

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

27 WRIT PETITION 4833 OF 2023

SHYAMRAO KISHANRAO KHANDELOTE

VERSUS

THE TAHSILDAR AND OTHERS

....

Advocate for Petitioner : Mr. S.S. Gangakhedkar
AGP for Respondent Nos. 1 & 2 : Mrs. Saie S. Joshi

...

CORAM : SHAILESH P. BRAHME, J.

DATE : 22nd JANUARY, 2024

PER COURT :

Heard learned counsel for the petitioner and learned AGP for respondent nos. 1 and 2, finally.

2. None appears for the respondent no. 3 who is already served with notice for final disposal issued by this Court.

3. The petitioner is challenging order dated 01.03.2023, passed below Exhibit 92 as well as order dated 13.03.2023 below Exhibit 94 in RCS No. 44 of 2017 which is pending before learned Civil Judge Senior Division, Bhokar, District Nanded. The petitioner is original defendant no. 3 and the present respondent no. 3 is the plaintiff. Respondent No. 4 is original defendant no. 4. Petitioner and respondent no. 3 are brothers.

4. Respondent no. 3 has filed RCS No. 44 of 2017 for declaration and injunction challenging sale deed dated 12.07.2012 executed by the petitioner in favour of present respondent no. 4. It is the case of respondent no. 3 / plaintiff that he is the owner of suit land which is the self acquired property. It is being alienated by the petitioner by sale deed dated 12.07.2012 illegally and on the basis of bogus document of consent deed.

5. Petitioner and respondent no. 4 have filed written statement and contested the claim of the plaintiff / respondent no. 3. Issues were settled in the suit. After commencement of trial, respondent no. 3 took out an application Exhibit 92 under Order VI Rule 17 of Code of Civil Procedure, seeking incorporation of additional pleadings and the prayer for declaration. The petitioner contested application by filing say. Application Exhibit 92 was allowed by order dated 01.03.2023.

6. The petitioner filed application Exhibit 94 seeking review of the order dated 01.03.2023 passed below Exhibit 92. By order dated 13.03.2023, application Exhibit 94 was rejected. In this manner orders below Exhibit 92 and 94 are under challenge in this petition.

7. Learned counsel for the petitioner submits that application for amendment was moved after commencement of trial without

disclosing due diligence. The additional pleadings and prayers permitted to be amended are in respect of mutation entry no. 2389. It was effected on 10.08.2009. The proposed pleadings and the prayers are not necessary to decide the controversy involved in the suit. According to him, it is an error of jurisdiction to record that pleadings are necessary for deciding the controversy between the parties.

8. Learned counsel for the petitioner has also assailed order dated 13.03.2023 below Exhibit 94. He would submit that it was beyond scope of review to consider an additional issue and to direct it to be incorporated. The order of review is a consequential order and liable to be quashed.

9. Learned AGP supports impugned orders. It appears that the real controversy is between the petitioner and respondent no. 3. Despite service, respondent no. 3 prefers not to appear before this Court.

10. There is no dispute that the issues were settled and when application Exhibit 92 was submitted the oral evidence of respondent no. 3 / plaintiff was over. Before resorting to provisions of Order VI Rule 17 of Code of Civil Procedure, it was incumbent upon respondent no. 3 / plaintiff to demonstrate due diligence. I have gone through application Exhibit 92. I find that there is no satisfactory pleadings regarding

exercise of due diligence in the application. I am of the considered view that learned Judge should not have allowed application Exhibit 92.

11. The suit is for declaration and injunction. The sale deed executed by the petitioner in favour of respondent no. 4 is under challenge. Respondent no. 3 has also prayed for declaration that he is the owner of the suit land. The suit appears to be filed on 01.04.2017. The mutation entry was effected on 10.08.2009. After commencement of trial, the respondent no. 3 sought an amendment to challenge mutation entry. It is not subsequent development.

12. It is informed that no steps have been taken by respondent no. 3 to challenge the mutation entry in question before the competent revenue authority. In a given circumstances, I am of the considered view that the proposed amendment is not required to decide controversy involved in the suit. I do not find any prejudice is going to be caused to respondent no. 3. Impugned order below Exhibit 92 is unsustainable.

13. Second impugned order below Exhibit 94 is in the form of substantial rejection of application for review. As I have recorded the findings regarding unsustainability of the order below Exhibit 92, I find that order below Exhibit 94 is consequential and liable to be quashed.

14. It appears from record that application Exhibit 69 for framing additional issue was allowed by order dated 27.11.2019. An additional issue is “Whether the relief of declaration that mutation entry no. 2389 is illegal and on that basis the sale-deed made is illegal and not binding upon the plaintiff, is barred by law of limitation ?” Though framed, it remained to be incorporated in the original issues. Learned Judge rectified this mistake while considering application Exhibit 94 for review.

15. Order dated 13.03.2023 below Exhibit 94 shows that while considering application for review strangely application Exhibit 94 was partly allowed to the extent of incorporating additional issue of limitation. While entertaining review under Order XLVII read with Section 114 of Code of Civil Procedure, it is impermissible to travel beyond the order under review. The direction issued by the learned Trial Judge vide order dated 13.03.2023 is without jurisdiction.

16. I, therefore, pass following order :

ORDER

- i. Order dated 01.03.2023 below Exhibit 92 and order dated 13.03.2023, below Exhibit 94 passed by learned Civil Judge Senior Division, Bhokar, in RCS No. 44 of 2017, are quashed and set aside.

- ii. The parties are at liberty to request learned Trial Judge to incorporate additional issue framed vide order dated 27.11.2019, below Exhibit 69.
- iii. Writ Petition is allowed in above terms.

[SHAILESH P. BRAHME, J.]