

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

WRIT PETITION (WP) NO.3137 OF 2018

- 1) Harish Bhayyalalji Mirjamale,
Aged about 46 years, Occ. Business,
r/o Ranpise Nagar, Akola,
Tq. and Distt. Akola.

.... Petitioner(s)

// VERSUS //

- 1) Mahadeo Brijlal Tiwari, (Deceased)
Through LR.
- 1-A Santosh s/o Mahadeo Tiwari,
Aged about 42 years, occ. Business,
- 1-B Rajesh s/o Mahadeo Tiwari,
Aged about 30 years, occ. Milk business,
- 1-C Mukesh s/o Mahadeo Tiwari,
Aged about 23 years, occ. Milk business,
Nos.1A to 1-C r/o Rajputpura, Akola,
Tq. and Distt. Akola.
- 1-D Umadevi Ravishnakar Mishra,
Aged about 35 years, Occ. Household,
R/o Rajputpura, Akola, Tq. and Distt. Akola,
- 1-E Sau. Urmila Gyandhar Pande,
Aged about 32 years, Occ. Household work,
R/o Singpur, Post Gyanpur, Distt. Bhadoi (Sant
Ravidas Nagar U.P.)
- 1-F Sau. Anju Ajaykumar Mishra,
Aged about 28 years, Occ. Household
R/o Mahu Aria (Bahulia)
Post Gajapur, (Anei), Distt. Varanasi
- 1-G Gayatri d/o Mahadeo Tiwari,

Address of
Respondent

Aged about 25 years, occ. Household,
~~R/o Rajputpura, Akola, Tq. and Distt. Akola.~~
R/o Ranigapur, Post Phulpur, Tq. and Dist.
Allahabad (UP)

No.1-G corrected
as per Court's
order
dt.06.03.2019

- 2) Sau. Babadevi w/o Vimalshankar Tripathi,
Aged about 50 years, occ. Household work,
R/o Ladies File, Ashok Nagar,
Hanuman Chowk, Akola, Tq. and Distt. Akola.

... Respondent(s)

Shri A.R. Deshpande, Advocate for the Petitioner/s
Shri P.S. Girdekar, Advocate for the respondent Nos.1 (A) to (c)
Shri J.B. Gandhi, Advocate for the respondent No.2

CORAM : ANIL S. KILOR, J.
DATED : 28.06.2023

ORAL JUDGMENT :

1. Heard.
2. **Rule.** Rule made returnable forthwith. Heard finally by consent of the parties.
3. In this writ petition order below (Exh.121) passed by 4th Jt. Civil Judge Senior Division, Akola, dismissing the counter claim, is under challenge.

4. In the present matter, admittedly, counterclaim was filed by the petitioner with the permission of the trial Court, granted vide order dated 26.03.2004 in Special Civil Suit No. 147 /2002 for declaration, partition, separate possession and permanent injunction filed by the respondent No.2.

5. The respondent No.2 raised a challenge to the said permission by filing the review application, however, it was withdrawn.

6. As far as defendant No.1 is concerned i.e. respondent No.1, he never challenged the said order and said order, therefore, has attained finality.

7. The respondent No.1, thereafter, on 30.01.2018 i.e. after 14 years filed the application (Exh.121) for dismissing the counter claim on the ground that, it is not maintainable. The learned trial Court, vide impugned order dated 11.4.2018 allowed the said application, which is the subject matter of the present petition.

8. In the above referred facts, the only question arises is that, once the trial Court has allowed the defendant No.2 to file counter claim and the challenge to the same was withdrawn by the plaintiff, whether the Court after 14 years of such permission, can dismiss the counter claim at the instance of co-defendant ?

9. The learned counsel for the respondent No.1, applicant to the application (Exh.121), submits that filing of the counter claim by the dependent No.2 is the abuse of process of law and as such under section 151 of Civil Procedure Code, the Court can be dismissed such counter claim. However, learned counsel for the respondent No.1 failed to point out any such pleading in the application or any such finding recorded by the learned trial code while dismissing the counter claim.

10. Admittedly, the application (Exh.121) does not disclose under what provision such relief was sought by the respondent No.1. Similarly, the Court has also not stated under what provision the order dismissing counterclaim, was passed.

11. Furthermore, there is no explanation offered for moving such application belatedly after 14 years of allowing dependent No.2 to file counter-claim.

12. In the circumstances, I am of the considered view that, the impugned order is liable to be quashed and set aside. Accordingly, I pass the following order:

(i) The writ petition is **allowed**.

(ii) The order below Exh.121 dated 11.04.2018 passed by 4th Jt. Civil Judge Senior Division, Akola, in Special Civil Suit No.147 of 2002, is hereby quashed and set aside.

All points are kept open.

Rule accordingly. No costs.

[ANIL S. KILOR, J.]