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

WRIT PETITION NO.4439 OF 2016

**BHAGWAN BABARAO POLE
VERSUS
PUNYARATHABAI W/O BHAGWAN KHARAL**

....

Mr R. J. Nirmal, Advocate for petitioner

Mr P. S. Agrawal, Advocate for respondent/sole

CORAM : PRAFULLA S. KHUBALKAR, J.

DATE : 13th June, 2025

PER COURT:

1. Heard Advocate R. J. Nirmal, learned counsel for the petitioner and Advocate P. S. Agrawal, learned counsel for the respondent/sole.

2. The petitioner has challenged order dated 10/03/2016, passed by the Court of Civil Judge Junior Division, Aundha Nagnath, on application for setting aside 'no evidence order' at Exhibit 147 in Regular Civil Suit No.42/2010, by which, the Trial Court has rejected the application filed by defendant No.1 (petitioner herein) for setting aside the no cross order.

3. Assailing the impugned order, Advocate Nirmal, learned counsel for the petitioner submits that the petitioner is original defendant No.1 in Regular Civil Suit No.42/2010. This is a suit by respondent No.1 for partition and separate possession alongwith

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declaration that the sale deeds dated 22/07/2011 and 07/12/2013 are not binding on the plaintiff (respondent herein). It is stated that the suit is in between members of the family with respect to their ancestral property, which is not yet partitioned although certain sale deeds are executed with respect to part of the property. The petitioner, who is defendant No.1 in the suit had already filed his written statement and had contested the suit. It is submitted that, during pendency of the suit, the plaintiff had entered into compromise with other defendants and in order to bring on record these subsequent developments, the petitioner had filed a separate application under Order VI Rule 17 of Code of Civil Procedure at Exhibit 149, seeking amendment of his written statement.

4. It is submitted that the petitioner, who is defendant No.1, had also explored the possibility of compromise of the suit with the plaintiff and had pursued in that regard, however, the compromise was not successful with him and in view of the compromise with the other parties, the petitioner got disturbed and confused and therefore, failed to appear on a few dates before the Trial Court. It is submitted that the petitioner was although quite diligent in prosecuting the suit, however, only on account of his failure to remain present, the Trial Court has

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adopted a hyper technical approach and passed the order of no evidence against him. It is vehemently submitted that the petitioner was not served with the notice sent by his Advocate as alleged, and since he was unaware about the specific dates, his absence on the dates of evidence was unintentional. He, therefore, submits that the approach of the Trial Court is detrimental to the interest of the parties, and refusing the petitioner/defendant No.1 to lead evidence, would amount to miscarriage of justice and ultimately it would lead to multiplicity of litigation. He therefore prays for quashing and setting aside of the impugned order, by granting an opportunity to the petitioner/defendant No.1 to lead evidence.

5. Per contra, Advocate Mr Agrawal, learned counsel for the respondent/sole vehemently opposes the petition. He submits that the petitioner was defendant No.1 in the suit and was present before the Court on 28/10/2015 when the parties desired to compromise the suit, and thereafter, he failed to remain present before the Court despite a notice dated 05/12/2015 sent by his Advocate. He vehemently submits that, defendant No.1 intentionally avoided to remain present before the Court, and thus, lost the opportunity to lead evidence. On the basis of these submissions, he supported the impugned order.

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6. It is undisputed position that the suit is in between family members claiming partition of their ancestral property. The suit is being contested on merits and the petitioner, who is defendant No.1 has also filed his written statement and had pursued the litigation. It has to be seen that, in the wake of compromise in between plaintiff with other defendants, excluding the petitioner, the subsequent events of compromise were necessary to be brought on record, and accordingly, petitioner/defendant No.1 had filed an application for amendment seeking to amend his written statement. It is pertinent to note that the petitioner moved two applications on the same date, one for amendment (at Exhibit 149) and another application for setting aside the 'no evidence' order (at Exhibit 147). It is thus clear that, defendant No.1 desired to contest the proceeding on merits after making the amendment and bringing on record the subsequent developments of compromise, which had a bearing on the civil suit. As such, even though the petitioner/defendant No.1 failed to lead evidence on the date fixed, his entire conduct of seeking amendment before leading evidence, cannot be considered to be an intentional avoidance to lead evidence. It has to be noted that the petitioner has contested the civil suit on merits and therefore, his valuable right to

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lead evidence cannot be taken away by adopting a technical approach. Pertinent to note, the Trial Court has rejected both the applications of the petitioner by passing the orders on the same date, thereby refusing the petitioner to amend his written statement and permission to lead evidence. In my considered view, this is a pedantic approach on the part of the Trial Court, which will ultimately lead to multiplicity of the litigations. It is desirable that the suit is decided on merits and the entire controversy is set at rest by affording opportunity to all the litigating parties.

7. In the light of above, the impugned order rejecting the petitioner's application for setting aside 'no evidence' order is unsustainable in law. The same deserves to be quashed and set aside.

8. The writ petition is, therefore, allowed. The impugned order dated 10/03/2016 passed by the Civil Court on application at Exhibit 147 in Regular Civil Suit No.42/2010 is quashed and set aside. The application at Exhibit 147 filed by the petitioner/defendant No.1 for setting aside 'no evidence' order dated 02/03/2016 is allowed. No order as to costs.

(PRAFULLA S. KHUBALKAR, J.)

sjk