

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

CIVIL REVISION APPLICATION NO.19 OF 2021

Shri. Manoharlal S/o Gopichand Nathani,
Age : 60 years, Occu : Agri. and Business,
R/o 22, Ganpati Nagar, Jalgaon,
Tq. and District Jalgaon.

... **Applicant.**

Versus

1. Smt. Bhikubai Vijay Shinde,
Age : 50 years, Occu. Agriculture,
2. Mas. Bharat Vijay Shinde,
Age : 23 years, Occu. Education,
3. Mas. Sagar Vijay Shinde,
Age : 20 years, Occu. Education,
4. Mas. Akash Vijay Shinde,
Age : 18 years, Occu. Education,
5. Shri. Rajendra Uttamrao Shinde,
Age : 46 years, Occu. Agriculture,
6. Shri. Sanjay Uttamrao Shinde,
Age : 42 years, Occu. Agriculture,

All R/o Village Vavadda,
Tq. and District Jalgaon.

... **Respondents.**

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Advocate for Applicant : Mr. Yawalkar S. B.

Advocate for Respondent Nos.1 to 6 : Mr. Atmaram J. Patil.

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CORAM : S. G. MEHARE, J.

DATE : 23.08.2023

ORAL JUDGMENT :-

1. Rule. Rule made returnable forthwith and heard finally
by consent of the parties.

2. The facts in brief of the case were that the present applicant had filed the suit for the specific performance of the contract against the respondents. When the suit was filed, respondent Nos.2 to 4 were minor. On attaining their majority, they have practically adopted/admitted the reply filed by respondent No.1, who was their mother. In addition to the admission, whatever she has averred in her written statement, they have filed an additional written statement raising various objections, including the defence that respondent No.1/mother had no exclusive right to sell the suit property. Hence, the agreement to sell on the basis of which the suit was filed was not binding upon them. In a written statement, they have also pleaded specifically that had there been any partition, defendant No.1 would not get share more than $1/8^{\text{th}}$. In those circumstances, she would not be entitled to sell the share from suit land more than $1/8^{\text{th}}$. A similar plea was raised in a written statement. However, on a similar plea, they have filed a counterclaim.

3. Learned counsel for the applicant would submit that though the title was the counterclaim, in fact, it is a suit in the nature of partition claimed by respondent Nos.2 to 4 against their mother (defendant no.1) and maternal aunt. He would

further argue that reading the so-called counterclaim as a whole is not a counterclaim in terms of Order VI Rule 8 of the C.P.C. It is a separate cause of action. Hence, the counterclaim is not as provided under the law. He would also submit that the learned Court did not consider the provisions of Order VIII Rule 6-C of C.P.C. The claim of respondents Nos.2 to 4 cannot be disposed of by way of counterclaim, and they have to file a separate suit. He would also argue that as far as the agreement to sell is concerned, similar defences have been raised. In the counterclaim, he sought relief against co-defendant No.1 and not against the plaintiff. On these grounds, he claims that the impugned order is illegal and invalid, hence, liable to be set aside.

4. Per contra, the learned counsel for the respondents would argue that there shall be no difference if the counterclaim is filed in the suit. He read the relevant provisions provided under Order XXXIV of C.P.C. There was no question to appoint a guardian for respondent Nos.2 to 4 as they have attained the majority. Further, he could not satisfy the Court that the counterclaim as submitted was in the form of counterclaim. He prayed that it was a common cause of action. Hence, they have correctly sought the relief of declaration in

their counterclaim that the agreement executed by their mother in favour of the plaintiff is liable to be declared illegal.

5. Perused the written statement and the counterclaim. Whatever the defences have been raised in the written statement, similar defences have been raised in the counterclaim. It appears that they have brought the theory of share in a notional partition. The plaintiff is claiming specific performance of the contract in pursuance of the agreement to sell executed by the mother of respondent Nos.2 to 4, executed when they were minors. After attaining the majority, they have rightly exercised their right to file a written statement. They have raised all the legal issues, claiming that defendant No.1 had no right to execute the agreement to sell on their behalf. However, the counterclaim appears as a suit in the form of partition claiming against their mother (defendant No. 1). The plaintiff would not be a party to the partition of the suit land. He is claiming the specific performance of the contract in pursuance of the agreement to sell. Reading Order VIII Rule 6A and 6C of the C.P.C., it is apparent that the counterclaim is not against the plaintiff, and there is no cause of action against him to file a counterclaim. Hence, there appears a substance in the arguments of learned counsel for the applicant.

6. Perusal of the impugned order reveals that the provisions of Order VIII Rule 6A and 6C have not been appropriately considered. Hence, the wrong conclusion has been recorded. The order impugned is illegal and, thus, liable to be quashed and set aside. For the above reasons, the Court proceeds to pass the following order :

ORDER

- (i) Civil Revision Application is allowed.
- (ii) The order passed below Exh.78 in Special Civil Suit No.44 of 2012, on 08.01.2020, by the learned Joint Civil Judge Senior Division, Jalgaon, stands quashed and set aside.
- (iii) Application Exh.78 filed by the original plaintiff in Special Civil Suit No.44 of 2012 is allowed in terms of prayer clause "B".
- (iv) Rule made absolute. No order as to costs

(S. G. MEHARE, J.)

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vmk/-