



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO.29 OF 2024
IN
WRIT PETITION NO. 1449 OF 2018

Rangnath Narayan Bhise (since deceased)
through LR.s. and Ors.

... Petitioners.

Versus

Karbhari Pandu Bodke (since deceased)
through LR.s. and Ors.

... Respondents.

*Mr. Girish Agrawal, Mr.Shubham Jangam, Ms. Naiana Boraste for Petitioners.
Ms. Rukmini Khairnar i/by Mr. P.N. Joshi, for the Respondent.*

Coram : Sharmila U. Deshmukh, J.

Date : April 16, 2024.

ORDER :

1. Review has been sought of the order dated 21st July, 2023 passed by this Court in Writ Petition No.1449 of 2018 allowing the Petition. Writ Petition No.1449 of 2018 was filed seeking to challenge the order dated 4th September, 2017, passed by the Executing Court rejecting the petitioner's application filed under Section 47 of the Code of Civil Procedure, 1908, raising objection to the execution of the decree passed in Regular Civil Appeal No.90 of 1982 by directing the judgment debtor to deliver possession of the encroached portion shown in the map. In the said Writ Petition, the Petitioners had

impleaded the following parties as Respondents.

“1. Rangnath Narayan Bhise,
Deceased Heirs,

1A. Chindhu Rangnath Bhise,
Age-85 years,

1B. Punja Rangnath Bhise,
Age-82 years,

1C. Babu Rangnath Bhise,
Age-Major,

1D. Awadabai Rangnath Bhise,
Deceased Legal Heirs,

1D-a. Vimal Walu Bhise,
Age-Major,

1D-b. Arun Walu Bhise,
Age-Major,

1D-c. Ramdas Walu Bhise,

All Agriculturists and Residing
at Village Moho, Post – Chincholil,
Tal-Sinnar, Dist.Nashik”

2. By order dated 26th February, 2019 passed in Writ Petition No.1449 of 2018, this Court had issued notice before admission to the Respondents and vide clause (c) of paragraph No.3, the Petitioners were directed to carry out amendment by placing on record the copy of the judgment and decree passed by the Appellate Court in Regular

Civil Appeal No.90 of 1982 on or before 30th March, 2019.

3. Admittedly, the copy of the judgment and decree in Regular Civil Appeal No.90 of 1982 was not placed on record by the Petitioners. The matter was listed on 21st July, 2023 before this Court. On 21st July, 2023, this Court considered the office report that the Respondents had refused to accept service and the submission of learned counsel appearing for the Petitioners that the notice of hearing was served upon the Respondents, however, the Respondents have refused to accept the service. The Court in view thereof proceeded with the hearing of the petition and allowed the Petition vide order dated 21st July, 2023. By the present Review Petition, the Petitioners seek review of the order dated 21st July, 2023.

4. Heard Mr.Agrawal, learned counsel for the Review-petitioners and Ms.Khairnar, learned counsel for the Respondents.

5. Mr. Agrawal, learned counsel appearing for the Review-petitioners would submit that the Affidavit of service dated 8th April, 2019 filed by the Petitioners in Writ Petition No.1449 of 2018, clearly mentions that the Respondent Nos.1D.a therein has expired. He further submits that the Respondent No.1A i.e. Chindhu @ Sahadu Rangnath Bhise expired on 25th January, 2022, Respondent No.1B-Punja

Rangnath Bhise expired on 2nd September, 2019 and Respondent No.1C had expired on 8th September, 2018 and Respondent No.1D.a expired on 23rd September, 2018. He would further submit that the office remark on the cause-list of 21st July, 2023 clearly mentions that the notice of Respondent Nos.1A to 1C and 1D.a to 1D.c is returned with the Bailiff remarks "refused to accept" by the Respondent Nos.1A to 1C and 1D.b and 1D.c due to incorrect name of Respondent Nos.1A and 1C and as informed that their correct names are "Sahadu Rangnath Bhise" and "Walu Rangnath Bhise". He would therefore submit that the notices were returned due to incorrect names of Respondent No 1A to 1C and not refused. He submits that apart from Respondent No 1A to 1C, even if the other Respondents had refused to accept the service, the proper course to be adopted by the Bailiff was to comply with the procedure under Order V Rule 17 of the Code of Civil Procedure, 1908 (for short, "CPC"). He relies upon the decision in the case of ***M/s.Neerja Realtors Pvt. Ltd. vs. Janglu***, reported in ***2018 (2) ALL MR 447 (S.C.)***.

6. On merits of the matter, Mr. Agrawal, would submit that before the Executing Court an application was moved by the Respondents herein for appointment of Court Commissioner for identification of encroached area as per the map prepared by DILR in Regular Civil Suit No.171 of 1971. He submits that the Executing Court by order dated 29th October, 2009 directed the Court Commissioner to measure the property

only for the purpose of fixation of boundary mark. He submits that the map of the TILR reduced the encroached portion from 99 Are as per the decreed to 27 Are which has been rightly declined to be considered by the Executing Court. He submits that the Executing Court could not have gone beyond the decree and that these orders were not placed for consideration of the Court while deciding the writ petition. He points out to the order passed by this Court in Second Appeal No.319 of 1999 arising out of the Trial Court judgment where it is specifically observed by this Court that the decree holds that the defendants are encroachers on the land admeasuring 99 Are in Gat No.281 owned by the plaintiffs. He would further submit that there was no notice for final disposal issued to the Review Petitioners and as such, there is sufficient cause for review of the order. In support, he relies on the decision of the Apex Court in the case of ***Namdeo Karbhari Bodake & Ors. vs. Chahabu @ Rangnath Bhise & Ors.*** reported in ***2006 (2) ALL MR 54.***

7. *Per contra*, Ms. Khairnar, learned counsel appearing for the Respondents would submit that the affidavit of service was filed on 16th March, 2019 and that the Respondent No.1B expired on 2nd September, 2019 and the Respondent No.1A expired on 25th January, 2022 after the refusal. She would further submit that as far as Respondent no.1D.a is concerned, she expired on 23rd September, 2019 and the legal heirs of the Respondent No.1C were already on record i.e. the Respondent

No.1D.a to 1D.c. She would further submit that the present review petition is also filed by the Respondent Nos.1D.a to 1D.c and that they both were served and did not appear in the proceedings.

8. On merits, Ms. Khairnar would submit that the Executing Court by order dated 29th October, 2009 had appointed the Court Commissioner for determination of portion of land shown in blue colour on the map at Exhibit-54 alongwith the decree and the TILR was appointed who has shown the encroachment to the extent of 27 Are. She submits that this Court by order under review had rightly directed the Trial Court to consider the subsequent map of the Court Commissioner. She would further submit that the review of the order under Order XLVII Rule 1 of the CPC is permissible only where the error is apparent on the face of record or in event of miscarriage of justice. She submits that the remedy of Review Petitioners is to challenge the order. In support, she relies upon the decision of the Apex Court in the case of ***Ramdulari vs. Meerabai*** reported in ***2014 (3) Mh.L.J. 323***. As regards the service, she submits that the refusal of the notice is proper service and in support, she relies on the order dated 13th October, 2023 in Transfer Petition(s) (Civil) No(s).2090/2019 in the case of ***Priyanka Kumari vs. Shailendra Kumar*** noting the decision of Apex Court in case of *K. Bhaskaran vs. Sankaran Vaidhyan Balan and Anr. (1999) 7 SCC 510* holding that the notice returned as unclaimed is deemed to be duly served upon the

addressee and is proper notice.

9. Considered the submissions and perused the record.

10. Pursuant to the order of this Court dated 26th February, 2019, in Writ Petition No.1449 of 2018 alongwith the Court notice the Petitioners were permitted to serve the Respondents through private service and to file affidavit of service. The affidavit of service dated 8th April, 2019 which is on record states that the copy of the petition was served upon the Respondent No.1's legal heirs on 16th March, 2019 and the packet served to the Respondent No.1D.a was returned back with the remark "person dead" and the other packets are returned back with the remark "not accepted". In the Writ petition, the name of the legal heirs of the deceased-Respondent No.1 is shown as "Chindhu", "Punja" and "Babu" as the Respondent No.1A to 1C.

11. The office noting on the cause-list which is annexed by the review-petitioners at page No.78 of the review petition would indicate that the notice of the Respondent No.1A to 1C has been returned due to incorrect name of Respondent No.1A and 1C as their correct names of "Sahadu Rangnath Bhise" and "Walu Rangnath Bhise". As the parties are litigating since 1971 from the Trial Court right up to this Court, the Respondents herein were well aware of the

names of the legal heirs of the original-plaintiff No.1. Perusal of the Execution Application would also indicate that the name of the Respondent Nos.1A and 1C are "Sahadu" and "Walu". Despite thereof, in the Writ petition incorrect names of the Respondent No.1A and 1C were stated and the Court notices were issued at the incorrect names which have been rightly refused by the Respondent Nos.1A and 1C. The envelopes sent by Registered Post accompanying the affidavit of service of 8th April, 2019 would indicate that the names of the Respondent Nos.1A and 1C were incorrect and the same has not been accepted. Even if it is accepted that some of the review-Petitioners had refused to accept the service the fact remains that as far as the Respondent nos.1A and 1C were concerned, the refusal was on account of the incorrect names.

12. The Apex Court in the decision of *M/s.Neerja Realtors Pvt. Ltd.* (supra), on consideration of Order V Rule 17 of the CPC and the Civil Manual has held that in facts of that case as the report of the Bailiff does not indicate that the summons was affixed on the conspicuous part of the house at the address mentioned in the summons, there was breach of the provisions of Order V Rule 17 of the CPC.

13. The provisions of Order V Rule 17 of CPC, prescribes the procedure to be followed when the defendant refuses to accept

service or cannot be found and requires the Serving Officer to affix the copy of summons on the outer door or some other conspicuous part of the house and to return the original to the Court from which it was issued with the report stating that he has affixed the copy of summons. In the present case, as indicated from the noting on the cause-list the notice was returned by the Bailiff with the remark that the review- petitioners have refused to accept the service. In that event, it was incumbent upon the Bailiff to comply with the provisions of Order V Rule 17 and to affix the summons on the outer door or some other conspicuous part of the house which has admittedly been not done. That apart, it is clear that the notices were issued in the incorrect names of the Respondent No.1A and 1C.

14. At the time of hearing of the Writ petition on 21st July, 2023, the submission of the learned counsel for the Respondents herein was that the notice of hearing was served by private service upon the Review Petitioners, however, they have refused to accept the service and as such, this Court has proceeded with the hearing considering the service as good service.

15. Perusal of the copy of the affidavit of service which is tendered across the bar would indicate that the notice of hearing of 21st July, 2023 was sent through private courier service and the remarks of the

courier company is that the Review-petitioners have not accepted service. However the covering letter indicates that the notice was not an intimation for final disposal.

16. The provisions of Order XLVII Rule 1 of the CPC, reads thus:

“1. Application for review of judgment.— (1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applied for the review.

Explanation.—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment.”

17. In exercise of powers under Order XLVII, the party aggrieved may apply for review either upon discovery of new and important matter which could not be produced earlier in spite of due diligence or on account of some mistake or error apparent on the face of record or for any other sufficient reasons. In the present case, firstly, the notice which was issued in the year 2019 was on the incorrect names of the Respondent No.1A and 1C, secondly, the Serving Officer had failed to comply with the provisions of Order V Rule 17 of the CPC by not affixing the summons upon refusal to accept by the other respondents and thirdly, no notice for final disposal was issued and in fact the private notice issued by the Respondents herein was again refused. As such, in my opinion, there is sufficient cause for recall of the order dated 21st July, 2023 passed in Writ Petition No.1449 of 2018.

18. It is not necessary for this Court to go into the merits of the matter as by virtue of a review an incorrect decision cannot be corrected and the remedy lies elsewhere. However, the order of 21st

July, 2023 is required to be recalled as the notice of the present proceedings was not properly effected upon the review Petitioners and the service could not be said to be proper service.

19. As far as **Priyanka Kumari** (supra) is concerned, the decision of Apex Court noted therein was considering the issue as to whether return of notice as unclaimed amounts to proper service of notice. In that case, the Court was not concerned with the issue of the procedure which is prescribed for service under Order V Rule 17 of the CPC by the Serving Officer. The decision is therefore inapplicable to the facts of the present case.

20. As regards the decision of this Court in the case of **Ramdulari** (supra), upon a plain reading of the Order XLVII Rule 1 of the CPC, it is clear that the order can be reviewed under the said provision even for sufficient reason. In the present case, as discussed above, as there is no proper service upon the Respondents, this Court is inclined to exercise the review jurisdiction and recall the order dated 21st July, 2023.

21. For the reasons stated above, the order dated 21st July, 2023 is hereby recalled. Writ Petition No.1449 of 2018 is restored to file.

[Sharmila U. Deshmukh, J.]