

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

SECOND APPEAL NO.2 OF 2023

1. Balaji s/o Marotirao Waghmare,
Age: 65 years, Occu.: Agriculture,
R/o: Dhangargalli, Wasmata,
Tq. Wasmata, District: Hingoli
..Ori.Def.no.1
2. Mathurabai w/o Parasram Ganar,
Age: 63 years, Occu.: Agriculture,
R/o.: Pethpimplagaon, Tq. Palam,
District: Parbhani ..Ori.Def.no.3
3. Savitribai w/o Sudam Pagde,
Age: 58 years, Occu.: Agriculture,
R/o.: Dhangarwadi, Tq. and
District: Nanded ..Ori.Def.no.4
4. Narmada w/o Balaji Pisal,
Age: 55 years, Occu.: Agriculture,
R/o.: Kawalgaon, Tq. Purna,
District: Parbhani ..Ori.Def.no.5
.. **Appellants**
[Ori. Defendants/Counter Claimants]

Versus

1. Kishan s/o Jalbaji Bakal,
Since deceased, through his
Legal representative,
- 1-A Kaushalyabai w/o Kishanrao Bakal,
Age: 61 years, Occu.: Household,
R/o.: Asarjan, Tq. and District
Nanded, pin code 431 606 .. Ori. Plaintiff
- 1-B Ashok s/o Kishanrao Bakal,
Age: 41 years, Occu.: Agriculture,
R/o: Asarjan, Tq. and District
Nanded, pin code 431 606 .. Ori. Plaintiff

- 1-C. Bhagwat s/o Kishanrao Bakal,
Age: 39 years, Occu.: Agriculture,
R/o.: Asarjan, Tq. and District
Nanded, pin code 431 606 .. Ori. Plaintiff
2. Sitaram s/o Marotrao Waghmare,
Age: 68 years, Occu.: Agriculture,
R/o.: Kottitirth, Post Sugaon,
Tq. and District Nanded,
Pincode 431 602 .. Ori. Defendant no.2

...
Advocate for Appellants: Mr. Amit A. Mukhedkar
...

CORAM: ARUN R. PEDNEKER, J.

Date: 07th JULY, 2023

ORDER:

1. Heard.
2. By the present second appeal the appellants are challenging the judgment passed by the learned District Judge-3, Nanded in Regular Civil Appeal No.156 of 2019, whereby the appellants / original defendants' counter claim is dismissed and the judgment of the trial court is set aside to the extent of the counter claim of the appellants / original defendants herein.
3. The facts giving rise to the present appeal can be summarized as under:-

A. Civil Suit was filed by the plaintiffs for specific performance of the agreement dated 30.04.2003 and perpetual injunction against the respondents. According to the plaintiffs, the late Maroti and his brother Nagorao had owned gut no.55 to the extent of 0H-27R, situated at Kotathirth, Taluka and District - Nanded. The late Maroti had agreed to sell his share in the said land to the extent of 0H-13R.50R to Kishan for consideration of Rs.50,600/- and executed an agreement to sell to that effect in his favour on 30.04.2003. The present dispute relates to the extent of 13.50R. agreed to be sold vide the aforesaid agreement to sell. Kishan had paid earnest amount of Rs.30,000/- to Maroti in presence of witnesses and the balance consideration was to be paid at the time of execution of sale deed. Possession was parted on the date of the agreement and

since then Kishan is in possession of the same. Due to ill health of Maroti, sale deed could not be executed. Thereafter, Maroti died in the year 2005 . After demise of Maroti, Kishan requested to the defendants legal heirs of Maroti through mediators to execute the sale deed. However, the defendants avoided to execute the sale deed in favour of Kishan. Thereafter, notice was issued dated 10.07.2013 to the respondents for execution of sale deed. Thereafter, since there was no sale deed executed, the original plaintiff Kishan filed suit for specific performance of contract and perpetual injunction. On the demise of Kishan, the legal heirs of Kishan have continued by the suit. The original defendant no.2 admitted the entire claim of the plaintiffs.

B. Defendants no.1, 3 to 5 filed written statement including the counter

claim disputing the claim of the plaintiffs. It is the contention of the said defendants that the agreement to sell is a forged document and they further stated that late Maroti executed a registered sale deed No.1773 in favour of Munjaji with the consent of defendants no.1 and 2. After denying the claim of late Kishan plaintiff, the defendants no.1, 3 to 5 filed their counter claim against the plaintiffs and defendant no.2 for partition in the property land gut no.55 admeasuring 1H-5R. to the extent of 0H-27R, which includes the suit property to the extent of 13.50R, in between defendants seeking allotment of 1/5th share to each of them. According to the said defendants the said property is their ancestral property and they being the legal heirs of the property are entitled to the share of the suit property. The counter claim was contested

by late Kishan by filing written statement. According to him, the counter claim is not maintainable in the eye of law. He has resisted the entire claim. The trial court framed issue at Exhibit-49 and after considering the evidence brought on record by the parties dismissed the suit and allowed the counter claim.

C. The trial court formulated following issues for consideration and passed the order as under:-

Sr. No.	ISSUES	FINDINGS
1]	Whether plaintiff proves that father of defendant deceased Maroti S/o Sambhaji Waghmare had executed agreement to sell on 30.04.2003 in respect of suit property for consideration of Rs-50,600/- in favour of plaintiff?	No
2]	Whether plaintiff proves that plaintiff has paid Rs.-30,000/- to deceased Maroti S/o Sambhaji Waghmare as earnest amount?	No
3]	Whether plaintiff proves	No

	that he is in possession of the suit property?	
4]	Whether the plaintiff was and is ready and willing to perform his part of agreement to sell?	Do not survive
5]	Whether defendant No.-1, 3 to 5 / counter claimant prove that the suit property is their ancestral property?	Yes
6]	Whether plaintiff is entitled for the relief of specific performance of agreement as prayed?	No
7]	Whether plaintiff is entitled for the relief of perpetual injunction to restraint defendants/counter claimant from causing obstruction and interference in his peaceful possession of the suit property as prayed?	No
8]	Whether the plaintiff is entitled for the relief of perpetual injunction to restraint defendants/counter claimants to alienate or create any third party interest in the suit property as prayed?	No
9]	Whether defendants No.-1, 3 to 5 / counter claimant are entitled for tor partition? If yes, to what Extent?	Yes. To the extent of 1/5 share each
10]	What order and decree?	As per final order

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ORDER1] *Suit is dismissed.*2] *Counterclaim is decreed.*

3] *It is declared that defendants have 1/5 share each in counterclaim property.*

4] *Certified copy of decree be sent to Collector directing him to execute the decree and effect the partition of property described in claim clause of counterclaim as per the determined shares.*

5] *Collector is hereby directed to recover the court fees to the extent of share of defendants at the time of actual delivery of possession and to inform this court in what manner the requisite court fees is recovered.*

6] *Parties to bear their own costs.*

7] *Preliminary decree be drawn up accordingly."*

D. In appeal the appellate court formulated following points for determination and passed the order as under:-

Sr. No.	Points	Findings
1]	Whether the suit is barred by limitation?	Yes
2]	Whether the counter claim is maintainable in law?	No
3]	Whether the appellants / original plaintiffs are entitled to decree for specific performance of sale as sought?	No

4]	Whether the respondents / original counter claimants are entitled to partition as sought?	No
5]	Whether any interference is required in the impugned judgment and decree?	Yes
6]	What order?	As per final order

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ORDER

1] *The appeal is partly allowed.*

2] *The impugned judgment and decree to the extent of counter claim is hereby set aside.*

3] *Counter claim of defendant Nos.1, 3 to 5 is dismissed.*

4] *The parties to bear their own costs.*

5] *Record and proceedings in R.C.S.No.535/2013 be sent back to the trial Court.”*

E. The appellate court held that the agreement to sell is proved as against defendants no.1, 3 to 5. However, the appellate court held that the plaintiffs have failed to prove payment of earnest money of Rs.30,000/- to late Maroti. They also failed to prove their readiness and willingness to get the sale

deed executed in their favour. The plaintiffs are twice failed to prove that they have already performed or was always ready and willing to perform the essential terms of the contract which were to be performed by them and, thus, the appellate court held that the relief for specific performance of contract as sought by them cannot be granted. It also held that there is no independent evidence produced to prove their possession. The court held that the agreement to sell cannot bind defendants no.1, 3 to 5. As to the issue of limitation, the appellate court held that the suit of the plaintiffs is barred by limitation. The appellate court, thereafter, considered the case of the counter claim of defendants no.1, 3 to 5. In the counter claim, they have sought partition of the family property. Counter is for partition between the defendants

inter-se. The appellate court held that the counter claim cannot be set up against the defendants inter-se and that there is no claim against the plaintiffs and in view of the same, the same was dismissed as being not maintainable.

4. In the present second appeal, the appellants are challenging the rejection of the counter claim of defendants no.1, 3 to 5. The appellants contend that the counter claim is permissible and relied upon the judgments of;

(1) Rohit Singh and others Vs. State of Bihar (Now State of Jharkhand) & Ors., 2006 (12) SCC 734,

(2) Shamrao Sitaram Kadam since deceased through his legal heirs and Others Vs. Tukaram Savala Jadhav, 2020 (2) Mh.L.J. 570,

(3) Manikchand Fulchand Katariya Vs. Lalchand Harakchand Katariya, 1994 (1) Mh.L.J. 732

and in the case

(4) Gurbachan Singh Vs. Bhag Singh and others, AIR 1996 SC 1087, of the Hon'ble Supreme Court, to contend that the counter claim is maintainable for

partition against the defendants inter-se in a suit for injuncton.

5. Having heard Mr. Amit A. Mukhedkar, learned counsel for the appellants, the point that arise for consideration is, whether a counter claim by defendants is available for partition inter-se between the defendants. In the instant case, the plaintiffs are not family members or it has no claim in the partition of the suit property. He sought specific performance of the contract of agreement of a sale, he is a outsider to the family of the defendants. Rule 6-A of Order 8 of the CPC provides for counter claim by the defendant and reads as under:-

"6-A Counter-claim by defendant.-

(1) A defendant in a suit may, in addition to his right of pleading a set-off under rule 6, set up, by way of counter-claim against the claim of the plaintiff, any right or claim in respect of a cause of action accruing to the defendant against the plaintiff either before or after the filing of the suit but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not:

Provided that such counter-claim shall not exceed the pecuniary limits of the jurisdiction of the Court.

(2) Such counter-claim shall have the same effect as a cross-suit so as to enable the Court to pronounce a final judgment in the same suit, both on the original claim and on the counter-claim.

(3) The plaintiff shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Court.

(4) The counter-claim shall be treated as a plaint and governed by the rules applicable to plaints."

6. The bare reading of Rule 6-A of Order 8 of the CPC suggests that there has to be a claim against the plaintiff. In the instant case, the counter claim is as regards the partition of the suit property. The prayer in the counter claim is as under:-

" Suit of the plaintiff may kindly be dismissed with costs with compensatory cost of Rs.1,00,000/- AND counter claim may kindly be decree with cost in respect of 1/5th share each as shown in claim clause of the counter claim and decree be sent to collector Nanded U/sec.54 of C.P.C. for effecting partition and separate possession of the counter claimant in the counter claim property."

7. There is no cause or case against the plaintiffs but the counter claim is inter-se

between the defendants and, on the face of it, Rule 6-A of Order 8 of the CPC, for filing counter-claim is not applicable.

8. Now adverting to the judgments relied upon by the Appellants, the Hon'ble Supreme Court in the case of Gurbachan Singh (supra), was considering the case, whether a counter-claim for possession could be entertained and whether a counter-claim can take a claim out of the pecuniary jurisdiction of the court on the ground that the counter claim is beyond the pecuniary jurisdiction. The Hon'ble Supreme Court in Gurbachan Singh (supra), at paragraph no.3, held as under:-

"3...In other words, by laying the counter claim pecuniary jurisdiction of the Court cannot be divested and the power to try the suit already entertained cannot be taken away by accepting the counter claim beyond its pecuniary jurisdiction. Thus considered we hold that in a suit for injunction, the counter-claim for possession also could be entertained by operation of Order 8 Rule 6(A)(1) of C.P.C."

However, the Gurbachan Singh (supra) judgment does not deal with a case, where the

counter claim is between the defendant inter-se and there is no cause against the plaintiff.

In the case of Rohit Singh (supra), the petitioner had relied upon at paragraph no.18 of the judgment reads as under:-

"18. Normally, a counter-claim, 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 counter-claim has necessarily to be directed against the plaintiff in the suit, though incidentally or along with it, it may also claim relief against co-defendants in the suit. But a counter-claim directed solely against the co-defendants cannot be maintained. By filing a counter-claim the litigation cannot be converted into some sort of an inter pleader 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 defendants 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 counter-claim, in our view, should not have been entertained by the trial court."

The above judgment in Rohit Singh (supra) clearly states that the counter claim has to be necessarily directed against the plaintiff in the suit, through incidentally or along with it, it may also claim relief against co-defendants in the suit. But a counter-claim directed solely against the co-defendants cannot be maintained. By filing a counter claim the litigation cannot be converted into some sort of an inter pleader suit.

9. Thus, the judgment cited by the appellants is against them, as in the counter claim there is no claim put up by the defendants no.1, 3 to 5 against the plaintiffs. The counter claim is not maintainable and the appellate court has rightly dismissed the counter claim as not maintainable.

10. In view of the same, the second appeal is dismissed as no substantial question of law arises for consideration.

[ARUN R. PEDNEKER, J.]

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