

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

APPEAL FROM ORDER NO. 584 OF 2022

SANTOSH
SUBHASH
KULKARNI

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SANTOSH SUBHASH
KULKARNI
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Mrs. Regina Anthony Godinho & ors. ...Appellants

Versus

Mr. Johny Alex Godinho (since deceased)
through LR.s. & ors. ...Respondents

WITH

INTERIM APPLICATION NO. 3444 OF 2022

Mr. Rajesh Parab, for the Appellants.
Mr. Prajakh Arjunwadkar, for the Respondents.

CORAM: N. J. JAMADAR, J.

DATED : 5th APRIL, 2023

ORDER:-

1. This appeal is directed against an order dated 17th December, 2021 passed by the learned Judge, City Civil Court, Boriwali Divison, Mumbai, in Notice of Motion No.1628 of 2018, whereby the said Notice of Motion taken out by the appellants – original defendants to condone the delay of 13 years and 85 days in filing the said Notice of Motion and, thereafter, to set aside the judgment and decree dated 21st September, 2004 passed against the defendants in SC Suit No.2088 of 2003 came to be dismissed.

2. Johny Alex Goldinho, the predecessor in title of the respondents had instituted a suit against the appellants –

defendants seeking a declaration that he had perfected title over two pieces of agricultural land admeasuring 5 Acres comprising of two farm houses bearing Survey No.43, Hissa No.1, situated at village Gorai, Taluka Borivali, Mumbai Suburban District (“the suit property”). It was also prayed that if the defendants were found to be in possession of the farm houses they be ordered to be evicted from the said houses shown in the map in the Schedule (Exhibit-B to the plaint) (prayer Clause (d)).

3. The defendants, as the record indicates, appeared but did not file the written statement. Eventually by a judgment and order dated 21st September, 2004 the suit came to be decreed under the provisions of Order VIII Rule 10 of the Code of Civil Procedure, 1908 (“the Code”) in terms of prayer Clause (d) of the plaint.

4. The respondents took out an execution application. In the said execution application, the respondents filed Misc. Application No.23 of 2016 seeking execution of the decree by forcibly dispossessing the defendants with the assistance of the police. Thereupon the defendants filed instant Notice of Motion No.1628 of 2018 seeking condonation of delay of 13 years and 85 days in taking out the Notice of Motion and also to set aside the

judgment and decree dated 21st September, 2004 purportedly passed *ex parte*.

5. In the affidavit in support of the Notice of Motion diverse grounds were raised; some of them touching upon the merits of the matter. The substance of the case put-forth by the defendants was that the predecessor in title of the defendants was killed on 15th October, 1998. The defendants were in a disturbed state of mind. They had no source of income. The defendants were unaware of, and could not participate in, the proceedings. Taking undue advantage of the adverse circumstances the plaintiffs obtained *ex parte* decree. The defendants also contended that the suit summons was not duly served.

6. The Notice of Motion was resisted by the respondents. It was asserted that the suit summons was duly served. The defendants did not participate in the proceedings despite having entered appearance. There was no ground to condone the delay of more than 13 years.

7. By the impugned order, the learned Judge, City Civil Court, was persuaded to reject the Notice of Motion on the ground that it was hopelessly barred by law of limitation. Where the suit summons was duly served the period of limitation to

seek setting aside of the *ex parte* decree was 30 days from the date of decree. There was no ground made out to condone the delay. The Court was also of the view that in the year 2014 itself the defendants were served with the execution application. Again the defendants – judgment debtors failed to enter appearance. Thus, even if the period of limitation is computed from the date of knowledge of the decree sought to be set aside, there was no justifiable reason to condone the delay of more than four years. Resultantly, the Notice of Motion came to be dismissed.

8. Being aggrieved the defendants are in appeal.

9. I have heard Mr. Parab, the learned Counsel for the appellants and Mr. Arjunwadkar, the learned Counsel for the respondents.

10. Under Order IX Rule 13 a defendant can apply to the Court to set aside the decree passed *ex parte* if he satisfies the Court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

11. Article 123 of the Limitation Act governs an application to set aside a decree passed *ex parte*. It prescribes 30 days period of limitation. The time begins to run from the date of decree or

where the summons or notice was not duly served when the applicant had knowledge of the decree. Two situations thus emerge where an application for setting aside an *ex parte* decree is preferred. One, where there is a proof of service of summons the period of limitation would be 30 days from the date of the decree. Two, in a case where it is alleged that the summons was not duly served on the defendants, then 30 days period starts to run from the date of the knowledge of the decree.

12. Consequently, it is incumbent upon the defendant to get a decree set aside to establish that either the summons was not duly served on him or he had sufficient cause to remain absent on the date fixed for hearing the suit in which decree came to be passed *ex parte*.

13. A conjoint reading of the provisions contained in Order IX Rule 13 of the Code and Article 123 of the Limitation Act would indicate that the aspect of proof of service of summons on the defendants is of critical salience. If the summons was duly served the period of limitation begins to run from the date of the passing of the decree itself. If not, the date of knowledge of the passing of the decree becomes relevant.

14. Reverting to the facts of the case, it is pertinent to note, the case of the defendants wavered from one end to another. At

one breath it was contended that on account of the adverse circumstances in which the defendants found themselves, after the death of the husband of defendant No.1, they could not appear in the suit. At another breath, it was contended that the suit summons was not duly served. This ambivalence does not advance the cause of the defendants.

15. The situation is further accentuated by the fact that the judgment dated 21st September, 2004 records that the despite sufficient opportunity no written statement was filed on behalf of the defendants. In the face of the entries in the *roznama* of Suit No.2088 of 2003 and the observations in the judgment dated 21st September, 2004 it would be difficult to accede to the submission on behalf of the defendants that the suit summons was not duly served.

16. Nonetheless, to satisfy the conscious of the Court, the respondents were directed to file an affidavit-in-reply in support of their claim that the writ of summons and/or notice of the execution proceedings were duly served on the defendants – appellants. An affidavit-in-reply came to be filed on 16th March, 2023. To the said affidavit the respondents have annexed the affidavit of service dated 17th November, 2003 by the Special Bailiff affirming that the writ of summons was duly served and

acknowledged by the defendants. Affidavit of the deceased plaintiff is also annexed. Copies of postal acknowledgments evidencing the service of notice appointing defendant No.1 as the natural guardian of defendant No.5 are also annexed. In addition, post the decree, Execution Application No.9 of 2014 in the said suit was also duly served on the defendants as is evidenced by the Bailiff Report (pages 129 and 130) and the affidavit of the serving officer.

17. The aforesaid material on record establishes beyond the pale of controversy that not only the writ of summons was duly served on the defendants in the year 2003 itself but, even post decree, the execution application was also served on the defendants/judgment debtors in the year 2004. Yet the Notice of Motion was taken out in the year 2018. Since there is a proof of due service of writ of summons in the year 2003, the period of limitation to set aside the decree would run from the date of the decree itself. There is huge delay of 13 years and 85 days. As noted above the defendants have ascribed diverse reasons. None of the reasons are sturdy enough to account for the delay of more than 13 years.

18. In the circumstances, the learned Judge, City Civil Court, committed no error in declining to exercise the discretion to

condone the huge and unexplained delay in taking out the Notice of Motion to set aside *ex parte* decree. It is true the Courts ordinarily lean in favour of the condonation of delay so as to advance the cause of substantive justice. However, the delay cannot be condoned as a matter of course where it is inordinate, by any standard, as in the case at hand. It was incumbent upon the defendants to satisfy the Court that they were prevented from a sufficient cause from taking out the application for setting aside the decree. Omnibus assertions in the affidavit in support do not constitute a sufficient cause.

19. For the foregoing reasons, no interference is warranted in the impugned order. Consequently, the appeal deserves to be dismissed.

20. The appeal stands dismissed with costs.

21. In view of dismissal of the appeal, interim application does not survive and stands disposed.

[N. J. JAMADAR, J.]