

VRJ

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

WRIT PETITION NO.4344 OF 2021

Gaurishankar N. Kalyani

... Petitioner

V/s.

Sulochana N. Kalyani & Ors.

... Respondents

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Mr. Nikhil Sakhardande, Senior Advocate with Mr. Rohan Rajadhyaksha with Ms. Anshika Misra, with Mr. Prabhav Shroff and Ms. Deepti Prabhu i/by AZB & Partners for the petitioner.

Mr. Sachin Mandlik i/by Mandlik & Partners for respondent Nos.2 and 5.

Mr. Kunal Kanungo with Ms. Tanushree Sogani and Ms. Annu Sharma i/by Mr. Atishay Jain for respondent No.6.

Mr. Vasim Shaikh with Ms. Mansi Utekar i/by Mr. Pravin Mehta & Mithi & Co. for the respondent Nos.7 and 8.

Mr. Kunal Dwarkadas and Ms. Rohini Jaiswal i/by Veritas Legal for respondent Nos.9, 33, 38, 78, 114, 115, 138, 163, 184.

CORAM : AMIT BORKAR, J.

DATED : OCTOBER 19, 2023

RC.:

1. By this petition under Article 227 of the Constitution of India, the petitioner/original defendant No.6 (plaintiff in the counter-claim) challenges the order dated 17th February 2018 passed by the 5th Joint Civil Judge, Senior Division, Pune, rejecting

the counter-claim filed by the original defendant Nos.6 and 7 against co-defendant has not maintainable.

2. It appears that respondent No.6 in the petitioner filed Special Civil Suit No.1524 of 2014 seeking relief of partition and possession regarding suit properties described in the plaint. As per the averments in the plaint, the plaintiff and defendant Nos.1 to 9 are members of the joint family and defendant Nos.19 to 130 are companies owned by the joint family. Defendant Nos.131 to 134 are partnership firms only owned by the family companies. Defendant Nos.135 to 141 are limited companies where the joint family has a substantial shareholding. Defendant Nos.135 to 183 are the subsidiaries or joint venture companies having shareholding of joint family members.

3. In the said suit, the contesting defendants filed their written statements.

4. Since initially, defendant No.6 (petitioner) and defendant No.7 did not file a written statement within the time prescribed, they filed an application below Exhibit-1176 seeking permission to file a written statement and counter-claim. By the impugned order, the Trial Court permitted defendant Nos.6 and 7 to file a written statement. However, the counter-claim filed by defendant No.6 was held to be not maintainable as, according to the Trial Court, reliefs claimed in the counter-claim are against the co-defendants. The validity of the order dated 17th February 2018 is the subject matter of the present writ petition.

5. Learned Senior Advocate for the petitioner relying on the

judgment of this Court in the case of **M/s. Multicon Builders vs. Sumandevi Deshmukh** reported in 2014 SCC OnLine Bom. 1051, submitted that the normal rule of the permissibility of counter-claim against co-defendants is inapplicable in a partition suit. He submitted that in a partition suit, every co-sharer is treated as plaintiff or defendant and, therefore, every claim in such a suit by a defendant against a co-defendant needs to be decided in the context of the nature of the suit, i.e. suit for partition. Placing reliance on the observations made in paragraph 22 of **M/s. Multicon Builders** (supra), it is submitted that this Court has held that counter-claim in a suit for partition against a co-defendant is permissible.

6. Per contra, the learned advocate for respondent Nos.2 to 5 submitted that in the absence of a lease between the plaintiff and defendants, the co-defendant is not entitled to file a counter-claim against another co-defendant. The counter-claim, by its nature, has to be against the plaintiff. Relying on the judgment in the case of **Rohit Singh vs. State of Bihar** reported in 2006 (12) SCC 734, it is submitted that the Apex Court has held that such counter-claim by co-defendant against another co-defendant is not maintainable.

7. Rival contentions fall for consideration. It is undisputed that the suit is for partition, and the plaintiff claimed that he, along with defendants Nos.1 to 9, are co-sharers. The counter-claim is filed by defendant No.6, along with the written statement. Prayer clause (a) of the counterclaim reads thus:

“(a) It may kindly be declared that the Plaintiff and Defendants No.6 and 8 have 1/3rd share in the properties of the joint family or such other share as may be declared by this Hon'ble Court, and a preliminary decree to that effect may kindly be passed;”

8. Defendant No.6 in prayer clause (a) is the plaintiff in a suit for partition. The counter-claim is in relation to properties mentioned in paragraphs Nos.1 to 3 of the counter-claim. According to the contesting respondents, defendant No.6 in the suit (plaintiff in counter-claim) has not included suit properties mentioned in the plaint and excluded other joint family properties. Parameters for consideration of counter-claim under Order 8 Rule 6(a) of the Civil Procedure Code, 1908, have been laid down by the Apex Court in the case of **Ramesh Chand Ardawatiya vs. Anil Panjwani** reported in (2003) 7 SCC 350. The Apex Court, considering the scheme of Order 8, held that there are three modes of setting up a counter-claim in a civil suit: (i) counter-claim filed along with the written statement; (ii) counterclaim filed by way of amendment subject to leave of the Court; (iii) counter-claim by way of subsequent pleadings under Rule 9. It is held that in case of a counter-claim filed along with the written statement, leave of the Court is unnecessary. In the first category, a counter-claim can be filed as of right, and in the latter two cases, the counter-claim cannot be filed as of right. Since the cause of action for filing the counter-claim appears to have been accrued before delivery of the defence, the counter-claim can be filed subject to other disqualifications, such as limitation.

9. However, in the facts of the case, the core issue involved in

the petition is whether a co-defendant in a suit for partition can file a counter-claim against another defendant. In my opinion, to answer the question involved, a suit for partition needs to be distinguished from other suits. In a suit for partition, considering the nature of the issues involved, every co-sharer is a plaintiff or defendant. In a suit for partition, even in the absence of relief claimed in the written statement, a share/relief can be granted in favour of the defendant. In ordinary suits, the relief in favour of the defendant in the absence of a counter-claim or set-off cannot be granted. The Apex Court, in the case of **Rohit Singh** (supra), was considering a suit for a declaration of title for confirmation of plaintiffs' possession over the suit property. The relief claimed was for declaration of title and confirmation of possession and, in the alternative, for recovery of possession. In the context of said relief, the Apex Court held that the counter-claim necessarily has 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. It is held that in such a suit, a counter-claim directed solely against the co-defendant cannot be maintainable.

10. A learned Single Judge of this Court in **M/s. Multicon Builders** (supra) considered judgment in the case of **Rohit Singh** (supra) and held that in a suit for partition filed amongst co-parceners, counter-claim would be permissible because co-parceners who are made defendants are plaintiffs also. I am in agreement with the view taken by the Co-ordinate Bench of this Court in **M/s. Multicon Builders** (supra).

11. The contentions raised by the contesting respondents of non-

joinder of joint family properties need to be raised in an appropriate proceeding, and, therefore, it shall be for the Trial Court to decide such objection in accordance with the law. However, the right of defendant No.6 to file a counter-claim in a suit for partition cannot be taken away on the ground that, according to contesting respondents, some of the properties are not joined in the counter-claim.

12. Hence, the following order:

a) The impugned order dated 17th February 2018 passed by 5th Joint Civil Judge, Senior Division, Pune, in Special Civil Suit No.1524 of 2014 below Exhibit-1176 to the extent of Clause No.3 is set aside.

b) The application of the petitioner seeking permission to file a counter-claim is allowed.

c) The contesting respondents shall be entitled to raise appropriate pleadings as are permissible in law.

13. The writ petition stands disposed of in the above terms. No costs.

(AMIT BORKAR, J.)