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**(2009) 04 BOM CK 0045**

**In the Bombay High Court**

**Case No :** Civil Revision Application No. 476 of 2003

Tulsidas Ambadas Chavan

APPELLANT

Vs

Uddhav Tukaram Gosavi and Others

RESPONDENT

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**Date of Decision :** 23-04-2009

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 22 Rule 4, Order 9 Rule 13  
Limitation Act, 1963 — Article 123

**Citation :** (2009) 4 BomCR 741 : (2009) 111 BOMLR 2195 : (2009) 4 MhLj 459

**Hon'ble Judges :** R.M. Savant, J

**Bench :** Single Bench

**Advocate :** G.S. Godbole, for the Appellant; S.A. Mudbidri, for the Respondent

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## **Judgement**

R.M. Savant, J.—Rule, with consent of the learned Counsel for the parties, made returnable forthwith and heard finally.

2. By the above Civil Revision Application, the Applicant takes exception to the Judgment and Order dated 1/3/2003 passed by the learned Additional District Judge, Solapur by which order the Civil Misc. Appeal No. 46 of 1998 filed by the Respondent No. 1 herein came to be allowed thereby setting aside the Judgment and Order passed in Civil Misc. Application No. 10 of 1995 and also setting aside the decree passed in Regular Civil Suit No. 194 of 1986 and restoring the said Regular Civil Suit No. 194 of 1986 to file.

3. Such of the facts which are necessary to be cited are stated thus:

The Applicant and the Respondent No. 9 herein had filed Regular Civil Suit No. 194 of 1986 in the Court of the learned Civil Judge, Junior Division, Barshi against the original Defendant No. 1 one Tukaram Narayan Gosavi and the Respondent No. 8 herein for possession of the land bearing Gat Nos. 26, 31, 27, 207, 221, 210, 33, 206 and 209 of village Dadsinge, Taluka Barshi, Dist. Solapur. On 24th July 1986 the Original Defendant No. 1 Tukaram Narayan Gosavi died and the Respondent Nos. 1 to 7 herein were brought on record as the heirs and

legal representatives of the said Tukaram. In the said suit, the Respondent No. 1 herein i.e. Uddhav, who is the son of deceased Tukaram, filed Vakalatnama on 19.6.1986 as Constituted Attorney of the said Original Defendant No. 1 Tukaram vide Exhibit 6. On the same day, an application Exhibit 8 was also filed by the Advocate for the Defendant seeking time to file written statement. A list of the document was filed which was numbered as Exhibit 10 in the said suit and the xerox copy of the Power of Attorney executed by the original Defendant Tukaram Narayan Gosavi in favour of his son Uddhav Tukaram Gosavi was also filed. As mentioned herein above, on 24.7.1986, the original Defendant No. 1 Tukaram Gosavi died leaving behind the following heirs:

1a] Uddhav Tukaram Gosavi;

1b] Anjanabai wd/o Tukaram Gosavi

1c] Bisu Tukaram Gosavi

1d] Jalindar Tukaram Gosavi

1e] Naganath Tukaram Gosavi

1f] Rukmini Adinath Gosavi

1g] Savitribai Shankar Gosavi

1h] Draupadi Bhaskar Gosavi, since deceased through heir Ratnamala daughter of Bhaskar Dattu Gosavi

4. It appears that on the death of the said Tukaram Gosavi i.e the original Defendant No. 1, the Plaintiffs filed an application Exhibit 15 in the said Regular Civil Suit No. 194 of 1986 for substitution of the heirs and legal representatives of the deceased Defendant No. 1 Tukaram. The said application was placed for hearing on 6.11.1986 when the advocate for the Defendant No. 1 made an endorsement on the said application that "he has no objection". Resultantly, the trial Court passed an order granting the said amendment which was to be carried out by 20.11.1986. It appears that on the same day, the advocate for the Defendant No. 1 filed an application Exhibit 22 seeking further time for filing written statement, the said application was also granted. In the said suit, the summons were issued to the heirs of the original Defendant No. 1 Tukaram. However, they remained absent and the said suit proceeded exparte against them. The said Regular Civil Suit No. 194 of 1986 was decreed on 29/8/1994 and the Respondent Nos. 1 to 7 herein were directed to hand over possession of the suit lands to the Applicant above named and the Respondent No. 8 herein, since the Respondent No. 8 had purchased half share in the suit property from the Respondent No. 9.

5. The Applicant and the Respondent No. 8 thereafter filed execution proceedings being Regular Darkhast Nos. 18 of 1995 and 19 of 1995. It appears that the Respondent Nos. 1 and 2 became aware of the exparte decree passed against them in the said Suit and, therefore, they filed Civil Misc. Application 10 of 1995

invoking the provisions of Order IX Rule 13 of the CPC for setting aside the said *ex parte* decree passed against them in the said Regular Civil Suit No. 194 of 1986 on the ground that the summons were not served upon them. The said Application filed by the Respondent Nos. 1 and 2 herein was opposed by the Applicant herein by filing a Reply which was numbered as Exhibit 17. The parties filed *purshis* that they did not want to lead any oral evidence in the said Civil Misc. Application No. 10 of 1995. The learned Civil Judge, Junior Division, Barshi dismissed the said Civil Misc. Application No. 10 of 1995 *inter alia* holding that the Respondent No. 1 Uddhav had conducted the said Regular Civil Suit No. 194 of 1986 as a Power of Attorney holder of the original Defendant No. 1 Tukaram and since the bailiff report showed that all the heirs of the original Defendant No. 1 were served, the Respondent Nos. 1 and 2 could not claim that they were not aware regarding the suit and the *ex parte* decreed passed therein. The learned Civil Judge Junior Division Barshi, therefore, dismissed the said Application on the point of limitation as also on the ground that the summons were duly served on the Respondents.

6. It appears that prior to the decision in the said Civil Misc. Application No. 10 of 1995, the Respondent Nos. 1 to 3 herein have filed Regular Civil Suit No. 273 of 1996 in the Court of the learned Civil Judge, Junior Division, Barshi for declaration that the Judgment and Decree in the said Regular Civil Suit No. 194 of 1986 is not binding on them. It appears that the said Regular Civil Suit No. 273 of 1996 was pending at the time of deciding the said Civil Misc. Application No. 10 of 1995.

7. It would be pertinent to note that in so far as Respondent No. 5 - Jalindar Tukaram Gosavi herein is concerned, he was not served in the said Civil Misc. Application No. 10 of 1995 and, therefore, the said Civil Misc. Application No. 10 of 1995 was dismissed for non prosecution as against Respondent No. 5 Jalindar. Hence the said decree, in so far as the said Jalindar is concerned, stands confirmed.

8. Aggrieved by the dismissal of the said Civil Misc. Application No. 10 of 1995, though the said Civil Application was filed by the Respondent Nos. 1 and 2, it is only the Respondent No. 1 who filed Civil Misc. Appeal No. 46 of 1998 in the District Court at Solapur. The said Appeal was filed *inter alia* on various grounds mentioned in the memo of the said Appeal. The principal ground urged in the said Appeal was as regards non service of summons/miservice of summons and wrong and fraudulent service of summons in the said Suit on the basis of which, according to the Appellant therein, the Plaintiffs obtained a decree. One of the grounds urged in the said Appeal was also as regards limitation as it was the case of the Appellant in the said Appeal that he became aware of the decree passed in the said Regular Civil Suit No. 194 of 1986 only after the Darkhast proceedings were filed. The said Civil Misc. Appeal was heard by the Addl. District Judge, Solapur and by the impugned Judgment and Order dated 1st March 2003, allowed the said Appeal. The learned Additional District Judge has *inter alia*

recorded a finding that the Respondent Nos. 1(a) to 1(h) were not served as admittedly, Uddhav who was shown as Defendant No. 1b was shown as dead.

9. In so far as point of limitation is concerned, the Learned Addl. District Judge held that the Application filed under Order IX Rule 13 of the CPC was well within limitation as the Applicant became aware of the decree only after coming to know of the filing of the said execution proceedings.

10. The Lower Appellate Court held that in the teeth of the dispute that was going on between the parties, which was hotly contested even before the Revenue Authorities, it is impossible to accept that the Defendant No. 1 would not have appeared in the said suit which was filed for possession by the Plaintiffs in spite of the service of summons. The Lower Appellate Court, therefore, did not accept the case of the Plaintiffs that the Defendant No. 1 had purposely remained absent in spite of service of summons.

11. I have heard Shri G S Godbole, the learned Counsel for the Applicant and Ms. Mudbidri, the learned Counsel for the Respondent No. 1.

12. On behalf of the Applicant, it was the contention of the learned Counsel Shri Godbole that on account of Exhibits 6, 8 and 10 Uddhav, who is the son of original Defendant No. 1 was aware of the said Regular Civil Suit No. 194 of 1986 and in fact was defending the said suit on behalf of his father i.e the original Defendant No. 1 Tukaram Gosavi. He, therefore, submitted that it cannot be accepted that the said Uddhav became aware of the said suit and the decree passed therein only after the execution proceedings were filed, as is the case sought to be made out by him in the Application filed under Order IX Rule 13 of the Code of Civil Procedure.

13. In so far as other Defendants are concerned, the learned Counsel for the Applicant, relying upon a compilation of the copies of the summons, submitted that the summons issued to the Defendant Nos. 1(a) to 1(f) numbered as Exhibit 28 submitted that the Defendant Nos. 1(a) to 1(h) who were substituted in the place of the original Defendant No. 1 were duly served with the summons vide Exhibits 25, 28 and 29. It was further submitted by the learned Counsel for the Applicant Shri Godbole that the Defendant No. 1(h), who was minor, was served through his guardian Bhaskar Dattu Gosavi vide Exhibit 25 which was duly served upon the said guardian on 6/12/1986. In so far as Defendant 1(g) Savitribai Shankar Gosavi is concerned, the summons was duly served on her personally on 28/9/1987. The learned Counsel Shri Godbole drew my attention to the copies of the summons which had been compiled in the said compilation. He also drew my attention to the said compilation to buttress his submission that all the Defendants i.e. Defendant Nos. 1(a) to 1(h) were in fact served. He further submitted that the finding therefore recorded by the lower Appellate Court that the Defendant No. 1(a) to 1(h) were not served with the summons was a finding which was not borne out by the record and, therefore, perverse. The learned Counsel for the Applicant submitted that merely because on account of a sheer

clerical error whereby the son of the Defendant No. 1 i.e. Uddhav is shown as Defendant No. 1(b) and wrongly mentioned as dead, would not entitle the Defendants to apply for setting aside the decree as the Defendant No. 1(a) who in fact has been shown as Defendant No. 1(b) was in fact served with the suit summons. He further submitted that it is well settled that mere irregularities in the service of summons would not entitle a party to apply for setting aside a decree passed and relied upon the Judgment of a learned single Judge of this Court reported in Mr. Gaspar G. Furtado Vs. Mrs. Filomena Cota and others, in the matter of Gaspar G Furtado v. Filomena wd/o Antonio Mariano Cota. He also submitted that on account of the peculiar nature of the decree which was joint and indivisible and in view of the fact that the Civil Misc. Application No. 10 of 1995 was dismissed for nonprosecution against the Defendant No. 5 i.e. Jalindar Tukaram Gosavi would result in the entire decree being confirmed as otherwise allowing the said Civil Misc. Application No. 10 of 1995 against the opponents would result in contradictory, conflicting and inconsistent orders. In support of his said submission, the learned Counsel for the Applicant Shri Godbole relied upon the judgment of the Apex Court reported in The State of Punjab Vs. Nathu Ram, . Paragraphs 4 to 8 of the said judgment are material and are reproduced herein under :"

Para 4 :It is not disputed that in view of Order 22, Rule 4, Civil Procedure Code, hereinafter called the Code, the appeal abated against Labhu Ram deceased, when no application for bringing on record his legal representatives had been made within the time limited by law. The Code does not provide for the abatement of the appeal against the other respondents. Courts have held that in certain circumstances, the appeals against the correspondents would also abate as a result of the abatement of the appeal against the deceased respondent. They have not been always agreed with respect to the result of the particular circumstances of a case and there has been, consequently, divergence of opinion in the application of the principle. It will serve no useful purpose to consider the cases. Suffice it to say that when Order 22, R.4 does not provide for the abatement of the appeals against the correspondents of the deceased respondent there can be no question of abatement of the appeals against them. To say that the appeals against them abated in certain circumstances, is not a correct statement. Of course, the appeals against them cannot proceed in certain circumstances and have therefore to be dismissed. Such a result depends on the nature of the relief sought in the appeal.

Para 5 :The same conclusion is to be drawn from the provisions of Order 1 Rule 9 of the Code which provides that no suit shall be defeated by reason of the misjoinder or nonjoinder of parties and the Court my, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It follows, therefore, that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with

such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it.

Para 6 :the question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse form. Courts will not proceed with in appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, the ineffective that is to say, it could not be success fully executed.

Para 7 :There has been no divergence between the Courts about the Court's proceeding with the appeal between the respondents other than the deceased respondent, when the decree in appeal was not a joint decree in favour of all the respondents. The abatement of the appeal against the deceased respondent in such a case, would make the decree in his favour alone final, and this can, in no circumstances, have a repercussion on the decision of the controversy between the appellant and the other decree holders or on the execution of the ultimate decree between them.

Para 8 :The difficulty arises always when there is a joint decree. Here again, the consensus of opinion is that if the decree is joint and indivisible, the appeal, against the other respondents also will not be proceeded with and will have to be dismissed as a result of the abatement of the appeal against the deceased respondent. Different views exist in the case of joint decrees in favour of respondents whose rights in the subject matter of the decree are specified. One view is that in such cases, the abatement of the appeal against the deceased respondent will have the result of making the decree affecting his specific interest to be final and that the decree against the other respondents can be suitably dealt with by the appellate Court. We do not consider this view correct. The specification of shares or of interest of the deceased respondent does not affect the nature of the decree and the capacity of the joint decree holder to execute the entire decree or to resist the attempt of the other party to interfere with the joint right decreed in his favour. The abatement of an appeal means not only that the decree between the appellant and the deceased respondent has

become final, but also, as a necessary corollary, that the appellate Court cannot, in any way, modify that decree directly or indirectly. The reason is plain. It is that in the absence of the legal representatives of the deceased respondent, the appellate Court cannot determine anything between the appellant and the legal representatives which may affect the rights of the legal representatives under the decree. It is immaterial that the modification which the Court will do is one to which exception can or cannot be taken.

The learned Counsel for the Applicant further relied upon the judgment of the Division Bench of this Court reported in Smt. Sheela Choudhary and Others Vs. Central Bank of India and Others, wherein it has been held that where the decree is joint and indivisible, the deletion of one of the Defendants from the said suit would have the effect of the decree passed by the trial Court becoming final against all the Defendants. The learned Counsel Shri Godbole therefore submitted that the lower Appellate Court had erred in setting aside the order passed by the trial Court in the said Civil Misc. Application No. 10 of 1995 as also the decree passed in the said Regular Civil Suit No. 194 of 1986.

14. On behalf of the Respondent No. 1 it is contended by the learned Counsel Ms Mudbidri that the father of the Respondent No. 1 Tukaram Gosavi was the tenant of the suit lands since prior to 1st April 1957 and, therefore, was a protected tenant and, therefore, Regular Civil Suit No. 194 of 1986 filed by the Applicant above named was not maintainable. It was further contended that the suit summons was never served upon Tukaram Gosavi as on the date mentioned on the summons i.e 8/6/1986 the said Tukaram was ill and was residing with the non applicant to the said Application at village Ladola and, therefore, the Tukaram did not have any knowledge about the suit. It was further submitted by the learned Counsel for the Respondent No. 1 that though the suit summons was issued to the Applicant No. 1 Uddhav, the bailiff reported that the Applicant No. 1 Uddhav was dead and, therefore, the summons was not served on the Applicant No. 1 Uddhav. It was further submitted that the summons was also not served on the Applicant No. 2 Bisu and since there is a dispute between non applicant No. 4 and his brothers, the service of summons on the non applicant No. 4 on behalf of the non applicant No. 5 was wrong. It was further submitted by the learned Counsel for the Respondent No. 1 that since the summons was not duly served upon the Applicants, it is only after the Regular Darkhast Nos. 18/95 and 19/95 were filed for taking possession of the suit lands from the Applicants and non applicant Nos. 4 to 8 and it is only when the non applicant Nos. 1 and 3 came on the suit land on 28/2/1995 and told the Applicant No. 1 to vacate the suit lands, that the Applicants made enquiry and came to know about the exparte decree passed against them. It is further submitted by the learned Counsel for the Respondent No. 1 that, applicants filed an application on 1/3/1995 for getting copies of documents and they received the said copies on 3/3/1995 and thus, the date of knowledge of the decree, according to the learned Counsel for the Respondent No. 1 was 28/2/1995 and the application, therefore, was filed within time and, therefore in view of the non service of

summons on the applicants, the applicants had made out a case for setting aside the exparte decree.

15. The learned Counsel for the Respondent No. 1 submitted that if the said exparte decree is not set aside, the Applicants would suffer great prejudice as the suit filed by the original Plaintiffs itself was not maintainable in view of the fact that Tukaram Gosavi - the original Defendant No. 1 was a protected tenant and the proceedings in respect thereof were prosecuted before the revenue authorities.

16. I have given my anxious considerations to the submissions made by the learned Counsel for both parties. As mentioned earlier in this order, the learned Civil Judge, Junior Division Barshi, has rejected Civil Misc. Application No. 10 of 1995 on the ground that the record of Regular Civil Suit No. 194 of 1986 clearly shows that the suit summons are duly served and that as per the provisions of Article 123 of the Limitation Act, the limitation starts from the date of decree i.e 19/8/1994 and since the Applicants failed to file the Civil Misc. Application No. 10 of 1995 within 30 days from 29/8/1994, the said Application was not within limitation. The trial Court therefore has rejected the said Application on the ground of limitation as also on the ground that the suit summons were duly served. The Lower Appellate Court considering the provisions of Order IX Rule 13 of the CPC examined the issue from the point, whether the summons were duly served or not on the Applicants. The Lower Appellate Court, in view of the fact that the Defendant No. 1(a), who was shown as Defendant No. 1(b) and was wrongly shown as dead, reached a conclusion that in view of the said fact, there was no service of summons on the said Defendant No. 1(a) Uddhav. The Lower Appellate Court also held that there is no material to show that the Defendant Nos. 1G and 1H in the said suit were also served with the summons.

17. The learned Counsel for the Applicant has drawn my attention the bailiff's report Exhibits 25, 28 and 29 in support of his submission that all the heirs of the original Defendant No. 1 Tukaram were served, though there is considerable merit in the said submission of the learned Counsel, a glaring fact remains that the Defendant No. 1(a) Uddhav Tukaram Gosavi, who is the son of the original Defendant No. 1, was shown as Defendant No. 1(b) and was shown as dead. This fact by itself proves that, the Applicants in the said Civil Misc. Application No. 10 of 1995 were not duly served. Reliance of Shri Godbole, the learned Counsel for the Applicant in the instant Civil Revision Application, on Exhibits 6, 8 and 10, in my view is, misplaced in view of the fact that the said exhibits were filed when the original Defendant No. 1 Tukaram was alive. However, after the death of the original Defendant No. 1 and after the heirs and legal representatives of the original Defendant No. 1 were brought on record, the summons had to be served on the said heirs and legal representatives of the original Defendant No. 1. It is at this stage that the Defendant No. 1(a) Uddhav is shown as dead. This in my view is a crucial fact which goes to the root of the matter. In my view it is not a case of a mere irregularity in the service of summons but a party who is very

much alive is shown as dead, and therefore, the summons were not served on the said Uddhav and he therefore could not appear in the said suit resulting in the exparte decree being passed. In my view therefore the above Civil Revision Application is required to be partly allowed.

18 Another important aspect which needs consideration is the fact that the Civil Misc. Application No. 10 of 1995 was dismissed because of the non service on non applicant No. 5 Jalindar Gosavi. The decree being joint and indivisible, the Lower Appellate Court erred in not remanding the matter below to the trial Court. The consequence is that the decree is confirmed in so far as non Applicant No. 5 Jalindar Gosavi is concerned. This would result in conflicting and contradictory orders, if ultimately the decree is set aside against the other Defendants. In my view, therefore, the Lower Appellate Court ought to have remanded the matter back to the learned Civil Judge, Junior Division Barshi so as to allow, the Defendant No. 1 in the instant Civil Revision Application to remove the defects in so far as service on the said non applicant No. 5 Jalindar Gosavi is concerned and, thereafter to consider the said Civil Misc. Application No. 10 of 1995. Resultantly, the instant Civil Revision Application would have to be partly allowed and the impugned order dated 1/3/2003 would have to be set aside to the extent mentioned herein after. Since this Court is of the view that the Lower Appellate Court ought to have remanded the matter back to the trial Court in the matter of hearing of the said Civil Misc. Application No. 10 of 1995, the order, of the Lower Appellate Court is set aside. The order passed by the trial Court in the said Civil Misc. Application No. 10 of 1995 dated 02/03/1998 is also set aside. The matter is remanded back to the trial Court for consideration afresh of the said Civil Misc. Application No. 10 of 1995 after giving an opportunity to the Applicants in the said Application to remove the defects in so far as service on the non applicant No. 5 Jalindar Tukaram Gosavi is concerned. On such remand the said Civil Misc. Application No. 10 of 1995 to be decided within a period of six months from date by giving an opportunity to the Applicants in the said Application to remove the defects as mentioned herein above within the time that will be stipulated by the trial Court. It is made clear that all the contentions of the respective parties are kept open. The said Civil Misc. Application No. 10 of 1995 to be decided on its own merits and in accordance with law uninfluenced by the earlier orders, as also the instant order passed in the above Civil Revision Application. Rule is accordingly made partly absolute with parties left to bear their respective costs. In view of the fact that the orders of the trial Court as well as the Appellate Court are set aside, the parties are directed to maintain statusquo in respect of the suit properties till the first date of hearing of the said Civil Misc. Application No. 10 of 1995 before the Civil Judge, Junior Division, Barshi and, thereafter the Applicants in the said Civil Misc. Application No. 10 of 1995 would be at liberty to apply for appropriate reliefs before the said Court.