

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

WRIT PETITION NO. 5183 OF 2023

Sau. Umadevi W/o Satyendra Biltheriya,
Aged about 76 years, Occ. Household work,
through per Power of Attorney Holder
Husband Satyendra Tulsiramji Biltheriya,
Aged about 81 years, Occ. Pensioner, R/o
Balaji Plots, Near Fulpakharu School,
Behind Ashirwad Apartment, Jatharpeth,
Akola and Taluka and District Akola

...Petitioner

// VERSUS //

1. Bhalchandra Govind Mahashabde,
Aged about 54 years, Occupation-Business,
R/o SBI Colony, Near Hanuman Mandir,
Jatharpeth, Akola, Tq. and Dist. Akola
2. State of Maharashtra, through the Hon'ble
Collector, Akola

... Respondents

Shri J.B.Gandhi, Advocate for the petitioner.

Mrs. S.K.Paunikar, Advocate for the respondent no.1.

Ms. H.N.Jaipurkar, AGP for the respondent no.2/State.

CORAM : ANIL S. KILOR, J.

DATED : 19th AUGUST, 2023.

ORAL JUDGMENT :

Heard. Rule. Rule made returnable forthwith. Heard finally
by consent of the parties.

2. The order dated 10th July, 2023 passed below exhibit 115
rejecting the application for framing of additional issue and order dated

13th July, 2023 passed below exhibit 116 are the subject matter in this writ petition, is under challenge.

3. In the present matter, admittedly, the issues were framed on 1st January, 2019 and during the cross-examination on 11th November, 2021 the order passed by the Collector was referred to.

4. In light of the same, the counter claim was filed by the defendant which came to be allowed, vide order below Exhibit 101 dated 16th December, 2022 by recording following reasons:

“11. On perusal of propose amendment it appears that defendant is seeking certain amendment regarding the order passed by Collector, which is as per the defendant not in her knowledge. It is also important to note here that the counter claim is also pending and defendant wants to amend her counter claim also. The propose amendment is not changing the nature of the counter claim nor changing the defence of the defendant. The order which the defendant wants to explain or challenge is related to the suit property. As already stated cross-examination yet to be begun therefore, there will no prejudice to the plaintiff. There is also no circumstances on record which suggest that the defendant was negligent or at belated stage deliberately moved the application. It is also well settled principle that court should be liberal for granting the amendment. Thus, from the all above discussion I come to the conclusion that the application deserves to be allowed. Hence, I pass the following order.

ORDER

- i) Application is allowed.
- ii) Defendant is directed to carryout the necessary amendment on or before next date.”

5. In view of the order for allowing the amendment in written statement and counter claim. The prayer clause 1-A was added to the counter claim which reads thus:

“1-A) That the order passed by the Collector on 13-06-2017 in case No. SRV-43/Kaulkhed/03/2016-17 be declared as null and void. And all subsequent proceedings taken on the basis of said order including measurements held to be nonest and suit of the non-applicant be dismissed with costs.”

6. Thus, it is apparent that though the issues were framed on 1st January, 2019, the amendment permitting to add prayer clause 1-A to the counter claim was allowed on 16th December, 2022 and accordingly the application for framing of additional issues came to be filed, which read thus:

1) Whether the defendant has proved that, the plaintiff has played the fraud and obtained the order of amalgamation of two plots.

2) Whether the Collector has passed the order of amalgamation is without following due procedure of law and without issuing any notice to defendant and therefore the order passed by the collector is nullity.”

7. Hence, it is apparent from the order that, without noticing the above referred facts, the application came to be rejected on the ground that after the evidence was recorded on 11th November, 2021 by moving certain application, the petitioner was trying to delay the proceeding.

8. The said findings is contrary to the record and therefore I do not find any favour with the submission made by the learned counsel for the respondent no.1 that the application for framing of additional issue

was filed at a belated stage and despite the fact that the evidence was recorded in the year 2021. Accordingly, the argument made by the learned counsel for the respondent no.1 is rejected.

9. Once the Court has permitted to amend the counter claim and to add the prayer clause relating to declaration that, the order passed by the Collector dated 13th June, 2017 is null and void, the prayer for framing of proposed additional issues relating to the same ought to have been allowed by the learned trial Court. In the circumstances, I pass the following order:

- i. The writ petition is allowed;
- ii. The order dated 10th July, 2023 passed below Exhibit 115 and order dated 13th July, 2023 passed below Exhibit 116 passed by the Joint Civil Judge, Senior Division, Akola in Special Civil Suit No. 22 of 2017 are hereby quashed and set aside and thereby application Exhibit 115 is allowed;
- iii. The learned trial Court is directed to expedite the suit and decide the same within six months from today;
- iv. Both the parties have undertaken to co-operate the learned trial Court to conclude the trial within stipulated period.

Digitally signed
by
SACHIDANAND
KUTTAN NAIR
Date:
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[ANIL S. KILOR, J.]