through their predecessor in title Ishwarlal Harkishendas Dalal and Thakurbhai Harkishendas Dalal. It was pleaded that the properties were owned by the two brothers and their

predecessors in title, who had never visited Vasai as one brother is residing in Mumbai and the other brother is residing abroad. Taking benefit of their absence, it was alleged that defendant Nos.10 and 11 got false and bogus sale deeds executed in respect of the properties described at Sr. Nos.1, 2, 5 and 6 of paragraph No.1 of the plaint by personating some persons as Ishwarlal Dalal and Thakurbhai Dalal and by sale deed dated 11/05/1989, the properties were transferred in the name of defendant Nos.10 and 11. It was also pleaded that the properties purchased in the names of defendant Nos.10 and 11 were further made over to defendant Nos.1 to 4 on 12/04/1990 by sale deed and as far as property at Sr. No.5 mentioned in the plaint is concerned, defendant No.8 purchased it from defendant Nos.1 to 4 by sale deed dated 25/08/2004. Further, property at Sr. No.3 was purchased by defendant No.5 from defendant Nos.1, 2 and 4 by sale deed dated 13/09/2004. A relief was sought in the plaint to set aside the sale deeds being illegal and fraudulent and a declaration was sought that the plaintiffs are entitled for peaceful possession of the said properties from the defendants.

5. Similar allegations were set out in respect of other properties being illegally assigned by sale deeds dated 11/12/1990 and 12/12/1990. A declaration was, therefore, sought to set aside the sale deeds executed in the names of the predecessors of the plaintiffs and it was alleged that the defendants had no concern with the properties as they were

owned by the predecessors in title of the plaintiffs Ishwarlal Dalal and Thakurbhai Dalal. It is pertinent to note that Ishwarlal Dalal expired on 07/05/2000 and Thakurbhai Dalal expired on 19/03/1996.

6. On the summons being issued, respondents filed written statement. However, defendant No.9, who was also served with the summons, failed to file written statement, resulting into an order being passed by the court on 12/09/2011 directing the suit to proceed ex-parte against him. No steps were taken by defendant No.9 for setting aside the said order, but on 19/09/2014, defendant No.9 preferred an application for setting aside the ex-parte order. The ground set out was to the effect that the power of attorney of the defendants has expired and, he was not aware about filing of the suit.

7. On 02/01/2015, the trial court allowed the application and deemed it fit to afford an opportunity to the defendants to put in his appearance.

8. On the permission being granted by the court, the written statement came to be filed by defendant No.9 and he inserted a counter-claim in the written statement, where he sought the following relief:

“23. This Defendant therefore prays before this Hon’ble Court that this Hon’ble court be pleased to grant -

a) decree declaring that the suit is dismissed.

b) decree declaring that the Deed of Conveyance dated 21st October 2014 executed by the Plaintiffs in favour of the Defendant No.5 is void, illegal and not binding upon this Defendant.

c) decree granting permanent order of injunction restraining Plaintiffs and the Defendant No.5 or any of them or any one claiming through them from selling, transferring, disposing of, creating any third party right or dealing with the said suit property no. 5 in any manner;

d) decree granting permanent order of injunction restraining Plaintiffs and the Defendant No.5 or any of them or any one claiming through them from dispossessing this Defendant;

e) Pending the hearing and final disposal of the suit and/or counter claim order of injunction restraining Plaintiffs and the Defendant No. 5 or any of them or any one claiming through them from selling, transferring, disposing of, creating any third party right or dealing with the said suit property no. 5 in any manner.”

9. The petitioner i.e. defendant No.5 to the said suit, on

gaining knowledge about the counter-claim being set out in the written statement, filed an application before the Civil Judge in the pending suit, wherein, he sought exclusion of the counter-claim filed by defendant No.9 by projecting a ground that no permission was sought by defendant No.9 to file counter-claim and the counter-claim is instituted nearly after three years of the limitation period fixed for filing written statement of defendant No.9 and, therefore, it is hit by Order 8 Rule 6A of the CPC. The objection, which was numbered as Ex-97 also pleaded that the counter-claim of defendant No.9 is against defendant No.5 and, therefore, it has to be excluded since it is in blatant violation of Order 8 Rule 6A of the CPC.

10. The impugned order is passed on the said application filed by the petitioner/defendant No.5 on 14/08/2015 and the application came to be rejected.

11. With the assistance of the respective counsel, when the impugned order is perused, it can be seen that after referring to the objections raised in the application vide Ex-97 for excluding the counter-claim filed by defendant No.9, which is opposed by defendant Nos.8 and 9 by filing their say submitted that the court has already allowed defendant No.9 to file written statement and the plaintiff has not objected to the counter-claim and failed to file his written statement to the counter-claim. The objection raised by defendant Nos.8 and 9 to the application of defendant

No.5 was that he had no locus to file the present application as he has fraudulently and illegally purchased the suit property from the plaintiff.

12. Referring to the provisions providing for counter-claim being Order 8 Rule 6A of the CPC, learned Judge considered both the objections raised, the first one being the counter-claim was a delayed one and secondly, the counter-claim against the defendant by another defendant is not maintainable since that is not the purport of Order 8 Rule 6A of the CPC, which permits institution of counter-claim against the plaintiff. While dealing with the first objection, learned Judge recorded to the effect that when defendant No.9 was permitted to file his written statement after expiry of the period prescribed, it will have to be taken that the limitation to file the counter-claim also simultaneously got extended till defendant No.9 submitted his defence by filing his written statement. On the point of delay, the court, therefore, held that the objection being the counter-claim of defendant No.9 is time barred, cannot be considered since it is filed along with written statement, which was permitted to be filed under the orders of the court.

13. Though learned court did not specifically deal with the other objection being no counter-claim can be instituted by one defendant against the other defendant, on hearing Mr. Dhakephalkar, learned senior counsel, the said objection also

does not warrant any consideration. The correct legal position on the said point has been enunciated by the Hon'ble Apex Court in the case of **Rohit Singh & Ors. v. State of Bihar (Now State of Jharkhand) & Ors.** reported in **(2006) 12 SCC 734**, where it has been held that the counter-claim is not maintainable if directed solely against co-defendant, but it has to be directed against the plaintiff, though incidentally or along with it, it may also claim relief against the co-defendants. A counter-claim, which is directed only against the co-defendant is not maintainable is the ratio of the decision of the Apex Court in the case of **Rohit Singh (supra)**.

14. Applying the aforesaid principle to the impugned order and on careful perusal of the counter-claim staked by defendant No.9, it can be clearly discerned that the counter-claim by defendant No.9 is for a declaration that the deed of conveyance dated 21/10/2014 executed by the plaintiffs in favour of defendant No.5 is void, illegal and not binding upon defendant No.9. The other reliefs that are sought in the counter-claim are directed against the plaintiffs and defendant No.5 or any of them or any one claiming through them. It is not the case that the counter-claim by defendant No.9 is only set out against defendant No.5.

15. When written statement of defendant No.9 is carefully read, a specific pleading has been taken to the effect that the

defendant No.5 had fraudulently purchased the suit property at Sr. No.6 when the sale deed entered into between late Ishwarlal Dalal and late Thakurbhai Dalal and defendant Nos.10 and 11 dated 11/05/1989 registered with the office of the Sub-Registrar of Assurances and the sale deed entered into between defendant Nos.10 and 11 and defendant Nos.1 to 4 on 05/04/1990 registered at the office of the Sub-Registrar of Assurances and the deed of conveyance between defendant Nos.1 to 4 and defendant No.9 dated 30/08/2005 is still valid and subsisting. It is specifically pleaded that the plaintiffs are not the owners of the suit land at Sr. No.6 but they are claiming to be the legal heirs. It is also claimed that the plaintiffs have illegally and fraudulently transferred the suit property at Sr. No.6 and other suit properties to defendant no.5 during the pendency of the suit and made over the possession to him. An apprehension was expressed in the written statement that the plaintiffs and defendant No.5 would dispossess defendant No.9 and, therefore, he was entitled for an order of injunction restraining them from doing so. The deed of conveyance executed by the plaintiffs in favour of defendant No.5 is thus pleaded to be fraudulent and is sought to be set aside.

16. In the wake of the aforesaid facts, learned Joint Civil Judge, Vasai has taken the objection further and recorded that the plaintiffs have not raised any challenge of whatsoever nature for exclusion of the counter-claim and even the argument that the

plaintiffs have lost interest in the property as he has already transferred it to defendant No.5 would not come in the way to entitle defendant No.5 to raise any objection. Recording that defendant No.5 did not have any locus standi to seek exclusion of counter-claim of defendant No.9, the objection has rightly been rejected. In view of the aforesaid reasoning of the learned Judge, which is perfectly within the parameters of Order 8 Rule 6A of the CPC, the objection raised by defendant No.5 being unsustainable has been rightly rejected. The impugned order has been upheld. The writ petition is dismissed. No order as to costs.

[SMT. BHARATI DANGRE, J.]