



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 58 OF 2023

1. Mangalbai Atmaram Karbhari
Age : 53 yrs, occ : household
2. Mahesh Atmaram Karbhari
Age : 32 yrs, occ : nil
3. Priti Atmaram Karbhari
Age : 30 yrs, occ : household
All r/o Javali, Taluka Lohara,
District Osmanabad

Petitioners

Versus

1. Mahadevi Mahadev Mule
Age : 36 yrs, occ : household
R/o Horti, Taluka Tuljapur,
District Osmanabad
2. District Collector,
Osmanabad
3. Special Land Acquisition Officer,
Osmanabad
4. Branch Manager, SBI, Solapur
5. Kamalabai Mailari Karbhari
Age : 83 yrs, occ : household
R/o Jewali, Taluka Lohari,
District Osmanabad
6. Laxman Mailari Karbhari
Age : 54 yrs, occ : service
R/o as above.
7. Basavraj Mailari Karbhari
Age : 52 yrs, occ : agri.,
R/o as above.
8. Mahadev Mailari Karbhari
Age : 44 yrs, occ : agri.,
R/o as above.

9. Laxmibai Shivanand Birajdar
Age : 39 yrs, occ : household
R/o Sultanpur, Tal. Akkalkot,
District Solapur

10. Parvati Annarao Munkundale
Age : 30 yrs, occ : household
R/o Barol, Taluka Tuljapur,
District Osmanabad

Respondents

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Mr. Rajendra Deshmukh, Senior Advocate a/w Ms. Ashwini Sahastrabudhe, i/b Mr. Devang Deshmukh, Advocate for the petitioners.

Mr. V.S. Badakh, A.G.P. for respondent Nos.2 and 3.

Mr. S.S. Gangakhedkar, Advocate for respondent Nos.5 to 10.

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CORAM : SANDIPKUMAR C. MORE, J.

Judgment Reserved on : 17.01.2024

Judgment Pronounced on : 21.02.2024

Judgment :

1. The petitioners, who are original defendant Nos.5-a to 5-c in Special Civil Suit No.1/2018, have challenged the order below Exh.75 dated 28.11.2022 passed by the learned trial Court i.e. Civil Judge (Senior Division), Omerga in the aforesaid suit. Vide the impugned order, the learned trial Court has rejected the application of present petitioners filed for rejection of counter-claim set up by original defendant No.7 against them under Order VII Rule 11 of the Code of Civil Procedure (for short, "C.P.C.").

2. Present respondent No.1 who is the original plaintiff, has filed the aforesaid suit for partition and share in compensation in respect of certain land against the present petitioners as well as respondent Nos.2 to 10. Defendant Nos.1 and 2 remained *ex parte*, whereas defendant No.3 had resisted the claim. Defendant Nos.4, 6, 8 to 10 supported the plaintiff. Original defendant No.5 i.e. the predecessor of present petitioners has contested the suit by filing written statement. Original defendant No.7 supported the plaintiff, but set up counter-claim against the present petitioners for declaring Survey No.12 as joint family property and also claimed one-eighth share in the same. The petitioners resisted the aforesaid counter-claim set up by original defendant No.7 on the ground that the counter-claim against co-defendant is not maintainable.

3. Learned Senior Counsel for the petitioners vehemently argued that it is now settled that no counter-claim by one defendant is maintainable against co-defendant. For that purpose he relied upon the following citations :

(i) Damodhar Narayan Sawale vs Tejrao Bajirao Mhaske and others, Civil Appeal No. 930 of 2023 (Supreme Court of India), decided on 4 May 2023.

(ii) Rohit Singh & ors vs State of Bihar, (2006) 12 SCC 734

- (iii) Orissa High Court Judgment in C.M.P. No. 1101 of 2018 (Basanta Behera and others vs Menakabala Behera and others), decided on 08.04.2019.*
- (iv) Punjab & Haryana Judgment in RSA No. 2643 of 2012 (Soma Devi vs Kashmiri Lal & another) decided on 27.07.2017*

4. On the contrary, learned Counsel for respondent Nos.5 to 10 strongly opposed the submissions made on behalf of present petitioners and supported the impugned order. He also relied on the following judgments :

- (i) Azgar Barid vs Mazambi @ Pyaremabai & ors AIR 2022 SC 1304*
- (ii) Mahendra Kumar and another vs State of Madhya Pradesh and others, (1987) 3 SCC 265*
- (iii) A. Mohamed Sulaiman & anr vs A. Ameena Beevi & others, 2013 (2) CTC 735*
- (iv) Muthukaruppan @ Velayuthan & ors vs Thirugananasambandam, 2015 (2) MWN (Civil) 107*
- (v) Rohit Singh & ors vs State of Bihar, (2006) 12 SCC 734*
- (vi) Kum. Geetha d/o Late Krishna vs Nanjundaswamy AIR 2023 Supreme Court 5516*
- (vii) Madhav Prasad Aggarwal vs Axis Bank Limited (2019) 7 SCC 158*

5. On the other hand, learned A.G.P. on behalf of respondent Nos.2 and 3 pointed out that respondent Nos.2 and 3 are formal parties.

6. Heard rival submissions. Also perused documents on record alongwith citations relied on by rival parties.

7. It is significant to note that the learned trial Court has rejected the application (Exh.75) filed by present petitioners for rejecting counter-claim of original defendant No.7 against them, as per Order V Rule 11 of C.P.C. mainly on the ground that in a partition suit the positions of plaintiff and defendants are interchangeable, and therefore, to avoid multiplicity of proceedings, counter-claim set up by one defendant against other defendant is maintainable. Learned trial Court appears to have relied upon the judgment of Madras High Court in the case of ***A. Mohamed Sulaiman & anr vs A. Ameen Beevi*** (supra). Admittedly, the suit filed by present respondent No.1 is for partition in ancestral property and in the said suit, defendant No.7 has set up a counter-claim against the present petitioners who are also original defendant Nos.5-a to 5-c for adding certain land as a joint family property and claiming share in it. Therefore, the core question involved in this matter is, whether one defendant can set up counter-claim claim against another defendant in view of Order VIII Rule 6A of C.P.C.

8. Learned Senior Counsel for the petitioners relied

upon various judgments as mentioned above and pointed out that there is no provision at all to enable one defendant to file counter-claim against co-defendant.

9. In the case of ***Damodhar Narayan Sawale vs Tejrao Bajirao Mhaske*** (supra) the Hon'ble Apex Court observed that counter-claim by a defendant is not permissible against the co-defendant by virtue of Order VIII Rule 6A of C.P.C. It appears that the Hon'ble Apex Court has relied upon its earlier observation in the case of ***Rohit Sing vs State of Bihar*** (supra). However, on going through the facts of the case of ***Damodhar Narayan Sawale***, it appears that it was *inter se* dispute between defendant No.1 and defendant No.2 about validity of certain sale deed and the said dispute was an independent dispute not concerning the prayers made by the plaintiff in the suit. In the case of ***Rohit Sing vs State of Bihar*** the same principle had already been laid down by the Hon'ble Apex Court, but the said suit also was not a suit for partition and it was for declaration of title. Further, in the case of ***Basanta Behera vs Menakabala Behera*** (supra), High Court of Orissa has also taken same view that counter-claim by one defendant against other defendant is not permissible. In the case of ***Suma Devi vs Kashmiri Lal*** (supra) the High

Court of Punjab and Haryana also followed the case of **Rohit Sing** (supra) and held that counter-claim by one defendant against another defendant is not permissible and it is permissible only against the plaintiff.

10. On the contrary, learned Counsel for respondent Nos.5 to 10 vehemently argued that the learned trial Court has rightly relied upon the observation of Madras High Court in the case of **A. Mohamed Sulaiman & anr vs A. Aameena Beevi** (supra), wherein it is held as follows :

“A perusal of the Order 8 Rule 6A of CPC , no doubt contemplates that a counter claim in a suit has to be made against the plaintiff. A careful perusal of Rule 6A would indicate that it is not very specific that the counter claim by a defendant has to be made only against the plaintiff. In other words, in a given circumstances, it does not specifically bar the filing of a counter claim against the co-defendant as well. Why I am expressing this view is that the plea of the parties and relief sought for vary in every suit and only by taking into consideration of the facts and circumstances of each case, it has to be determined as to whether such counter claim raised by a defendant can be restricted or permitted only against the plaintiff or it can be extended even to the other co-defendant. For instance, in a suit for partition, the parties are being interchangeable and therefore a defendant therein can be considered to be a person suing. Therefore, when a defendant in a partition suit can be considered as a party suing also, I am of the view that such defendant can also make a counter claim under Order 8 Rule 6A in a partition suit against the co-defendant. When such claim is exercised, certainly, the person making such plea becomes the plaintiff insofar as that relief is concerned and the person against whom such claim is made, becomes the defendant in the very same suit. That is why sub-clause (2) of Order 8 Rule 6A was very specific in saying that such counter claim shall have the same effect as a cross suit so as to

enable the court to pronounce the final judgment in the same suit both on the original claim and on the counter claim. Therefore, in my considered view, it cannot be said that Order 8 Rule 6A in stricto sensu is applicable only as against the plaintiff and not against a co-defendant.

Even otherwise, an overall consideration of the facts and circumstances of the case would necessarily warrant the Court below to consider the said issue raised by the first defendant, while deciding the suit filed by the plaintiff, in view of the fact that the first defendant also claimed 1/6th share in the suit property. Therefore, for adjudication of her claim, necessarily the rival claim made by the defendants 2 and 3 based on the disputed settlement has also to be gone into by the court below. While considering such rival claim of the defendants 2 and 3, necessarily the Court below has to go into the question with regard to the validity of the said settlement deed which has been raised by the first defendant in her original written statement itself. Therefore, even in the absence of the application under Order 8 Rule 6A, the Court below is bound to consider this issue in order to arrive at a just and proper conclusion and to decide the lis between the parties without relegating any one of them to agitate an issue, which is relevant and germane to the main issue, to be agitated and adjudicated upon in a separate proceedings.

All the above decisions relied on by both sides only indicate that an issue which is raised by the defendant by way of counter claim even arising out of fresh cause of action can be considered within the same suit as a cross suit in order to avoid multiplicity of proceedings between the parties. In this case the counter claim made by the first defendant cannot be said to be as the one out side the scope and lis between the parties in the suit. The plaintiff filed the suit for partition of her 1/6th share of the suit property. The first defendant supported the plaintiff and claims her 1/6th share also. But the defendants 2 and 3 claimed that the first defendant had released her right of 1/6 th share in the suit property by way of disputed release deed.

In all fairness and in the interest of justice, the first defendant should be given an opportunity to make her counter claim against the defendants 2 and 3 especially when she claims to be an illiterate and pleads no knowledge of the execution of the said document. The fight is between the brothers and sisters and as such, too much of technicalities should

not be permitted to flow in between the claim and counter claim made by them. Otherwise, the litigation would never reach its finality. In order to arrive at a just and proper conclusion in the said suit and to decide the lis between the parties, the Court below has rightly allowed the application filed by the first defendant for filing the additional written statement with which I find no infirmity or irregularity warranting interference by this court. Accordingly, the Civil Revision Petition deserves no merits and the same is dismissed. Consequently, the connected M.P. is closed. No costs”.

11. He also relied on the judgment of Madras High Court in the case of ***Muthukaruppan @ Velayuthan vs Thirugananasambandam*** (supra)m, wherein the principle laid down in A. Mohamed Sulaiman’s case has been followed. Like the learned Senior Counsel for the petitioners, he also relied upon the observation of Hon’ble Apex Court in the case of ***Rohit Sing vs State of Bihar*** (supra) to the extent whereby it was observed that the defendant while making counter-claim against the plaintiff can seek certain reliefs against co-defendant incidently. He relied on the observation of Hon’ble Apex Court in para 21, as follows :

“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”.

Thus, though it was observed in the citations relied upon by the learned Senior Counsel for the petitioners that a counter-claim by one defendant against another defendant is not maintainable, but the facts of those cases were different. There was *inter se* dispute between the defendants and the counter-claim set up by the defendants against other defendants in those cases were nothing to do with the relief claimed by plaintiff in the main suit. On the contrary, the partition suit stands on different footing. The Hon’ble Apex Court in the case of ***Azgar Barid vs Mazambi @ Pyarembai*** (supra) has observation as follows :

“We will first deal with the objection of the appellant that since plaintiff Nos.4 to 8, whose claim was denied by the trial court and who had not challenged the same by way of appeal, are not entitled to relief in the second appeal. This Court in the cases of Bhagwan Swaroop and Others v. Mool Chand and Others¹ and Dr. P. Nalla Thampy Thera v. B.L. Shanker and Others², has held that in a suit for partition, the position of the plaintiff and the defendant can be interchangeable. Each party adopts the same position with the other parties. It

has 1 (1983) 2 SCC 132 2 1984 (Supp) SCC 631 been further held that so long as the suit is pending, a defendant can ask the Court to transpose him as a plaintiff and a plaintiff can ask for being transposed as a defendant”.

Thus, it appears that in the partition suit the position of plaintiff and defendant is always interchangeable and since in a partition suit the shares of plaintiff as well as defendants are to be determined, each and every defendant can be considered as plaintiff. It is extremely important to note that the High Court of Madras in the case of A. Mohamed Sulaiman (supra) has already expressed that Order VIII Rule 6A of C.P.C. does not specifically bar filing of a counter-claim against the co-defendant since the plea of the parties and relief sought for vary in every suit and only by taking into consideration of the facts and circumstances of each case, it has to be determined as to whether such counter claim raised by a defendant can be restricted or permitted only against the plaintiff or it can be extended even to the other co-defendant. Thus, though generally the counter-claim is not permissible by one defendant against the other defendant, but considering the relief claimed by plaintiff in a partition suit, the defendant can raise counter-claim against co-defendant for proper adjudication of the shares of parties in the suit properties. Even in the case of ***Rohit Sing vs State***

of Bihar (supra) the Hon'ble Supreme Court has supported the act of setting up counter-claim by one defendant against other defendant alongwith the relief claimed in that counter-claim against plaintiff. Therefore, considering the peculiar facts and circumstances of the present case which is filed by the present respondent No.1 and the interchangeable position of the parties from plaintiff to defendant and vice-versa, the observation of the learned trial Court based on the view taken by Madras High Court in Mohmed Sulaiman's case and permitting defendant No.7 to set up a counter-claim against present petitioners namely defendant Nos.5-a to 5-c, appears justifiable.

12. Learned Senior Counsel for the petitioners has also argued in the alternative that if the Court is of the opinion that counter-claim set up by defendant No.7 against the petitioners is maintainable, then the prayers at Clause Nos.2 and 3 in the said counter-claim at least be held as not maintainable. On perusal of the copy of counter-claim set up by original defendant, it appears that defendant No.7 has claimed his one-eighth share in the compensation of land Survey No. 12 alongwith appropriate interest from the petitioners. However, as per the learned Counsel for

respondent Nos.5 to 10, such rejection in respect of certain prayers is not permissible. For that purpose he relied upon the judgments of the Hon'ble Apex Court in the case of ***Kum. Geetha d/o Late Krishna vs Nanjundaswamy*** and ***Madhav Prasad Aggarwal vs Axis Bank Limited*** (supra) wherein it has been held that plaint cannot be rejected in part and the said principle has been laid followed continuously since 1936. Therefore, when this Court has observed that the counter-claim set up by defendant No.7 is maintainable considering the nature of dispute between the parties, then same principle as observed in the aforesaid cases, can be applied to it. Thus, the counter-claim cannot be rejected partially as claimed by the learned Senior Counsel for the petitioners.

13. Thus, considering all these aspects in the light of the facts of this particular case, the impugned order appears to be passed appropriately and the same needs no interference. Accordingly, the Civil Revision Application stands dismissed.

(SANDIPKUMAR C. MORE, J.)