

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.11774 OF 2017

MANOHAR ANNASAHEB TANDALE AND ANOTHER
VERSUS
SUNANDA ANIL MATE AND OTHERS

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Advocate for the Petitioners : Shri D.R. Irale Patil
Advocate for Respondent 1 : Shri R.K. Jadhavar
Advocate for Respondent 5 : Shri N.S. Tekale

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CORAM: SMT. BHARATI H. DANGRE, J.

DATE :- 21st February, 2022

Per Court:

1. Heard the learned counsel for the petitioners, who are the Defendant Nos.20 and 21 in the Counterclaim filed by the original Defendant No. 5 in RCS No. 133/2002, are aggrieved by the order dated 12.07.2017 below exhibit 143.

2. Sequence of events leading to the impugned order dated 12.07.2017 passed by the learned Joint Civil Judge, Junior Division Nevasa, below exhibit 143 filed by the present petitioners, would reveal that RCS No.133/2002 filed for partition and separate position came to be partly decreed and the plaintiff was held entitled to 6/15th share along with share of Defendant Nos.1A to 1C through the deceased Defendant No.1 and 1/15th share of Defendant Nos.6 to 8. Defendant No.5 to the

suit is Shri Kakasaheb Anil Mate, who was minor when the suit came to be decreed on 05.12.2008.

This constrained defendant No.5 to file an appeal bearing RCA No.198/2014 (old No.67/2011), which was allowed on 17.08.2016 and the matter was remanded back to the Trial Court for fresh decision.

3. While the matter was proceeded on its remand, the original Defendant No.5 filed the counterclaim along with exhibit-5 against the third parties/ petitioners. The petitioners were projected as Defendant Nos.20 and 21, being subsequent purchasers of the property, who were neither impleaded in the original suit nor the property, which they purchased was part and parcel of the suit property.

4. The petitioners were issued summons to response to the counterclaim on 18.03.2017. On issuance of the summons by the learned Judge by taking recourse Order VIII 8 Rules 15 and 16 (Bombay Amendment), the petitioners appeared and filed their Say vide exhibit 143 in response to the counterclaim, wherein, they raised multiple objections including the objection about requisite court fees being paid for the counterclaim. Another objection is raised to the effect that the counterclaim has to be filed along with the written statement and the written statement was filed long back and now the counterclaim is being introduced. The big thrust of the petitioners/ defendant Nos.20 and 21 is to the effect that the counterclaim has been filed against them, who are

not parties to the original suit and there is no cause of action against them to file the counterclaim. Further, it is also contested on the ground that the counterclaim can be filed in terms of Order VIII Rule 6A only against the plaintiff and it being the settled position of law that the counterclaim can only be maintainable against the plaintiff and not against the defendants and same cannot be entertained. It was, therefore, prayed to the following effect:-

- “18) *The counter claim is not maintainable unless there is claim, in the present case there is no claim of the present respondents as against the present defendant No.5. The application as such is not maintainable.*
- 19) *That for all the above reasons, the application of the defendant No.5 is required to be dismissed with costs and compensatory.”*

5. Upon this reply, the order came to be passed by the learned Judge on 12.07.2017, wherein, instead of adjudicating the merits of the opposition/reply of the Defendant Nos.20 and 21 to the counterclaim, leaving that issue open, the learned Judge has directed their impleadment in the suit by relying upon Order VIII Rules 15 and 16.

6. The impugned order apparently is erroneous in the wake of the facts and provisions of law. If the Bombay Amendment to Order VIII is carefully read, Rule 14 contemplates the Defendant setting up a counterclaim, shall specifically state so in the written statement. Rules 15 and 16 contemplate the contingency which is involved in the present case

when the defendant is sought to be added, who is not a party to the suit and the procedure which is contemplated is prescribed in Rules 15 to 19. A careful reading of the said scheme would reveal that where the Defendant by way of the written statement sets up the counterclaim, which raises a question between himself and the plaintiff along with any other person, he shall add to the title of his written statement a further title similar to the title in the plaint, setting forth the names of all persons who, in such counterclaim were to be enforced by a cross-suit, would be defendants to such cross-suit and shall deliver the copies of the written statement to such of them as are already parties to the suit within the period within which he is required to deliver it to the plaintiff.

Rule 16 further contemplates that where any such person as is mentioned, in Rule 15, is not already party to the suit, he shall be summoned to appear by being served with a copy of the written statement and thereafter by virtue of Rule 17, when any person who is not the defendant to suit, but is served with the written statement and the counterclaim, shall appear before the court as if he had been served with a copy of writ summons to appear in the suit. It is open for him to deliver a reply within time and Rule 19 of Order VIII makes it imperative for the Court to hear such application and make such order as shall be just.

Rule 19 of Order VIII reads thus:-

“19. Objection to counter-claim being allowed to be set up in the

suit:-

Where a defendant sets up a counter-claim, if the plaintiff or any other person named in the manner aforesaid as party to such counter-claim contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent suit, he may, at any time before reply, apply, to the Court or a Judge for an order that such counter-claim may be excluded and the Court or Judge may, on the hearing of such application, make such order as shall be just.

7. Thus, reading of the scheme as involved and applicable to the State by the amendment, would make it imperative for the Judge to dispose of the counterclaim on an objection being raised about the maintainability of the counterclaim and by staking the claim that an independent suit can be brought against the cause of action and the learned Judge is duty bound to hear such application and make such order as he deems fit.

8. However, perusal of the impugned order at page 84 of the paper book, would reveal that the learned Judge has not yet determined the merits of the counterclaim filed by the defendant No.5 and particularly, in the wake of the objection raised vide exhibit 143 that the counterclaim is not maintainable on certain grounds in law and the impugned order reveals that the learned Judge has deferred the hearing on the said exhibit 143, but has directed the impleadment of the petitioners/ Defendant Nos.20 and 21, which, in wake of the scheme contained in the Code of Civil Procedure reproduced above, is premature

exercise of power by the learned Judge. Vide exhibit 143, the present petitioners/proposed Defendant Nos.20 and 21 had raised an objection and therefore, this objection about the maintainability of the counterclaim against them, will have to be determined first, but the learned Judge has refrained from doing so and the impugned order dated 12.07.2017, therefore, cannot be sustained, since the learned Judge has observed that the determination of exhibit 143 is only for the limited purpose of their impleadment in the counterclaim. Necessarily, the impugned order cannot be sustained and is quashed and set aside. The Writ Petition is, accordingly, allowed.

9. The learned Judge is directed to decide the counterclaim filed by the defendant No.5 after affording an opportunity of hearing to the petitioners/ Defendant Nos.20 and 21 and shall pass necessary orders about the maintainability of the counterclaim and thereafter, adjudicate whether, the present petitioners/Defendant Nos.20 and 21 are necessary parties to the said counterclaim.

10. Since it is noted that the proceedings in the suit are stayed by this Court by order dated 04.10.2017, with the disposal of this writ petition, the learned Judge shall determine the counterclaim filed by the defendant No.5 to the original suit by taking into consideration exhibit 143 and pass necessary orders within a period of 6 weeks from today.

Needless to state that, upon adjudication of the counterclaim,

the learned Judge shall determine the suit itself, within a period of six months from today.

kps

(SMT. BHARATI H. DANGRE, J.)