



**COMMON ORDER BELOW APPLICATION AT EXH.58 AND 60.**

**CNR No.-MHLA150013342021**

1. These applications have been filed by defendant no.1, 2 and 4 of counter claim filed by counter claimant for framing of preliminary issue of maintainability of counter claim under Order XIV Rule 2 of the Code of Civil Procedure on the contention that the counter claim is not maintainable and also prayed to decide the same first instead of going to the merits of the case.

2. According to the applicants/ defendant no.1, 2 and 4 of counter claim, present counter claim is not maintainable. It is submitted that counter claim defendants shows land Gat No. 469 Adm. 52 R. and Land Gat No. 482 Adm. 47 R. and they have claim partition of that properties. However, that properties are not the subject matter of original suit of original plaintiff. So also, in counter claim defendants have shown new parties i.e. defendants no. 3 and 4 who are not party to the original suit bearing RCS No. 225/2021.

3. As per order 8 Rule 6 and 6-A of C.P.C. it is clearly shows that for counter claim being made by defendants through in order 8 Rule 6(2)of C.P.C. there is provision is

made for set off against the claim, which the plaintiff makes in a suit. However, plaintiffs have not made claim of land Gat No. 469 Adm. 52 R. and Land Gat No. 482 Adm. 47 R. in plaint and not made party, which shown in counter claim as proposed defendant no. 3 and 4. Therefore, in view of the above said facts counter claim of original defendants is not maintainable in the eye of law. Therefore, the present application has been filed to frame preliminary issue of maintainability of counter claim and prayed to decide first without going to merits of the case.

4. The counter claimants have strongly objected the application by filing his say below Exh.69. According to counter claimants, the said application is filed by the defendant no. 1 & 2 i.e. original plaintiff no.1 and 2 false and baseless, they have no locus standi, they are trying to misguide the court. It is further contended that issue involved in the application is depend upon the fact and circumstances of every case. Suit of the plaintiff and cross suit of the counter claimant are related to each other and issue involved in both suits may be decided by the court in one judgment and same trial. All provision relating to plaint provided in the C.P.c. are applicable to the counter claim. Counter claim will have the same effect as cross suit.

5. Sub sec. 2 of Rule 6(A) of order VIII of C.P.C. make it clear that such counter claim shall have the same effect as a cross suit. Counter claimant is also to be a person suing and

defendant no.3 and 4 in the counter claim are the necessary and proper party to the original suit and cross suit without them no effective order can be made and in the absence of them no effective order can be passed, so their presence is necessary for complete and final decision. On perusal of para no. 4 and 5 of the plaint it is clear that the late father of the plaintiff was alienated land gat no. 482 adm. 00 H. 47 R to defendant no.3 and also same land had been re-purchased from defendant no.3. Original plaintiff had pleaded in his para no.5 that land gat no. 469 adm. 00 H. 52 R and land gat no. 482 adm. 00 H. 47 R land had been alienated by late father of the plaintiff to the defendant no.4. Properties mentioned in the present application in para no.2 i.e. land gat no. 469 adm. 00 H. 52 R and land gat no. 482 adm. 00 H. 47 R are the suit property in counter claim, filed by counter claimant in the W.S.

6. Original plaintiff no.1 and 2 had intentionally not made necessary party to defendant no.3 and 4 to the original suit. So, defendant no.3 and 4 are not new parties and suit properties in cross suit is relevant. Original plaintiff in collusion with defendant no.3 and 4 intentionally not added as a necessary party of the original suit and not claimed in suit property in cross suit. Application filed by the original plaintiff is against the provisions of law and against the real facts and circumstances of the present suit, so application be deserves to be rejected with costs.

7. So far as the provision of Order XIV Rule 2 of the Code of Civil Procedure is concern, under said provision preliminary issue can be framed only when there is a pure question of law and suit is likely to be disposed of on the legal issue only. I must mention here that, the question of **maintainability of counter claim** is not pure question of law. Whereas same is mixed question of law and fact. Therefore question pertains to **maintainability of counter claim** is required to be decided on the basis of evidence. It cannot be decided by framing preliminary issues.

8. Thus, it is just and proper to take the issue of **maintainability of counter claim** along with other issues. Considering the above facts and circumstances, I pass following order :-

#### **ORDER**

1. The applications at Exh.58 and 60 are rejected.
2. Parties to bear their own cost.
3. parties are directed to proceed further without fail.

( Dictated and pronounced in open court )

Date : 18.06.2024

Place : Chakur

[ M.S. Luniya]

Jt. Civil Judge, J.D., Chakur