

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

**CIVIL REVISION APPLICATION NO.167 OF 2020**

Smt. Nalini Ramakant Jadhav (since deceased) through her legal heirs and representatives):-

- 1) Mrs. Vibhavari Mohan Shinde
- 2) Mrs. Sunita Ashok Shinde
- 3) Mrs. Anjali Ashok Shinde

...Applicants

Versus

- 1) Manorama widow of Madhavrao Jagtap (since deceased)
- 2) Uday Madhavrao Jagtap
- 3) Ujwala Madhavrao Jagtap @ Smt. Ujwala Uday Kale
- 4) Mangla Madhavrao Jagtap @ Mrs. Anupriya Mohanrao Nimbalkar

...Respondents

**WITH  
INTERIM APPLICATION NO. 1337 OF 2021  
IN  
CIVIL REVISION APPLICATION NO. 167 OF 2020**

New Manoday Co-op. Housing  
Society Ltd.

.... Applicant/Intervenor

In the matter between :-

Nalini Ramakant Jadhav (since deceased through legal heirs) :

Mrs. Vibhavari Mohan Shinde and ors.

.... Applicants

v/s.

Manorama w/o. Madhavrao Jagtap  
(since deceased through legal heirs) :

Uday Madhavrao Jagtap and ors.

.... Respondents

....

Mr. Sanjeev Sawant, senior Advocate with Mr. Herambh Kadam i/b. Mr. D.A. Sakhalkar for the Applicants.

Mr. Rajesh Kachare with Mr. Ajit Tamhane, Ms Savita Sawalkar i/b. M/s. Tamhane and Co. for Respondent Nos.3 and 4.

Mr. Sachin Mhatre a/w. Ms. Vaishnavi Mudras and Ms. Ishita

Kamath i/b. M/s. Mhatre Law Associates for the Intervenor.

**CORAM : SMT. ANUJA PRABHUDESSAI, J.**

**JUDGMENT PRONOUNCED ON : 29<sup>th</sup> JULY, 2021.**

**JUDGMENT:-**

. By this application, filed under Section 115 of the Code of Civil Procedure, 1908 (CPC) the Applicants, who are the legal representatives of the original Plaintiff, have impugned the order dated 21/02/2020 whereby the learned Judge, City Civil Court, Mumbai, allowed the Notice of Motion No.1314 of 2018 filed in S.C. Suit No.9750 of 1977 and thereby set aside the ex-parte decree dated 9<sup>th</sup> October, 2014 passed in the said Suit.

2. The factual matrix giving rise to this application is that the original Plaintiff-Nalini had filed a suit before this Court being Regular Civil Suit No.246 of 1977 for partition and separate possession. The Respondents (Defendant Nos.1 to 4 in the suit, hereinafter referred to as Defendants) were shown to be the residents of Jagtap Bungalow, 6/166 Kaneri Road, Borivali, Bombay. Summons were issued to the Defendants on the said address. The Defendant Nos.1 to 3 put in their appearance through an Advocate and filed written statement. The said suit was dismissed for default and was restored on three occasions.

Subsequently, in view of rise in the pecuniary jurisdiction, Suit No.246 of 1977 was transferred from this Court to the City Civil Court, Mumbai and was re-registered as Suit No.9750 of 1977.

3. The Plaintiff thereafter filed chamber summons for amendment of the plaint, notice of which was issued to the Defendants on the same address mentioned in the cause title. Notice issued to Defendant Nos.3 and 4 was returned unserved as 'unclaimed' and the Plaintiff applied for substituted service by publication, which was allowed and the notice was published in 'Free Press Journal' and 'Navshakti' circulated in Mumbai. The Defendants did not put in their appearance. The trial court allowed the chamber summons and accordingly, the suit, for partition was allowed to be converted into a suit for declaration and possession.

4. The Plaintiff filed an affidavit of service stating that copies of the amended plaint were sent at the last known address of these Defendants. The Defendants neither remained present nor filed their additional written statement. The evidence of the Plaintiff was recorded in the absence of the Defendants. Upon considering the evidence adduced by the Plaintiff, the Trial Court by judgment and decree dated 08/10/2014 partly decreed the Suit and thereby declared the Plaintiff to be the owner of the suit property, with further

directions to the Defendants to deliver possession of the suit property and to give complete accounts of rents and profits recovered by them from the suit property since filing of the suit till handing over of the possession of the suit property.

5. The Plaintiff filed an application for execution No.55 of 2015. The original Plaintiff/Decree Holder died during pendency of the execution application. The Applicants herein filed chamber summons to bring them on record as legal representatives of the original Plaintiff / Decree Holder. Since the notices issued to these Defendants were returned by the postal authorities with a remark "left", the Applicants sought to serve them by substituted service. Subsequently, the Applicants filed an affidavit of substituted service and by order dated 08/01/2016 the learned Judge, City Civil Court allowed the chamber summons with directions to serve the amended copy of the execution application on all the Defendants.

6. The Applicants/Decree Holders thereafter filed an application to transfer the decree to the City Civil Court at Dindoshi and sought leave to serve the transfer application on the Defendants by substituted service. The Applicants filed an affidavit of service stating that the Defendants were served by substituted service. These Defendants did not appear before the executing Court and

subsequently, the execution proceedings No.55 of 2015 came to be transferred to the City Civil Court at Dindoshi. The executing court once again directed the Applicants to serve the Defendants by affixation as well as by publication.

7. On 26/03/2018 the Defendant Nos.3 and 4 filed Notice of Motion No.1314 of 2018 for setting aside ex-parte decree dated 08/10/2014 mainly on the ground of non-service of summons. The Defendant No.3-Ujwala and Defendant No.4 Mangla @ Anupriya have filed their affidavits in support of the motion. They claim that Defendant No.4 was married in the year 1971 and since then she has been residing in her matrimonial home at Goa. Whereas Defendant No.3 got married in the year 1978 and stayed at in her matrimonial home at Vidyavihar, Mumbai. After the death of her husband in the year 2006, she stayed at Vikhroli, Mumbai till April-2017 and that since the month of April-2017 she is residing with her sister (Defendant No.4) in Goa.

8. These Defendants have stated that they had married against the wishes of their mother and that they were not visiting their mother due to their strained relationship. They further claimed that they were not aware of the pendency of the suit. It was only when the Bailiff visited the suit property and the Defendant No.2-Uday gave evasive

replies to their queries, that they contacted a lawyer and checked the website of the Court and learnt about the decree passed by the Court in Civil Suit No.9756 of 1977.

9. In the affidavit- in- reply to the said notice of motion, the Applicants questioned maintainability of the notice of motion on the ground that the same was filed after considerable delay without a prayer for condonation of delay. The Applicants also claimed that Defendant Nos.3 and 4 had knowledge of the suit and that Defendant No.3 had put in her appearance through an advocate and filed her written statement. The Applicants further claimed that the Defendant No.3 was duly served by registered post as well as by publication. It is stated that these Defendants had chosen to remain absent despite knowledge of the pendency of the proceedings.

10. By the impugned order the learned Judge held that there were sufficient grounds and circumstances, which prevented these Defendants from appearing before the Court and participating in the proceedings. The Trial Court therefore allowed the notice of motion and set aside the ex-parte decree dated 08/10/2014 in Civil Suit No.9750 of 1977. Being aggrieved by this order the Applicants have filed this application under Section 115 of the CPC.

11. Mr. Sanjeev Sawant, learned senior counsel for the Applicants contends that the Defendant Nos.3 and 4 were duly served through the Bailiff as well as by publication and that they had knowledge of filing of the Suit. He submits that Defendant No.3-Ujwala had put in her appearance through an advocate and filed the written statement. He submits that these Defendants intentionally chose to remain absent and filed the notice of motion only for avoiding execution of decree. He submits that the application was filed after considerable delay and hence the trial Court was not justified in condoning the inordinate delay and interfering with the right accrued in favour of the Applicants. In support he has relied upon the decision of the Apex Court in ***University of Delhi vs. Union of India and Ors., 2019 (0) Supreme (SC) 1372*** and the decision of the Madras High Court in ***S.R. Vediappan and Ors. Vs. S.P. Ramalingam and Ors. 2020 (0) Supreme (Mad) 23***. He contends that the Defendant Nos.3 and 4 have not made out sufficient cause to condone the delay. He has relied upon the decision of the Apex Court in ***Parimal Vs. Veena [AIR 2011 SC 1150]*** and in ***Mahesh Yadav and Anr. Vs. Rajeshwar Singh and Ors. [2009 (4) Mh.L.J. 324]***. He submits that the impugned order, which is an unreasoned order cannot be sustained.

12. Per contra, Mr. Rajesh Kachare, learned counsel for

Defendant Nos.3 and 4 submits that Defendant No.4 was married in the year 1971 and since her marriage she has been residing in her matrimonial home in Goa. He submits that despite due knowledge of this fact, the Defendant No.4 is shown as a resident of Mumbai. He submits that the summons were not served on Defendant No.4 at the address where she was ordinarily residing. He further submits that the Applicants had not adhered to the provisions of Rule 20 (1-A) of Order V of CPC, which prescribes substituted mode of service when the Defendant avoids service of summons or when the summons cannot be served in the ordinary way. He submits that Defendant No.3 was married in the year 1978 and since her marriage, she has been residing at Vikhroli. He submits that the Suit was dismissed, and the Plaintiff had not taken steps to serve the copy of restoration application, or the copy of the order dated 7/12/2010 on these Defendants. He therefore contends that the learned Judge was perfectly justified in setting aside the ex-parte order.

13. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties. Order IX Rule 13 of Civil Procedure Code, 1908 lays down procedure for setting aside an ex-parte decree against the Defendant, which reads thus:-

**"R.13. Setting aside decree ex parte against defendant.-** In any case in which a decree is passed ex

parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside and if he satisfies the Court that the summons was not duly served, or that there was sufficient cause for his failure to appear when the suit was called on for hearing the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also:

Provided also that no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

**Explanation I.-** Where a summons has been served under Order V, Rule 15, on an adult male-member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served with the meaning of this rule.

**Explanation II.-** Where there has been an appeal against a

decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.”

14. Order 9 Rule 13 of CPC empowers the Court to set aside the decree in two different situations i.e. (i) if the Defendant satisfies the Court that summons were not duly served or (ii) that there was sufficient cause for his failure to appear when the suit was called on for hearing. The first proviso to this rule enables the Court to set aside the entire decree, where the decree is of such a nature that it cannot be set aside only as against the Defendant, who applies for setting aside the decree. The second proviso ensures that the ex-parte decree is not set aside merely on the ground of irregularity in the service of summons, when the Defendant had notice of the date of hearing and had sufficient time to appear and defend the suit.

15. In ***Parimal*** (supra) the Apex Court has observed that an ex-parte decree has to be set aside if the party satisfies the Court that summons has not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the Court shall not set aside the decree on mere irregularity in the service of summons or in a case where the Defendant had notice

of the date and sufficient time to appear in the Court. It is held that the expression 'sufficient cause' means that party had not acted in a negligent manner or there was a want of bonafide on its part in view of the facts and circumstances of the case or the party cannot be alleged to have been 'not acting diligently' or 'remaining inactive'. The Apex Court has observed that the facts and circumstances of each case must afford sufficient ground to enable the Court concerned to exercise discretion for the reason that whenever the Court exercises discretion, it has to be exercised judiciously. The Apex Court has further observed that in order to determine the application under Order IX Rule 13 CPC, the test that is to be applied is whether the Defendant honestly and sincerely intended to remain present when the suit was called for hearing and did his best to do so. Sufficient cause is thus the cause for which the Defendant could not be blamed for his absence.

16. In the instant case, the Defendant Nos.3 and 4 had applied for setting aside of ex-parte decree essentially on the ground of non-service of summons. The Trial Court was therefore required to consider whether the Defendants were duly served and /or whether they had knowledge of the pending proceedings. A perusal of the impugned order indicates that the Trial Court has set aside the decree on the ground that there were sufficient grounds and circumstances that

prevented the Defendants from appearing before the Court and participating in the Suit. It is to be noted that the Trial Court has not analyzed or specified the facts and circumstances which constituted 'sufficient ground' and has not assigned any reasons for arriving at the finding that the Defendants were prevented by sufficient cause from appearing before the Court. Learned counsel for the Applicant is justified in contending that the impugned order is an unreasoned order. It is imperative for this Court to examine the records for satisfying as to the correctness, legality or propriety of such order.

17. The question is whether the ex-parte decree was liable to be set-aside for non-service of summons/notice. It is pertinent to note that the dispute between the parties was in respect of the property owned by Madhavrao Jagtap. He was married twice. First to Alice Johan and later to Defendant No.1-Manorama. The original Plaintiff-Nalini is the daughter of Madhavrao and Alice whereas Defendant Nos.2 to 4 are the children of Madhavrao and Manorama (defendant No.1). The Plaintiff, had filed a suit for partition and possession wherein all the Defendants i.e. Manorama and her three children were shown as residents of 'House No.6/661, Kanheri Road, Borivali (East), Mumbai', and the summons were issued on the said address.

18. Defendant Nos.1 to 3 had appeared and filed their written

statement. Defendant No.4 did not appear either personally or through an advocate. She claims that she was not served with summons and had no knowledge about the suit. Defendant No.4 has stated that she was married in the year 1971 and since her marriage, which was much prior to the institution of the suit, she has been residing in her matrimonial home in Goa. There is no specific denial of this statement. The records also reveal that in the Notice of Motion No.126 of 1975 filed by the Plaintiff in pauper petition No.1 of 1975, Defendant No.4 was served at her matrimonial address at Goa. Affidavit to that effect was filed by Mr. Abbas Husain, attorney of the Plaintiff. Defendant No.4 had also filed her affidavit in the said notice of motion wherein she had disclosed her address as c/o. Mohanrao Nimbalkar, residing at House No.73, Gokulwadi, Village Sanquelin, Taluka Bicholim, District North Goa, Pin 403 505. It is thus, evident that the Plaintiff was well aware that Defendant No.4 was married much prior to the institution of the suit and was residing in her matrimonial home at Goa, despite which in the cause title she has been shown to be the resident of Mumbai. Defendant No.4 was admittedly not served with summons at Goa address, wherein she was residing since marriage.

19. It is true that Defendant No.3 was initially served and she had put in her appearance and filed written statement. It is however to

be noted that the Suit was dismissed for default on 09/06/2005 and the Plaintiff had filed Notice of Motion for condonation of delay and restoration of suit. Undisputedly, the notice of motion was issued to Defendant Nos.3 and 4 at Mumbai address and the same were returned unserved with remark that they were not residing at the given address. Orders dated 07/12/2010 in delay condonation and restoration application records that Defendant No.2 -Uday was present in person and had stated that his sisters i.e. Defendant Nos.3 and 4 are not interested in the suit property and had not come forward to oppose the suit. He had given no objection for condoning the delay and for restoring the suit. In view of the said statement, the delay was condoned, and the suit was ordered to be restored. This Court had specifically directed the Plaintiff to forward copies of orders dated 07/12/2010 to Defendant Nos.3 and 4 by registered post at the address provided by the Defendant No.2. It is not in dispute that the copies of these orders were not forwarded to Defendant Nos.3 and 4 and they were not informed about restoration of the Suit.

20. It is also pertinent to note that subsequent to the transfer of the Suit from this Court to the City Civil Court in view of rise in the pecuniary jurisdiction, the Plaintiff had filed a chamber summons for amendment of the plaint, by which the suit for partition was sought to

be converted into suit for declaration and possession. Notices were once again issued on the same address as mentioned in the cause title. These notices were once again returned unserved and the plaintiff prayed for substituted service by publication. It is to be noted that notice of this amendment application was not served on Defendant No.4 at Goa address. The Defendant No.3, who was married in the year 1978 was also not served at her matrimonial address. The records reveal that the Trial Court had allowed the Plaintiff to serve the Defendant Nos.3 and 4 by publication and accordingly notices were published in 'Free Press Journal' & 'Navshakti'. Suffice it to say that substituted service cannot be ordered in a casual manner without there being any reason to believe that the Defendant was avoiding service or could not be served in ordinary manner for any other reason. In the instant case, as stated earlier the Plaintiff had tried to serve the Defendant Nos.3 and 4 at their parental address despite knowing that they were married and were residing at their matrimonial address. The Plaintiffs had applied for substituted service without taking steps to serve these defendants in the ordinary manner and without there being any material to indicate that they were evading the service. Therefore the service upon these defendants cannot be considered to be in accordance with law.

21. It is further to be noted that Order V, Rule 20 (1A) provides for service by an advertisement in a daily newspaper circulating in the locality in which the Defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain. In the instant case, notices were published in 'Free Press Journal' and 'Navshakti' which are circulated in Mumbai. There is no material on record to indicate that Defendant No.4 was residing at Vikhroli as alleged. As stated earlier, the records indicate that the Defendant No.4 was a resident of Goa. The daily newspapers in which the notices were published had no circulation in the locality in which the Defendant No.4 was actually residing. Under the circumstances, the substituted service cannot be considered to be valid service.

22. The suit was restored without notice to these defendants. As stated earlier, the Plaintiff had not taken steps to obtain the address of this Defendant through Defendant No.2, and had not served the copy of the orders on both these Defendants. There is nothing on record to indicate that despite non-service of notice and /or the copy of the order, these Defendants were aware about the restoration of the Suit and that they had deliberately avoided appearing in the proceedings.

23. These Defendants have claimed that on learning that the

Bailiff had visited the suit property, they came down to Mumbai on 23/03/2018 and contacted their brother (Defendant No.2). It was only when he gave evasive replies that they checked the website through their Advocate and learnt about the decree. There is no specific denial of the statement that these Defendants had learnt about the decree only in the month of March-2018. The notice of motion for setting aside the ex-parte decree was filed on 26/03/2018 i.e. within 30 days from the date of knowledge and is therefore within limitation. The Defendants had not adopted delaying tactics and as such in the facts of the case the decisions in **University of Delhi** and **S.R. Vediappan** (supra) have no application.

24. The records indicate that the Defendant Nos.3 and 4 were not served with summons/notice. Hence, Defendant No.4 had no knowledge of filing of the suit whereas Defendant No.3 had no knowledge of restoration of suit. In short, they had no knowledge of pendency of the suit. They had neither acted in a negligent manner nor can they be attributed with want of bonafides. Non-service of summons/notice is therefore a valid ground for setting aside the decree.

25. By the impugned judgment and decree, the Plaintiff is declared to be the owner of the suit property and the Defendants have

been directed to deliver possession of the suit property with further direction to give accounts of rents and profits received from the suit property. The decree is of such nature that it cannot be set aside only against Defendant Nos.3 and 4, who have applied under this Rule and has to be set aside as a whole against all the Defendants including Defendant No.2.

26. Under the circumstances, the Civil Revision Application has no merits and is accordingly dismissed.

27. In view of dismissal of Civil Revision Application, Interim Application No.1337 of 2021 does not survive and stands disposed of.

**(SMT. ANUJA PRABHUDESSAI, J.)**

28. At this stage, learned counsel for the Applicants seeks stay of the order. No stay was operating during the pendency of the Application. No grounds are made out to stay the order.

**(SMT. ANUJA PRABHUDESSAI, J.)**