

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

APPEAL FROM ORDER NO. 705 OF 2016

Jayant Vasant Agnihotri	... Appellant
Versus	
Vijay Udhav Upasani & Ors.	...Respondents

**WITH
APPEAL FROM ORDER NO. 488 OF 2016**

Jayant Vasant Agnihotri	... Appellant
Versus	
Vishwanaath Nilkanth Agnihotri	...Respondent

...

Mr. Hrishikesh S. Shinde, for Appellant in both Appeals.

Mr. Chandrakant Chandratre for Respondent Nos.1 to 3 & 5, 6A to 6C & 12 in AO No.488 of 2016 and for Respondent Nos.1, 3 to 6 in AO No.705 of 2016.

Mr. Kush Lahankar i/by i/by Mr. S.R. Ganbavale for Respondent Nos.11A to 11E in AO No.488 of 2016.

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CORAM : SANDEEP V. MARNE, J.
DATE : OCTOBER 12, 2023.

P.C.:

1. The challenge in the present Appeals is to the order dated 18 November 2015 passed by District Judge-1, Malegaon by which Regular Civil Appeal Nos.48 of 2004 and 47 of 2006 have been allowed and the Judgment and Decree dated 31 July 2004 passed in Special Civil Suit No.38 of

1999 by Civil Judge Senior Division, Malegaon, has been set aside. The Appellate Court has remanded the suit to the trial Court for trial afresh.

2. It appears that there was a dispute before the District Court as to whether Defendant Nos.2 to 5 were served in the suit. The District Court has considered the entire records of the case and has arrived at a finding that there was no proper service in respect of Defendant Nos.2 to 5. Perusal of various documents placed on record would indicate that the Plaintiff had initially stated the address of Defendant Nos.1 to 5 as "Peth Road, Datta Nagar, Balasaheb Housing Society Nasik". When the bailiff reached the said address on 19 March 1999, he met only Defendant Nos.1, who informed the bailiff that Defendant Nos.2 to 5 had gone out on a religious tour. Thereafter, the Plaintiff filed application dated 15 June 1999 providing a new address in respect of Defendant No.2 as "6 May Apartment, 2nd Floor, near old Petrol Pump, above MERI, Nashik-3". When the bailiff again made an attempt for service, he found that the building "Balasaheb Housing Society", in respect of Defendant Nos.1, 3 4 & 5 was not found. He however met Defendant No.1. He also found that Defendant Nos.3 & 5 were not residing with the mother and Defendant No.4 had gone out of station. Plaintiff thereafter filed application before the trial Court for service of summons on Defendant Nos.2

to 5 under provisions of Order 5 Rule 20 of the Code of Civil Procedure by contending that the said Defendants were avoiding service of summons. I have gone through that application as well as order passed thereon by the trial Court on 18 December 1999. Firstly, the order is not legible. Secondly, the said order does not show that the trial Court has recorded a specific finding that the Defendant No.2 to 5 were actually avoiding service of suit summons. In fact no material was produced before the trial Court to demonstrate that Defendant No.2 to 5 were avoiding suit summons. In fact, from the bailiff reports dated 19 March 1999 and 4 December 1999, it is clear that the Defendant Nos.2 to 5 were not avoiding the suit summons in any manner. In the light of the above factual position, the finding recorded by the District Court about absence of service of suit summons on Defendant Nos.2 to 5 cannot be found fault with.

3. It must be borne in mind that the suit is for partition and it is necessary that all the parties to the suit are heard. The order passed by the District Court could only result in grant of an opportunity to Defendant Nos. 2, 3 & 5 to appear before the trial Court and file their defence in the suit. This would also enable the trial Court to decide the issues framed by it in a more effective manner. I therefore do not find any patent error committed by the

District Court in remanding the suit for fresh trial, after it arrived at a conclusion that Defendant Nos.2, 3 & 5 were not properly served.

4. No interference by this Court is therefore warranted. The Appeals being devoid of merits, are dismissed without any order as to costs.

(SANDEEP V. MARNE, J.)