

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO. 705 OF 2016
IN
CIVIL REVISION APPLICATION NO. 273 OF 2014**

Sou.Kamal @ Lilivati Shankarro Bahirat ...Applicant

Versus

Shri. Vinayak Haribhau Bajare & Ors. ...Respondents

**WITH
CIVIL REVISION APPLICATION NO. 273 OF 2014**

Sou.Tarabai Murlidhar Dangat & Anr. ...Applicant

Versus

Shri. Vinayak Haribhau Bajare & Ors. ...Respondents

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Mr.P.S.Dani, Senior Advocate i/b. Mr.Abhijit B.Kadam for the Applicant.
Mr.Shriram S. Kulkarni for Respondent No.1.

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**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 11, 2017**

P.C. :

1. This Civil Revision Application is directed against the order dated 05.12.2013 passed by the learned 7th Asstt. Civil Judge, Junior Division Court No.1 Pune in Misc. Application No. 373 of 2011 below Exhibit 1. By the said order, the trial Court allowed the application for condonation of delay of 1203 days filed by the respondents and also for setting aside the ex-parte order dated 05.12.2007 in Regular Civil Suit No, 330 of 2006.

2. The applicants had filed a Regular Civil Suit No. 330 of 2006 for partition and separate possession of ancestral property against the respondents, in which respondent no.1/original defendant no.2 is a contesting party. In the said Suit, summons were served on some defendants and not on original defendant nos. 1,2 and 5 to 8 by regular service and therefore, they were served by publication. None appeared in the Suit and therefore, the said Suit was decreed ex-parte against respondent nos. 1,2 and 5 to 8, vide order dated 05.12.2007 passed by the learned Civil Judge, Senior Division, Pune. Thereafter, respondent no.5/defendant no.5 Gajanan Bajare had filed a Misc. Application No. 209 of 2009 under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex-parte order dated 05.12.2007. The said application was dismissed for want of taking steps, vide order dated 10.03.2011. Thereafter, present respondent no.1/defendant no.2 had filed a Misc. Application No. 373 of 2011 under Order 9 Rule 13 of the Code of Civil Procedure alongwith the application for condonation of delay of nearly 1203 days. The said application was allowed, vide order dated 05.12.2013 and hence this Civil Revision Application.

3. The learned senior advocate for the applicants has submitted that there is an inordinate delay of 1203 days at two stages. The Suit was decreed on 05.12.2007. In fact, respondent no.1/defendant no.2

was served by publication hence it is deemed and good service. He further submits that till February 2009 i.e. till filing of Misc. Application No. 209 of 2009 by respondent no.5/defendant no.5 –Gajanan Bajare, no steps were taken for challenging the said ex-parte order and therefore, there is a delay at first stage. The respondent no.1/defendant no.2 had knowledge after service of summons in Misc. Application No. 209 of 2009 and nobody has been prevented respondent no.1 from filing second application for setting aside the ex-parte order and condonation of delay. However, he chose not to file a separate application independently. Misc. Application No. 209 of 2009 was dismissed for not taking the steps, thereafter other defendants have no right to file second application for the same relief of setting aside the ex-parte order. It may amount to res-judicata. He further submits that respondent no.1 ought to have filed the second application independently in the year 2009 itself, but he awaited till the application is dismissed and then he filed a separate Misc. Application No. 373 of 2011 and hence there is a delay, which cannot be condoned. Considering the averments made in Misc. Application No. 373 of 2011 that respondent no.1/defendant no.2 had no knowledge of the proceedings i.e. Suit No. 330 of 2006, is false. He relied on the documents and notices exchanged by the lawyers. He has further submitted that during the pendency of the appeal, one of the

defendants i.e. defendant no.5 Gajanan Bajare and the legal heirs of the original owners had sold their property to third party, who are the purchasers and who are added in Civil Application No.705 of 2016 as party respondents. A public notice was given by the lawyers of the purchasers. The said notice was replied by the lawyer of the present applicants thereby disclosing that Suit No. 330 of 2006 for partition was pending, in which the vendor Gajanan Bajare i.e. defendant no.5 have appeared. He relied on sale deed dated 05.05.2007, which was executed between the purchasers i.e. added respondents in this Civil Revision Application and Gajanan i.e. respondent no.5/defendant no.5 and his branch. He pointed out that in the sale deed, the conditions were mentioned and condition no.3 in respect of title and pendency of the suit was mentioned by the applicants. He has further submitted that Sale Deed of the land which was fallen in the share of Gajanan Bajare i.e. defendant no.5 and his branch is executed and on the said Consent Terms which were annexed to it, Vinayak i.e. defendant no.2 had signed as a witness. In the said consent terms, it was mentioned that sale deed dated 05.05.2017 has been taken place. Thus respondent no.1 cannot deny that he had no knowledge about the pendency of Suit No. 330 of 2006 in the trial Court. He further relied on the cross examination of the present respondent no.1, which was recorded before the trial Court in Misc. Application No. 373 of 2011. In the cross-

examination, respondent no.1 had given admission about the knowledge of the pendency of Suit No. 330 of 2006 and made a false statement that he had no knowledge regarding Misc. Application No. 209 of 2009 was filed by defendant no.5 Gajanan Bajare.

4. The learned counsel for respondent no.1 supported the order passed by the trial Court. He submitted that respondent no.1 did not have knowledge regarding pendency of the Suit and the ex-parte order passed in the said Suit. He relied on Misc. Application No. 209 of 2009, which was filed by respondent no.5/defendant no.5 i.e. Gajanan Bajare and on the reply given by respondent no.1 in the said Misc. Application. He has submitted that respondent no.1 i.e. Vinayak had appeared in the said application and had submitted that at the relevant time he had knowledge of the judgment and order therefore, he did not object the said application. The said application was dismissed on 10.03.2011 for default thereafter, immediately he had filed Misc. Application No. 373 of 2011 independently. He argued that respondent no.1 has right to litigate the Suit, as this is a Suit for partition of the ancestral property. The present applicants i.e. sisters have relinquished their right and executed the Deed of Relinquishment to that effect and that is required to be produced before the Court to adjudicate the issue. He has argued that the documents produced before the Court and relied by the learned senior counsel for the applicants were not produced before the trial

Court at the time of hearing; so respondent no.1 had no opportunity either to explain or to cross examine on the documents before the trial Court. He has further submitted that whatever documents filed before the trial Court, respondent no.1 would have said about it in the examination-in –chief. The learned counsel for respondent no.1 challenges the execution of the consent letter.

5. Heard submissions. Perused the documents. There is a delay of 1203 days. However, the Court has to see whether sufficient cause is shown by the applicant to condone the delay. In the order dated 5.12.2007, the learned Judge has noted that respondent no.1/defendant no.2 was not served in normal course, but there was a service by publication. It appears from the pleadings in Misc. Application No. 373 of 2011 that respondent no.1 had no knowledge of the ex-parte order passed by the trial Court, till he was served a summons in Misc. Application No. 209 of 2009. Thereafter, he appeared in Misc. Application No. 209 of 2009 and gave his no objection. In his cross-examination, a statement made by respondent no.1 that he had no knowledge of Misc. Application No. 209 of 2009 filed by respondent no.5-Gajanan, is apparently false. However, it is a fact that he had mentioned about the knowledge of the ex-parte order when he filed his appearance in the said application. The said application was dismissed

on 10.03.2011. The learned senior counsel for the applicants argued that if said application is dismissed, then other defendants are barred from filing the second application and it may amount to res-judicata under Section 11 of the Code of Civil Procedure. The principle of res-judicata will not be applicable in this matter though in both the applications same relief is asked for. However, earlier the application was not heard and not finally decided by the Court, but was dismissed for default. The present respondent nos. 1 and 2 have supported the said application when they appeared in it. The conduct of respondent no.1 is also to be taken in account that thereafter respondent no.1 took steps by filing the application for condonation of delay of 1203 days and prayed that the ex-parte order is to be set aside. Thus respondent no.1 has shown sufficient ground to condone the delay. A Regular Civil Suit No. 330 of 2006 is for partition and separate possession of the ancestral property and respondent no.1-brother has share in that ancestral property. As per his case, the applicants-sisters have executed the Deed of Relinquishment of their rights in the ancestral property. Moreover the documents, sale deed and the consent letter which are relied in Civil Revision Application were not produced before the trial Court. The execution of the consent letter cannot be itself *prima-facie* proof of the knowledge of the pendency of Suit No. 330 of 20065 to respondent no.1. In fact, the consent terms is annexure to the

sale deed and fact of pendency of Suit is not mentioned therein. Respondent no. 1 is a real brother of the applicants. The order passed by the trial Court is a well reasoned order, only the amount of the cost is to be increased i.e., additional payment of costs of Rs. 15,000/- is to be paid.

6. Civil Application No. 705 of 2016 is filed by applicant no.2 the subsequent purchasers of portion of the land for adding as party to the proceedings. This application is allowed only for the purpose of Civil Revision Application, so the purchasers be added as the respondents only in this Civil Revision Application. If the separate application is moved before trial Court for adding them as party, the said application is to be decided by the trial Court on merits.

7. The learned counsel for the applicants prays for time to file a rejoinder in the trial Court. Three weeks time is granted. Interim relief is extended by three weeks. The additional payment of costs of Rs. 15,000/- is to be paid to the applicants within a period of three weeks.

8. In view of the above, Civil Revision Application is disposed of.

(MRIDULA BHATKAR, J.)