

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.7418 OF 2013**

KASHINATH HANMANTRAO GARIBE

..PETITIONER

VERSUS

GUNWANT SHIVLING HAIBATPURE AND OTHERS ..RESPONDENTS

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Mr. Warad Kedar h/f Mr. Sunil V. Warad, Advocate for the Petitioner.

Mr. Shriram Deshmukh h/f Mr. D. R. Deshmukh, Advocate for Respondent No.1.

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CORAM : S. V. GANGAPURWALA, J.

DATED : 14th JANUARY, 2022.

PER COURT:-

1. The present respondent no.1 filed Suit for declaration of ownership and injunction. The said Suit came to be decreed ex-parte on 09.02.2000. The present petitioner filed application for setting aside ex-parte decree in the year 2005 alongwith application for condonation of delay bearing Civil Miscellaneous Application No.12/2008. Initially, it was numbered as 69/2005. Because of change of Taluka, the same was subsequently re-numbered as 12/2008. The application for condonation of delay in filing application for setting aside ex-parte decree is rejected.

2. The learned counsel for petitioner submits that, the petitioner was not served with the Suit summons. Directly recourse to substitute service was resorted by the plaintiff by publication in the local newspaper. The petitioner was serving at Mumbai. The petitioner was not aware of the decree passed. The petitioner appeared in the proceeding

before the Tahsildar in the year 2002, but advocate of the petitioner did not inform the petitioner about the decree passed against him. After petitioner changed his lawyer, he got the knowledge of passing of ex-parte decree. As such, the petitioner applied for the certified copies and thereafter, immediately filed application. The delay caused is not intentional, but because the petitioner was not aware of the decree passed.

3. The learned counsel for respondents submits that, the Trial Court has considered the entire evidence threadbare and thereby has rightly rejected the application for condonation of delay in filing application for setting aside ex-parte decree. The delay is of 5 years 5 months and 11 days. The delay is abnormal and inordinate one. The proceeding before the Tahsildar for mutation in the year 2002 was filed on the basis of the decree passed in favour of present respondent no.1. The petitioner appeared in the said proceeding in the year 2002 and as such, was aware of the said decree. Atleast from the year 2002, the present proceeding ought to have been filed within limitation. The witnesses of the petitioner have also not supported the petitioner. The contradictory evidence has been led. AW-2 Shivdas Patil has stated that, the present petitioner was working at Mumbai upto 2002 and since 2002 he is residing at his village Neknal, whereas AW-3 Maroti Kalwar states that, the petitioner was working upto

year 2006 at Mumbai. The same are contradictory statements given. The learned Judge has considered all these aspects and has rightly rejected the application. No error has been committed while passing the order.

4. The decree passed by the Trial Court in RCS No.196/1996 is an ex-parte decree. It appears that, the regular summons was not served upon the petitioner and the petitioner was served by substitute service by proclamation in the local newspaper. It has come in evidence that, at the time the Suit was pending, the petitioner was residing and serving at Mumbai. Naturally, the petitioner may not get the knowledge of the decree. The present respondent no.1/original plaintiff took up proceedings before the revenue authorities on the basis of the ex-parte decree passed in RCS No.196/1996. In the said proceedings, the petitioner appeared in the year 2002. However, according to the petitioner, the petitioner could get the knowledge of the ex-parte decree only after he changed his lawyer in the revenue proceedings and thereafter immediately applied for certified copies and thereafter filed the application.

5. The Suit of plaintiff is substantive Suit for declaration of ownership. The petitioner admittedly was not served with the summons through Bailiff and was served through proclamation in the local newspaper. It has come on record that, the petitioner at the relevant time, atleast till the

decree was passed was serving at Mumbai. The decree is passed in the year 2000.

6. In light of that, I am inclined to consider the case of the petitioner. However, the petitioner also deserves to be mulct with cost for the delay caused.

7. In the result, I pass the following order:

ORDER

A. The impugned order dated 03.08.2013 passed in Civil Miscellaneous Application No.12/2008 is set aside and Civil Miscellaneous Application No.12/2008 is allowed on condition that, the applicant deposits cost of Rs.20,000/- in Trial Court within a period of four weeks from today. The deposit of cost is condition precedent. Failure to deposit cost as directed above, would entail rejection of Civil Miscellaneous Application No.12/2008.

B. If the cost as directed is deposited within four weeks, then Trial Court may proceed further on its own merits for deciding the application filed by the petitioner for setting aside ex-parte decree. The cost that may be deposited by the petitioner is allowed to be withdrawn by the original plaintiff.

8. Writ Petition is disposed of. No costs.

(S. V. GANGAPURWALA)
JUDGE

Devendra/January-2022