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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 8723 OF 2018

Dr. Nilesh Vasudeo Mahajan
Age – 40 years, Occ – Medical Practitioner
R/o Saipushp Hospital, Yawal Road
Bhusawal, Taluka – Yawal
District - Jalgaon

PETITIONER

VERSUS

1. Hemlata Pravin Chaudhari
Age – 53 years, Occ – Agri
R/o Phulgaon, Taluka – Bhusawal
District – Jalgaon

RESPONDENTS

2. Madhukar Digambar Chaudhari
Since deceased through LR's

2a. Malti Madhukar Chaudhari

DELETED

2b. Jayant Madhukar Chaudhari,
Since deceased through LR's

2bi. Asha Jayant Chaudhari
Age 56 years, Occ – Service

2bii. Ninad Jayant Chaudhari
Age – 28 years, Occ – Service

2biii. Khitali Jayant Chaudhari
Age – 24 years, Occ – Education

Respondents No.2bi to 2biii at present
residing at "Ambabhavani Krupa", Ere Road
Tukaram Nagar, In front of Dr. Shaha's
Hospital, Dombivali (East)
District – Thane

2c. Kishori Satish Bauskar
Age – 53 years, Occ – Service
R/o Through Satish Bauskar

Sarvodaya Towers, Second Floor
In Front of Temple Shri Khandyaji Jain
Manpada Road, Dombivali (East)
District – Thane

2d. Rajesh Madhukar Chaudhari
Age – 49 years, Occ – Service
R/o Room No.3 Balaramshruti Chawl,
Behind Asha Prem Building
Tukaram Nagar, Ravi Patil Ground
Ere Road, Dombivali (East)
District - Thane

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Mr. Swapnil S. Patil, Advocate for the petitioner
Mr. M. M. Bhokariker, Advocate for respondent No.1
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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 11th JANUARY, 2022

JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard finally with the consent of learned advocates for the parties.
2. This petition takes exception to orders dated 22nd February, 2017 passed below Exhibit-1 and dated 26th March, 2018 passed below Exhibit-24 in Special Civil Suit No. 33 of 2016, by learned Civil Judge, Senior Division, Bhusawal.
3. The petitioner is the original defendant No.1 in the Special Civil Suit No. 33 of 2016 filed by respondent No.1 – original plaintiff for declaration, partition, separate possession and injunction in respect of suit property i.e. gut No. 1818/1/2

admeasuring 2 Hectare 42 *Are*, situated at Savada, Taluka – Yawal, District – Jalgaon.

4. After receipt of suit summons issued on 25th August, 2016, the petitioner appeared in the suit on 3rd November, 2016. Since, written statement was not filed within the period of ninety days, by order dated 22nd February, 2017 "*no written statement*" order (for short "no w.s. order") came to be passed against the petitioner – original defendant No.1.

5. By filing application Exhibit-24, the petitioner prayed for setting aside no w.s. order and the written statement filed by him be accepted. This application was resisted by respondent No. 1 – original plaintiff. The Trial Court rejected the application by the impugned order. Hence this writ petition.

6. Learned advocate for the petitioner submitted that though it is a fact that the petitioner has approached the Trial Court belatedly seeking condonation of delay in filing written statement and setting aside no w.s. order, however, the trial court ought to have taken into consideration the fact that the petitioner is the main contesting defendant, who has purchased the suit property from the father in law of the plaintiff, who is no more. Since the suit pertains to immovable property, the petitioner needs to be

given an opportunity to contest the matter on merits. The trial court has adopted too technical approach while rejecting the application Exhibit-24. The trial court has failed to take into consideration the fact that the petitioner is a medical practitioner and he has filed affidavit in support of the application. The Trial Court ought to have favourably considered the application filed by the petitioner.

7. The Learned advocate for respondent No.1, strongly opposed the writ petition. By relying on the impugned order, he submitted that the Trial Court was justified in rejecting the application filed by the petitioner, as the same was belatedly filed and no sufficient reason was given for condonation of delay. In support of his submissions, he relied on *"M/s SCG Contracts India Pvt. Ltd., V/s K. S. Chamankar Infrastructrue Pvt Ltd.," AIR 2019 Supreme Court 2691, "Sandeep Thapar V/s SME Technologies Private Limited" AIR 2014 Supreme Court 897 and "Sheshrao Yadavrao Patil (Jadhav) and Others V/s Wamanrao Yadavrao Patil (Jadhav) and Others" 2012 (2) AIR Bombay Reporter 62.*

By placing reliance in the judgment in the case of *"Sheshrao Yadavrao Patil"* (*supra*) learned advocate for respondent No.1 submitted that if this court is inclined to allow

the writ petition, then, the matter may be remanded back to the trial court for fresh consideration on application Exhibit-24, on merits.

8. Heard learned advocate for the petitioner and learned advocate for respondent No.1, at length. Other respondents, though served, have not filed their appearance. Perused the record.

9. It is a matter of record that the petitioner appeared in the suit on 3rd November, 2016 and no w.s. order was passed on 22nd February, 2017. Thereafter, on 7th November, 2017, the petitioner filed application Exhibit-24 for setting aside no w.s. order with a prayer to accept the written statement. In the application, the petitioner has contended that due to per-occupation, and as his father was constantly ailing, he was required to take his father at Pune and Mumbai for medical treatment, he could not file the written statement within stipulated time and the delay has occurred in filing the written statement.

10. The Trial Court has rejected the application Exhibit-24 on the ground that the defendant - petitioner failed to file written statement for about 14 months from the date of service of suit

summons. Though he has contended that he was required to take his old aged father for medical treatment to Pune and Mumbai, he has not placed on record the details of the treatment received by his father at Pune and Mumbai. He has not explained as to whether the liability of his father prevented him from attending court continuously during this time. The application is not supported with plausible reasons. Inordinate delay has not been satisfactorily explained. Hence, the application was rejected by the trial court.

11. The petitioner purchased the suit property from father in law of the plaintiff – respondent No.1, who is no more. The plaintiff is claiming her one fifth share in the suit property. Thus, substantial rights of the petitioner, in respect of the immovable property, are involved in the present suit. The petitioner is the contesting defendant in the suit. If the petitioner is denied an opportunity to defend the suit on merit, the petitioner is likely to suffer irreparable loss. Already, no w.s. order is passed against defendants No. 2a and 2d and *ex parte* order is passed against defendants No. 2(a)(1), 2(b)2 and 2 (c).

12. In these circumstances, the Trial Court ought to have favourably considered the application Exhibit-24 filed by the petitioner, so as to give fair opportunity to the petitioner to

contest the suit on merits. The petitioner has given plausible reasons in the delay condonation application and also filed affidavit in support of the application.

13. In "*M/s SCG Contracts India Pvt. Ltd.,*" and "*Sandeep Thapar*" (*supra*) the Hon'ble Supreme Court has held that in exceptional circumstances, the court has power to permit the defendant to file written statement beyond the period prescribed in Order VIII, Rule 1 of the Code of Civil Procedure. There cannot be any dispute about the ratio laid down by the Hon'ble Apex Court in these rulings.

14. In "*Sheshrao Yadavrao Patil (Jadhav)*" (*supra*) the Trial Court allowed the defendants to file written statement without recording cogent reasons and exceptional circumstances while setting aside no w.s. order. This court set aside the order of the Trial Court and remanded the matter back for fresh consideration on merits. In this ruling, the facts were totally different. The only reason assigned for seeking condonation of delay was that the defendant was prosecuting the matter till the Supreme Court and, therefore, he could not file the written statement within the stipulated time. Such are not the facts of the present case. In that case, affidavit in lieu of examination in chief was filed by the plaintiff and this court held that the averments in the application

are general in nature and too vague. No particulars were given about which documents the respondents wanted to procure from the record of the appeal, which was filed in the Supreme Court. In that case, the other defendants had already filed their respective written statements. In that view of the matter, this court set aside the order impugned in that matter and remanded the matter back to the trial court for fresh consideration on merits.

15. In **"Sangram Singh V/s Election Tribunal Kotah and Another"** AIR 1955 SC 425, the Hon'ble Supreme Court has observed thus -

"Our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course, there must be exception and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso, our laws of procedure should be construed, wherever that is reasonably possible, in the light of that principle."

16. In **"Salem Advocate Bar Association, Tamil Nadu V/.s Union of India"** AIR 2005 SC 3353 the Hon'ble Supreme Court has observed that Rules of procedure are made to advance the cause of justice and not to defeat it. Right of a party to prosecute

litigation and that too, when civil rights of the party are involved in the matter, should not be taken away by technicalities.

17. In the light of the authoritative pronouncements referred above, the petitioner should not be precluded from contesting the suit on merits, on technical grounds. The impugned order, therefore, is unsustainable and is liable to be quashed and set aside. The inconvenience caused to the plaintiff – respondent No.1, at the instance of the petitioner, can be adequately compensated. In the result, the following order-

ORDER

- I. Writ petition is allowed.
- II. Impugned orders dated 22nd February, 2017 passed below Exhibit-1 and dated 26th March, 2018 passed below Exhibit-24 in Special Civil Suit No. 33 of 2016, by the learned Civil Judge, Senior Division, Bhusawal, are quashed and set aside.
- III. Application Exhibit-24 is allowed, subject, however, to payment of costs of Rs.25,000/- to be paid by the petitioner to respondent No.1 – plaintiff, in the trial court.
- IV. Rule is made absolute accordingly.

[NITIN B. SURYAWANSHI]
JUDGE