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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4090 OF 2022

Gulam Dastagir Abdul Salam Pathan

PETITIONER

VERSUS

Savita Ishwar Pande and Others

RESPONDENTS

.....

Mr. Shaikh Samir Ahmad Saifuddin, Advocate for the petitioner
Mr. Namit S. Muthiyan, Advocate for respondent NO.2

.....

[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 26th SEPTEMBER, 2023

ORDER :

1. Leave to correct prayer clause.
2. Petitioner – original defendant No.14 in Regular Civil Suit No. 792 of 2010 is aggrieved by order passed by learned 11th Civil Judge, Senior Division, Aurangabad below Exhibit-94. By the said application, petitioner has prayed for setting aside *ex parte* order, which was passed against him on 27th August, 2013. The application for setting aside *ex parte* order was filed on 4th October, 2021, contending that address of petitioner in the plaint is of Gadhe Jalgaon, Taluka and District – Aurangabad, but since last about 15 years, petitioner is permanently residing at Aurangabad, therefore, summons was not properly served upon

him and he was not aware about pendency of the suit.

3. On 27th September, 2021, while he was doing agricultural work in the suit property, son of defendant No.4 met him and told him about the suit and the orders passed in the suit. On getting that knowledge, he filed the application for setting aside *ex parte* order. Trial Court rejected the application, as *ex parte* order was passed prior to 8 years and since the suit was posted for final arguments. Trial Court has also considered the fact that substituted service was allowed and the petitioner was served by paper publication. It is also observed by the Trial Court that petitioner has not produced any document in support of his contention that he has left the address given in the plaint 15 years back. It is also held that the address mentioned in the suit and the address given by the petitioner are both within Aurangabad Taluka and, therefore, summons is properly served on the petitioner.

4. Heard learned advocate for petitioner and learned advocate for respondent No.2. Perused the memo of writ petition, its annexures, the impugned order and the citations relied on by the learned advocates for the parties.

5. The suit is filed by the plaintiff for partition and separate

possession of ancestral property. Petitioner is purchaser of part of the suit property, admittedly prior to filing of the suit. Substantial rights of petitioner, in respect of immovable property, are involved in the matter and, therefore, he needs to be given an opportunity to contest the suit on merits.

6. Fact remains that while filing application for setting aside *ex parte* order, petitioner has failed to file application seeking delay condonation. In "**Ballumal A. Jaisingh V/s J. J. Builders and Others**" 2003 (3) *Mh,LJ.* 238, it is held that if application is barred by limitation, it cannot be entertained. In "**Sujitnath Sudhanshukumar Banerjee V/s Opadma Motilal Kotecha**" *LAWS (Bom)* 2015-4-5, learned Single Judge of this Court, in similar circumstances, has held that opportunity needs to be given to petitioner to file application for condonation of delay.

7. In the light of above, following order would meet the ends of justice -

ORDER

- A. Writ petition is allowed.
- B. Impugned order dated 11th January, 2022 passed by learned 11th Civil Judge, Senior Division, Aurangabad below Exhibit-94 in Regular Civil Suit No. 792 of 2010 is quashed

and set aside.

- C. Petitioner is at liberty to file application seeking condonation of delay for setting aside *ex parte* order, within a period of two weeks from the date of receipt of writ of this order. The said application shall be considered on its own merits by the Trial Court, without being influenced by the observations made in the present order.
- D. Petitioner to pay costs of Rs.10,000/- to respondent No.2 in the Trial Court, within a period of two weeks from the date of receipt of writ of this order.
- E. Considering the fact that the suit is of the year 2010, Trial Court shall make every endeavour to decide the suit within a period of 6 months from the date of receipt of writ of this order. Parties shall co-operate.

[NITIN B. SURYAWANSHI]
JUDGE