

Arun Sankpal

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

CIVIL REVISION APPLICATION NO. 225 OF 2019

Ahmad Ali Hodekar,
Aged 55 years, Occu. Trade,
Residing at 347B, New Phansop,
Tal. Dist. Ratnagiri.
At present residing at Alsaja,
Post Box No. 2348, Sharja, U.A.E.

...Applicant

Versus

1. Ruksanabegam Ahmad Hodekar
Residing at Plot No. 29, Survey No. 72
Samarth Nagar, Shivaji Park,
Road No.3, Aundh,
New Sangvi, Pune 411 027.
(Since deceased through legal heirs).

1a. Habib Abdulla Solkar
Aged 52 yrs, Occu. Service
Residing at Survey No. 72,
Shivaji Park, Lane No.3,
Samarth Nagar, Sai Chowk
Plot No. 29, al Munib Manjil
New Sangvi, Pune,
Aundh Camp 411 027.

1b. Jubeda Banu Najir Solkar
Aged 58 yrs, Occu. Household
Residing at A.P. Karla,
Tal & Dist. Ratnagiri.

1c. Rahimatbi Sallauddin Majgaonkar
Aged 50 yrs, Occu Service
Residing at 37/8, Shree G. Chambers
Kalikat Street, Fort,
Mumbai 400 001.

...Respondents

Mr. Bhushan Walimbe, a/w Mayank Tripathi and Vaishnavi
Nagargoje, for the Applicant.
Mr. Shashank Mangle, for the Respondent Nos.1(a) to 1(c).

CORAM: N. J. JAMADAR, J.
RESERVED ON : 27th FEBRUARY 2025
PRONOUNCED ON: 18th MARCH 2025

JUDGMENT:-

1. This revision is directed against a judgment and order dated 20th December, 2018 passed by the learned Principal District Judge, Ratnagiri, in Misc. Civil Appeal No.15 of 2016, whereby the appeal preferred by the respondents came to be allowed by setting aside an order dated 21st July, 2015 passed by the learned Civil Judge, Senior Division, Ratnagiri, in Misc. Civil Application No.80 of 2011 declining to condone the delay in filing an application to set aside the *ex parte* decree passed in RCS/130/2009 and thereby allowed the application to set aside the *ex parte* decree itself, and, consequently, the *ex parte* decree in RCS/130/2009 was set aside and RCS No. 130 of 2009 came to be restored to file.

2. The background facts leading to this application can be stated in brief as under:

(a) The applicant had instituted RCS/130/2009 against Ruksanabegam, the sister and predecessor-in-title of the respondents, seeking a declaration that the properties, which were purchased in the name of the said Ruksanabegam, his quondam wife, were owned by him. The entire consideration to acquire those

properties was paid by the applicant and he was in exclusive possession of the said properties.

(b) Despite service of the summons, Ruksanabegam, the defendant, did not appear. The suit proceeded *ex parte*. By a judgment and order dated 17th June, 2010, the learned Civil Judge partly decreed the suit *inter alia* declaring that the applicant – plaintiff was the owner of the suit properties described in paragraphs ‘1A’ and ‘1B’ of the plaint and restrained the defendant from causing obstruction to the possession and enjoyment of the plaintiff over the suit properties 1A and 1B. No relief was granted qua the suit property 1C.

(c) The defendant preferred an application to set aside the *ex parte* decree under the provisions of Order IX Rule 13 of the Code of Civil Procedure, 1908 (“the Code”). It was submitted that the defendant came to know about the judgment and decree in RCS No.130/2009 on 9th August, 2011 and, thus, the application was within the period of limitation. However, an objection was raised by the Registry that there was delay in preferring the application to set aside the decree. Thereupon, the defendant preferred an application on 22nd September, 2011 seeking condonation of delay in filing the application to set aside the decree.

(d) The said application was resisted by the plaintiff.

(e) The learned Civil Judge recorded the evidence of the parties. By a judgment and order dated 21st July, 2015, the learned Civil Judge was persuaded to reject the application observing that the material on record indicated that the defendant had raised objection to the mutation of the name of the plaintiff to the record of rights of suit properties 1A and 1B. When the notice was served on her, she had appeared before the revenue authority on 17th February, 2011. The proceedings before the revenue authority indicated that the copies of the judgment and decree were received by her on 28th February, 2011. Thus, there was no sufficient cause for not preferring the application within the stipulated period from 28th February, 2011 even if it was assumed that the defendant had not known about the passing of the judgment and decree in RCS No.130/2009 on 17th June 2010. Thus, the application came to be rejected holding that no sufficient cause was ascribed.

(f) Aggrieved, the defendant preferred an appeal before the District Court.

(g) By the impugned order, the learned Principal District Judge allowed the appeal observing, *inter alia*, that there was no delay as such in filing the application for setting aside the *ex parte* decree; thus, the question of satisfactorily accounting for delay did not arise and, in the facts of the case, a sufficient cause to set aside the decree

in RCS No.130/2009 was made out. Resultantly, the decree was set aside and the suit came to be restored to the file of the learned Civil Judge.

3. Being aggrieved, the plaintiff has invoked the revisional jurisdiction of this Court.

4. I have heard Mr. Walimbe, the learned Counsel for the applicant, and Mr. Mangle, the learned Counsel for the respondent, at some length.

5. At the outset, Mr. Walimbe would urge that the appeal before the District Court against an order of rejection of application for condonation of delay was itself not maintainable under Order XLIII of the Code. That objection was raised before the District Court. However it was negated. But, Mr. Walimbe fairly submitted that, in view of the decision of the Supreme Court in the case of *Koushik Mutually Aided Co-operative Housing Society vs. Ameena Begum and another*¹, the said objection cannot be urged. In the said case, the Supreme Court has observed that against the order passed under Order IX Rule 13 of the Code rejecting an application for seeking setting aside the decree passed *ex parte*, an appeal is provided. When an application is filed seeking condonation of delay in filing an application to set aside an *ex parte* decree and the same is dismissed

¹ 2023 SCC Online SC 1662.

and, consequently, the petition is also dismissed, the appeal under Order XLIII Rule 1(d) of the Code is maintainable. Thus, an appeal only against the refusal to set aside the *ex parte* decree is maintainable whereas if an order allowing such an application is passed, the same is not appealable.

6. In view of the aforesaid enunciation of law the objection that an appeal under Order XLIII of the Code was not maintainable before the District Court need not detain the Court any further.

7. On the merits of the matter, Mr. Walimbe strenuously submitted that the learned Principal District Judge approached the controversy from a wholly incorrect perspective. The learned Principal District Judge went on to observe that there was no delay at all in preferring the application for setting aside the *ex parte* decree by proceeding on an incorrect premise that the time to file an application to set aside the *ex parte* decree would begin to run from the date of receipt of the certified copies of the judgment and decree in such suit. Though, the learned Principal District Judge quoted the provisions contained in Article 123 of the Limitation Act, yet, the said provision was completely misconstrued and it was held that the limitation begins to run from the date of the receipt of the certified copies. Such an incorrect impression of law, according to Mr. Walimbe, vitiated the entire consideration.

8. Had the learned Principal District Judge recorded that there was some cause for the delay and condoned the same construing it to be a sufficient cause, different considerations would have come into play. The learned Principal District Judge surprisingly held that there was no delay at all, urged Mr. Walimbe.

9. It was further submitted that since the appeal was against rejection of application for condonation of delay, at any rate, the learned Principal District Judge could not have allowed the application to set aside the *ex parte* decree. Whether the decree was required to be set aside for the non-service of summons or any other sufficient cause was not at all considered by the Trial Court. Yet the Principal District Judge granted the said relief in an appeal against an order declining to condone the delay in seeking setting aside of the *ex parte* decree. Therefore, the impugned order warrants interference.

10. Mr. Mangle, the learned Counsel for respondent Nos.1(a) to 1(c), supported the impugned order. It was submitted that the learned Principal District Judge was justified in observing that there was no delay as the defendant had, in fact, filed an application within a period of 30 days from the date of knowledge of the decree. It was on account of the objection raised by the Registry of the Civil Court that the application was beyond the period of limitation, by

way of abundant caution, the defendant had filed application for condonation of delay. In any event, the suit summons was sent on the purported address of the defendant at Mumbai. Whereas the defendant was residing at Pune and the notice of the proposed change in the mutation entry in the revenue record was served on the defendant at her address at Pune. Thereupon the defendant promptly approached the revenue authorities. Thus, even if it was assumed that there was some delay, in the peculiar facts of the case, the application for condonation of delay could not have been rejected by the Trial Court. The learned Principal District Judge thus cannot be said to have committed any error in allowing the appeal, submitted Mr. Mangle.

11. To being with, it is necessary to keep in view the nature of the underlying dispute between the applicant and Ruksanabegam, the deceased defendant. The applicant had three wives. Ruksanabegam was the second. The applicant claimed that while the applicant and defendant were cohabiting together, the applicant had acquired the suit properties in the name of the defendant, nominally. The entire consideration was parted with by the applicant. It was never agreed between the applicant and defendant that suit properties were to be acquired for the defendant. The possession of the suit properties continued to remain with the plaintiff. As the defendant started to

take undue advantage of the suit properties standing in her name, the applicant was constrained to initiate action for declaration and perpetual injunction.

12. Incontrovertibly, the suit proceeded *ex parte*. The cause title of the plaint indicates that the defendant was then shown to be residing at “Shreeji Chamber, 37/8, first floor, Calikat Street (Pot Market), Near General Post Officer, V.T. Mumbai”. Indisputably, the suit summons could not be served on the defendant through the Bailiff. After few attempts at service of summons on the defendant on the same address, it seems that the plaintiff filed an application for service of summons through RPAD and an affidavit of service was filed to the effect that the postal envelope containing the summons was returned with the remarks “unclaimed, returned to sender”. Thereupon, the Trial Court declared that the summons was duly served and, thus, the suit proceeded *ex parte*. Eventually, a decree came to be passed on 17th June 2010.

13. It appears that there is not much controversy as to the proceedings before the Trial Court up to the date of passing of the decree, save and except the correctness of the address of the defendant, on which the summons was allegedly served.

14. After the passing of the decree, the defendant initially approached the Trial Court seeking setting aside of the decree by

filing an application under Order IX Rule 13 on 8th September 2011 asserting that she had applied for certified copy of the judgment and decree in RCS No. 130 of 2009 on 6th August 2011 and certified copies were supplied to her on 9th August 2011 and thus the application was within the statutory period of limitation. The Registry of the Civil Court raised an objection, and, thereupon the defendant filed an application seeking condonation of delay in filing application for setting aside *ex parte* decree being CMA No. 80 of 2011.

15. The Trial Court was of the view that defendant had appeared before the Revenue Authorities on 17th February 2011 pursuant to a notice issued to her in connection with the application filed by the applicant to mutate his name to record of rights of suit properties 1A and 1B on the strength of said decree. Copies of the documents were furnished to the defendant by the Revenue Authorities on 28th February 2011. Thus the defendant had knowledge about the passing of the decree in RCS No. 130 of 2009 at least on 28th February 2011. Yet, the defendant, preferred the Application on 22nd September 2011 and no cause was ascribed for condonation of delay.

16. The learned District Judge, on the other hand, returned a finding that there was no delay as such. The proceedings before the Revenue Authority do not indicate that the defendant was supplied

copies of the Judgment and Decree passed in RCS No. 130 of 2009. The defendant can be said to have learnt about the *ex parte* decree on 9th August 2011, the day the certified copies were furnished to her. Thus, filing of the MCA No. 80 of 2011 on 8th September 2011 was within the stipulated period of limitation.

17. As noted above the thrust of challenge to the impugned order passed by the learned District Judge was on the premise that the learned District Judge equated the knowledge of passing of the *ex parte* decree with the actual receipt of the certified copies of the Judgment and Decree in RCS No. 30 2009.

18. Before advertng to deal with this submission, it may be necessary to consider the material, which was arrayed against the defendant, to contend that the defendant had knowledge of the decree in the month of February 2011 itself.

19. The learned District Judge has carefully evaluated the said material. It was *inter alia* noted that the notice of the Revenue proceeding was addressed to the defendant at “Plot No. 21, Survey No. 72, Shivaji Park, Lane No.3, Samarthnagar, Sai Chauk, Plot No. 29, Al Munib Manjil, New Sangvi, Aundh Camp, Pune”. The acknowledgment (Exhibit “28”) also contained aforesaid address. Another acknowledgment (Exhibit “29”) also contained the same address at Pune. The learned District Judge was of the view that the

service of notice of Revenue proceeding on the defendant on the aforesaid address at Pune could have been possible only upon the said address being made available by the applicant to the Revenue Authority. In contrast, the suit summons was shown to have been served on the defendant on the address at Mumbai, which was stated to be the residential address of her sister. This discrepancy, in the view of the learned District Judge, was fatal to the applicant's case of due service of the summons on the defendant.

20. The aforesaid approach of the learned District Judge appears justifiable. It was the consistent case of the defendant that she was working and residing at Pune, to the knowledge of the applicant. She was not residing at the Mumbai address on which the summons was allegedly served. In this backdrop, the issue of notice of proceeding before the Revenue Authorities, under few months of the passing of the decree, at the address of the defendant at Pune leads to an inexorable inference that the applicant had known that the defendant was residing at Pune and, yet, in the suit it was stated that she was residing at Mumbai and multiple efforts were made to serve the summons on the defendant at said address at Mumbai. This factor, in my view, is of critical salience. The learned District Judge, therefore, does not seem to have committed any error in drawing the

inference about the due service of the summons on the defendant at Mumbai address.

21. The fact that the defendant had appeared before the Revenue Authority on 17th February 2011 and there also appears an acknowledgment of receipt of the documents on 28th February 2011, was pressed into service on behalf of the applicant to draw home the point that in the month of February 2011 itself the defendant had knowledge about the decree.

22. The learned District Judge downplayed the aforesaid factor by observing that the endorsement dated 28th February 2011 does not make it clear as to which documents were received by the defendant, especially whether the copies of the Judgment and Decree were delivered to the defendant on 28th February 2011. During the course of evidence of the defendant also, it seems, it could not elicited that on 28th February 2011, the defendant had received the copies of the Judgment and Decree.

23. In this proceeding this Court may not delve into thickets of facts. At best, it can be urged that the defendant had knowledge that the applicant had applied for deletion of her name from the record of rights of the suit properties and mutation of his name instead of defendant. It could also be urged that the defendant ought to have made further enquiries and instantaneously obtained the copies of

the Judgment and Decree in RCS No. 130 of 2009 and filed an Application for setting aside the decree. However, the substance of the matter, especially in the backdrop of the nature of underlying dispute, cannot be lost sight of.

24. Mr. Walimbe was justified in canvassing a submission that the knowledge of the decree cannot be equated with the receipt of the copies of Judgment and Order. It appears the applicant's case regarding due service of summons on the defendant, in the face of the service of notice of the revenue proceeding on the defendant at her Pune address, had significantly weighed with the learned District Judge in reckoning the date of receipt of the certified copies of the Judgment and Order as the date of knowledge and returning a finding that there was no delay. However, the aforesaid finding does not vitiate the entire order of the learned District Judge.

25. As noted above, the Court cannot lose sight of the fact that there is a serious cloud of doubt over the service of the Suit summons on the defendant at Mumbai. The service of summons on the defendant enters into an arena of uncertainty on account of the service of the notice of revenue proceeding on the defendant at her Pune address under few months of the passing of the decree. To add to this, the underlying nature of the dispute indicates that rights of the parties to valuable properties are the subject matter of lis. The

applicant asserts that though the properties stood in the name of the defendant, he was the real owner and the defendant was a nominal holder of those properties. In this view of the matter, the aspect of delay in seeking setting aside the decree ought to have been considered by the Trial Court.

26. It is trite that an Application for condonation of delay should receive liberal consideration. The Courts ordinarily lean in favour of condonation of delay so as to advance the cause of substantive justice. Thus, the term 'sufficient cause' receives liberal consideration.

27. Moreover, the distinction in the case where the Court below has exercised the discretion to condone the delay and where Application for condonation of delay has been rejected, is also required to be kept in view. Where the Court below condones the delay, it is an instance of exercise of positive discretion. Ordinarily, the Superior or Revisional Court ought not interfere with the exercise of such discretion, unless the discretion has been exercised sans material or borders on perversity.

28. A useful reference in this context can be made to the judgment of the Supreme Court in the case of **N. Balakrishnan V/s. M. Krishnamurthy**² wherein the law was enunciated as under :

2 (1998) 7 SCC 123

“9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases delay of very long range can be condoned as the explanation thereof is satisfactory. Once the court accepts the explanation as sufficient it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in reversional jurisdiction, unless the exercise of discretion was on whole untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. Time limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy

the right of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. the object of providing a legal remedy is to repair the damage caused by reason of legal injury. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. Time is precious and the wasted time would never revisit. During efflux of time newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. Law of limitation is thus founded on public policy. It is enshrined in the maxim Interest *reipublicae up sit finis litium* (it is for the general welfare that a period be putt to litigation). Rules of limitation are not meant to destroy the right of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly. The idea is that every legal remedy must be kept alive for a legislatively fixed period of time.

12. A court knows that refusal to condone delay would result foreclosing a suitor from putting forth his cause. There is no presumption that delay in approaching the court is always deliberate. This Court has held that the words "sufficient cause" under Section 5 of the Limitation Act should receive a liberal construction so as to advance substantial justice vide *Shakuntala Devi Jain V/s.*

Kuntal Kumari³ and State of W.B. V/s.
Administrator, Howrah Municipality⁴.

13. It must be remembered that in every case of delay there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy the court must show utmost consideration to the suitor. But when there is reasonable ground to think that the delay was occasioned by the party deliberately to gain time then the court should lean against acceptance of the explanation. While condoning delay the Court should not forget the opposite party altogether. It must be borne in mind that he is a loser and he too would have incurred a large litigation expenses. It would be a salutary guideline that when courts condone the delay due to laches on the part of the applicant the court shall compensate the opposite party for his loss.”

29. Mr. Walimbe, the learned Counsel for the Applicant, submitted that no cause was ascribed for the delay and, therefore, the Trial Court was justified in rejecting the Application for condonation of delay. This submission is required to be appreciated in the light of the fact that it was the consistent case of the defendant that the suit summons was not duly served on the defendant and the applicant-

3 AIR 1969 SC 575

4 (1972) 1 SC 366

plaintiff had falsely claimed that the defendant was residing at Mumbai though the applicant had known that she was residing at Pune. Thus the tenor of the application was that on account of such sharp practice on the part of the applicant, the defendant had no knowledge of the Judgment and Decree and learnt about the same only after obtaining copies thereof. If this stand of the defendant finds some credence, as is evident from the material on record, the submission on behalf of the applicant that no cause was ascribed by the defendant pales in significance.

30. Thus, to the extent of condonation of delay in filing of the application to set aside the *ex parte* decree, this Court does not find any reason to interfere with the impugned order. On an independent analysis, this Court finds that the Trial Court was not justified in rejecting the application for condonation of delay. The Trial Court could have better exercised the discretion in favour of condonation of delay.

31. However, the learned District Judge proceeded to set aside the *ex parte* decree and restore the suit to file. This part of the impugned order cannot be sustained. The reason is not far to seek.

32. First and foremost, what was determined by Trial Court was the application for condonation of delay in filing application to set aside the *ex parte* decree, only. As the Trial Court declined to

condone the delay the next stage of consideration as to whether the defendant could show a sufficient cause for setting aside the decree did not arise, before the Trial Court. In that view of the matter, the learned District Judge could not have embarked upon an enquiry as to whether the *ex parte* decree was required to be set aside.

33. Mr. Walimbe, learned Counsel for the Petitioner placed reliance on a Judgment of the Supreme Court in the case of **C. Prabhakar Rao & Anr Vs Sama Mahipal Reddy & Anr**,⁵ wherein, in a revision against an order refusing to condone the delay, the High Court while condoning the delay in filing an application for setting aside *ex parte* decree had proceeded to set aside the *ex parte* decree and restored the suit for further hearing, the Supreme Court held that the High Court could not have proceeded to automatically restore the Suit after setting aside the order of refusal of application for condonation of delay. The Supreme Court observed that the circumstances, justification, consideration and legal remedies for “condoning the delay” on the one hand and “setting aside the *ex parte* decree” on the other are different and must dealt with independently. The aforesaid pronouncement is on all four with the facts of the case at hand.

5 2025 SCC OnLine SC 495.

34. I am, therefore, persuaded to partly allow the Revision Application.

35. Hence the following order:

: O R D E R :

(i) Application stands partly allowed.

(ii) Impugned order to the extent that it set aside the *ex parte* decree in RCS No. 130 of 2009 and restores the said Suit to file stands quashed and set aside.

(iii) The application for condonation delay, i.e., MCA No. 80 of 2011 stands allowed.

(iv) The delay in filing the application for setting aside the *ex parte* decree stands condoned.

(v) The application for setting aside the *ex parte* decree in RCS No. 130 of 2009 stands restored to the file of the Trial Court.

(vi) The Trial Court shall hear and decide the application for setting aside the *ex parte* decree on its own merits and in accordance with law

without being influenced by the observations in the impugned order and the observations made hereinabove, as expeditiously as possible.

(vii) No costs.

[N. J. JAMADAR, J.]