

## Naziruddin Khan Vs Champalal

**Court:** Bombay High Court (Aurangabad Bench)

**Date of Decision:** July 9, 2014

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 41 Rule 31, Order 5 Rule 13, Order 5 Rule 14, Order 5 Rule 17, Order 5 Rule 20

**Citation:** (2014) 5 ABR 154

**Hon'ble Judges:** T.V. Nalawade, J

**Bench:** Single Bench

**Advocate:** P.F. Patni, Advocate for the Appellant; P.B. Shirsath, Advocate for the Respondent

**Final Decision:** Dismissed

### Judgement

1. Admit.

2. Notice after admission made returnable forthwith. By consent heard both the sides for final disposal.

3. The appeal is filed against the judgment and decree of Special Civil Suit No. 487 of 1998 which was pending in the Court of the Civil Judge,

Senior Division, Aurangabad. The trial Court has given decree of specific performance of contract in favour of respondent No. 1. It is ex parte

decree.

4. The suit was filed in respect of two agricultural lands bearing Gat Nos. 155 and 209 situated at village Teesgaon, Tahsil and District

Aurangabad. It is the case of plaintiff that defendants had agreed with him to sell the suit property in the month of December 1993 and the terms

and conditions of the agreement were reduced into writing and were signed by the defendant No. 1 for himself and as Power of Attorney for

defendant Nos. 2 to 4 and defendant No. 9. Defendant Nos. 1 to 3 are brothers inter se. Defendant No. 4 is the wife of deceased brother of

defendant Nos. 1 to 3 and defendant Nos. 5 to 8 are sons of defendant No. 4 born from deceased brother of defendant No. 1. Defendant Nos. 9

and 10 are sisters of defendant Nos. 1 to 3.

5. The predecessor of these defendants, Mumtazuddin Khan, father of defendant No. 1, was the owner of the suit property. After the death of the

owner, defendants became owner of the suit property. The defendants are Muslims.

6. It is the case of the plaintiff that the agreed consideration was Rs. 13,50,000/-. It is the case of the plaintiff that at the time of agreement he had

made payment of Rs. 1,00,000/- by cheque and cash and the remaining amount was to be paid on the date of execution of the sale deed. It is

contended that at the time of agreement, defendant No. 10 was not available so she had not signed on the agreement. It is contended that

subsequently she joined to the aforesaid transaction, she executed agreement in respect of her share on 6-7-1994 and the price of her share was

fixed as Rs. 1,35,000/- and this was in addition to the aforesaid consideration. It is contended that the amount of Rs. 25,000/- was paid to her

also as earnest money. It is contended that the defendants were expected to move the authorities like Income Tax office and also the CIDCO for

getting necessary permission and no objection as the property is situated within the development area of CIDCO.

7. It is contended that subsequently, in January 1995 defendant No. 10 approached the plaintiff and she took additional amount of Rs. 10,000/- as

she was in need of money. It is contended that she gave separate receipt in respect of that amount.

8. It is the case of the plaintiff that due to Government order, it became necessary to obtain no objection of CIDCO authority for alienation of the

property and so transaction could not be completed immediately. It is contended that as per the scheme prepared by CIDCO, 25% of the land is

required to be given to CIDCO when property is to be developed. It is contended that it was agreed that plaintiff was to get compensation in

respect of part of property acquired by Government.

9. It is the case of the plaintiff that on 4-3-1994 Madhav Sali and his sons filed application before the Additional Tahsildar, Aurangabad for

surrendering tenancy rights and for handing over possession of the aforesaid land. In that proceeding plaintiff was arrayed as respondent No. 1 as

he was the prospective purchaser. It is contended that surrender of tenancy rights of the tenant was accepted by the Tenancy Court and it was

agreed that possession was to be given to the plaintiff. It is contended that after the said proceeding, possession was given of the two properties to

the plaintiff and then additional amount was given by the plaintiff to the defendants like Rs. 4,15,000/-. It is contended that out of that amount, the

amount of Rs. 25,000/- was given in cash and Rs. 75,000/- was given by cheque No. 686520 dated 7-9-1995 drawn on State Bank of India to

defendant No. 2 and accordingly receipt was given by defendant No. 2 along with other defendants.

10. It is the case of the plaintiff that he had given the amount of Rs. 5.5 lakh as on 21-1-1995 and the amount of Rs. 8,00,000/- was to be paid by

the plaintiff. It is contended that on 7-9-1995 defendant No. 1 accepted Rs. 1 lakh on behalf of defendant Nos. 4 to 8 and the said amount was

kept in the names of the minors.

11. It is the case of the plaintiff that CIDCO then granted permission for alienation of the land and accordingly on 23-9-1996 information was

given by the authorities to the plaintiff and he was asked to surrender 25% of the land as per the scheme. It is contended that the plaintiff requested

the defendants to complete the formalities and plaintiff was ready and willing to perform his part of the contract. It is contended that it was

necessary for the defendants to surrender 25% of the land to the CIDCO and that step was necessary before the execution of the sale deed. It is

contended that plaintiff then took steps for determination of stamp duty and obtained order in respect of the stamp duty on 2-2-1998. It is

contended that in spite of taking such steps by the plaintiff, the defendants avoided to complete the formalities. It is contended that then plaintiff

gave notice to the defendants on 28-2-1998. It is contended that husband of defendant No. 10 then approached the plaintiff and expressed

willingness to perform the part of contract of defendant No. 10. It is contended that as other defendants are avoiding to perform their part of the

contract, he is required to file the suit. Relief of specific performance of the aforesaid contract was claimed by the plaintiff as against all the

defendants.

12. Defendant No. 10 filed written statement at Exhibit 16 and defendant No. 10 admitted the claim of the plaintiff. Defendant No. 10 admitted the

receipt of consideration of her share as contended by the plaintiff and she requested for giving direction to the plaintiff to give Rs. 85,000 as the

remaining consideration.

13. Defendant No. 1 filed written statement at Exhibit 84 and he disputed everything. He denied that, he voluntarily executed the agreement with

the plaintiff. He denied that he executed the agreement on behalf of other defendants as their power of attorney. He contended that said document

is forged document and it is prepared with the help of one Advocate. He denied receipt of the consideration and passing of receipt of some

amount. He, however admitted that there was tenancy proceeding between the tenants and the defendants as contended by the plaintiff. He

contended that there was probably collusion between plaintiff and defendant No. 10. He contended that suit was bad for non joinder of necessary

party as one Abidabegum was also necessary party. It is contended that there was other agreement between plaintiff and defendant No. 1 dated

15-12-1993 and in that agreement even the tenants were involved. It is contended that under the said agreement plaintiff was given right of

development. It is contended that there was agreement to hand over symbolic possession to the plaintiff. It is contended that in one proceeding the

plaintiff had admitted that possession was handed over for development and sale. It is contended that plaintiff is trying to take undue advantage of

inter se disputes amongst the defendants and the plaintiff has created some forged documents. It is contended that one learned Advocate helped

the plaintiff by getting signatures of the defendants on blank documents and he had taken action against the said Advocate for misconduct.

14. Defendant Nos. 4 to 8 filed written statement at Exhibit 144. They admitted the claim of the plaintiff.

15. Defendant No. 3 filed compromise document at Exhibit 168 and by this document he admitted the claim of the plaintiff. Similar documents

were filed by defendant No. 9 at Exhibit 169 and by defendant No. 10 at Exhibit 197. Then defendant No. 1 filed similar document at Exhibit 238

and admitted everything. However, consideration amount was then increased to make it Rs. 30,00,000/-. This compromise document was signed

by the legal representatives of defendant No. 1.

16. The aforesaid compromise documents were filed in the year 2009. In the year 2003 defendant No. 2, predecessor of the appellants, had filed

written statement. Defendant No. 2 had denied that defendant No. 4 had share in the property and he contended that she had remarried. He

denied that he had given power of attorney to defendant No. 1 and on his behalf of agreement was made by defendant No. 1. He denied the

contention in respect of the receipt of consideration by him. He denied that he had given receipt in respect of part consideration received by him.

He denied that application was moved before CIDCO authority for permission by the defendants. He denied that possession of the suit property

was handed over on 7-9-1995 to the plaintiff.

17. It is the case of the defendant No. 2 that due to disputes of the defendants with third party in respect of suit lands the defendants were in need

of money. It is contended that there was agreement between plaintiff on one side and the defendants who are owners of the property on the other

and it was decided that plaintiff was to develop the property and prepare plots for sale. It is contended that the price of development was to be

given to the plaintiff which was 40% of sale proceeds and the defendants, owners, were to get 60%. He has denied that some amount was given to

the third party by the plaintiff and he prayed for dismissal of the suit.

18. During pendency of the suit the aforesaid development took place and except defendant No. 2, all other defendants admitted the claim and

that part of the suit was decreed in terms of compromise. After the death of defendant No. 2 application was moved by the plaintiff on 1-10-2007

for bringing legal representatives of defendant No. 2 on the record. The application was filed on the basis of pursis filed at Exhibit 170 by the

Advocate of legal representatives of defendant No. 1. Order was made by the Trial Court on 1-10-2009 itself and the application was allowed.

After bringing legal representatives on record, application was moved by the plaintiff at Exhibit 175 to issue summons to the legal representatives of

defendant No. 2. Summons were issued accordingly. The bailiff report in respect of Nadimuddin Khan [defendant No. 2(iii) or 2(c)] shows that

the summons was sent at the address of Bungalow No. 6, Patel Planet, Harsul, Aurangabad. Information was given by the neighbour that he was

out of station. Bailiff pasted copy of the summons on the door of the residential place and submitted report on 18-1-2010. Summons to defendant

No. 2(d) or (iv) was also issued on the aforesaid address and this time other bailiff gave report that the name mentioned was not known to the

persons residing in that area and he could not find this defendant. This report was given on 17-2-2010. Report in respect of defendant No. 2(v)

shows that summons was sent at address of Chhota Takiya, Nutan Colony, Aurangabad. Bailiff could not get information about this defendant on

the address and he informed that mentioning of house number was necessary for service and gave report accordingly on 17-2-2010. In subsequent

attempt, bailiff could serve notice on defendant No. 2(v) Smt. Ashiya at Paithan Gate and he obtained her signature on the summons and submitted

report on 3-12-2010. Summons was sent to defendant No. 2(i) Sabina at the address of defendant No. 1(iii), Patel Planet, Bungalow No. 6,

Harsul. Persons residing in the locality of this address informed that she had shifted to Mumbai. The house was found to be in locked condition.

Report was given accordingly on 6-12-2010. Summons to defendant No. 2(ii) Ikramuddin Khan was sent on the address of Patel Planet,

aforesaid address. In the report dated 6-12-2010 bailiff informed to the Court that he received information that the person was residing at

Mumbai. In the report dated 6-12-2010 also bailiff informed to the Court that defendant No. 2(iv) Rehana was residing at Mumbai as per

information supplied to him from the Patel Planet locality.

19. The record shows that plaintiff had applied for appointing special bailiff and accordingly orders were made by the Court. On 15-1-2011

application was moved by the plaintiff for effecting service under Order 5 Rule 17 of the CPC (for short ""CPC"" ) on the aforesaid addresses. The

Court made order as follows:-

Re-issue notice to LR's of defendant No. 2 as prayed on payment of process fee. It is orally submitted that notices be issued by paper publication

and by RPAD. In view of this submission, notices be issued to the LR's by RPAD and paper publication on payment of process fees and charges.

20. In view of the aforesaid order, the notice was published in news paper dated 5-2-2011.

21. Nobody turned up for the appellants after paper publication of notice. Notice was published in daily news paper ""Sakal"" which is published in

Aurangabad District. As other defendants have compromised the dispute with the plaintiff, the suit proceeded only against defendant No. 2. Issues

were framed on the basis of the pleadings from the written statement of defendant No. 2. The plaintiff gave evidence. He relied on document like

agreement of sale dated 15-12-1993. He examined witness to prove this document. The document was executed by defendant No. 1 on behalf of

defendant Nos. 2 to 9. Evidence was given to the effect that consideration mentioned in the document was given as earnest money. The Court

considered this evidence and also considered circumstances like compromise of plaintiff with other defendants in which this document is admitted

and it is also admitted that there was such document though it was only signed by defendant No. 1. Then receipt dated 7-9-1995 was exhibited on

the basis of oral evidence of the plaintiff and the admission of other defendants in respect of passing of such receipt and acceptance of the

consideration of Rs. 4,15,000/-. One witness Bhingare also came to be examined to prove the receipt dated 7-9-1995 and so the execution came

to be proved as against the defendant No. 2 also. In this document there is mention of agreement dated 15-12-1993 and it shows that the

defendants, who are signatories to the receipt dated 7-9-1995 admitted that there was such agreement with the plaintiff and receipt was prepared

in furtherance of that agreement.

22. The plaintiff has given evidence about giving of consideration to the defendants which include giving of part of consideration to defendant No. 2

under receipt at Exhibit 252. This evidence shows that cheque was also given to the defendant No. 2 as part payment of the consideration and the

number of the cheque of Rs. 75,000/- is mentioned in the document. The trial Court has considered other documents like panchanama at Exhibit

108 showing that the possession was given to the plaintiff in the presence of defendant No. 2. The document at Exhibit 109 is possession receipt

and this document was also signed by the defendant No. 2. The plaintiff produced one document at Exhibit 262 to show that the defendant No. 2

had also applied to the Administrator, CIDCO, Aurangabad to inform that they had agreed to sell the land to the plaintiff and they were ready to

give 25% of the land to the CIDCO as per the scheme of the CIDCO. On basis of this application dated 4-10-1995 the matter was processed in

CIDCO office and that can be seen from the other documents. It is not disputed that there was proceeding between tenants and the owners and in

that proceeding plaintiff was involved. In view of these circumstances and as there was no rebuttal, the Court has decreed the suit against

defendant No. 2 (present appellants). It is mainly contended by the appellants that there was no service of suit summons on them and without

satisfaction of the said fact the Court proceeded ex parte against them. It is contended that there was no valid service of summons as required by

law and even application was not made for paper publication of the summons by the plaintiff. It is contended that there was no material before the

Court for satisfaction to publish the summons in news paper. It is also contended that the parties are Muslim and they were not knowing Marathi

and so there was no service on them. It is contended that when there was information from the bailiff that defendant Nos. 2(b) and (c) were

residing at Mumbai, publication of notice in news paper at Aurangabad cannot be used against them. It is contended that the Court has not

considered the circumstances like non production of power of attorney by the defendant No. 1 which was purportedly given by other defendants

to him.

23. It is contended that Advocate of the defendant No. 2, predecessor of the appellants, did not contact the appellants and so there was no reason

for them to have information about pendency of the suit. On this ground the appellants have prayed for setting aside the ex parte decree as

provided under Order 9 Rule 13 CPC. They have filed application before the trial Court also for setting aside the decree but they have prosecuted

present matter. The provision of Order 9 Rule 13 CPC is as under:-

13. Setting aside decree ex parte against defendant.-- In any case in which a decree is passed ex parte against a defendant, he may apply to the

Court by which the decree was passed for an order to set it aside; and 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, the Court shall make an order setting aside the

decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the

suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any

of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been irregularity in the service of

summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

24. The aforesaid provision of the CPC shows that there are two parts in the provision - (1) filing proceeding for setting aside decree on the

ground that summons was not duly served; and, (2) filing proceeding on the ground that the defendant was prevented by any sufficient cause from

appearing when the suit was called on for hearing. The appellants want to rely on the ground that the summons was not duly served. In respect of

their contention that they had no knowledge of the suit summons and there was no reason to have knowledge of suit summons, aforesaid second

proviso that mere irregularity in service of summons is not sufficient for setting aside the ex parte decree and the burden is on the appellants to

satisfy the Court that summons was not duly served needs to be kept in mind.

25. The aforesaid provision needs to read with provision Order 5 CPC. The suit was filed for specific performance of contract in respect of two

agricultural lands, immovable property, situated in Aurangabad District. All the defendants, including defendant No. 2 were duly served with suit

summons and they had appeared in the suit. The defendants were close relatives of each other and they were related as brothers and sisters.

Except one defendant, other defendants wanted to contest the matter in the beginning. Written statement of defendant No. 1 and defendant No. 2

was similar and they had contended that they had agreement with plaintiff but it was of different nature. In this background, procedure adopted by

the Court and the provision of Order 5 CPC need to be considered.

26. The provisions of Order 5 Rules 9 and 14 show that the requirement of service of process personally on the party or on the empowered agent

of the party is relaxed. In some cases the summons can be served on the person in charge of immovable property if he is agent of the defendant

and the defendant is not available for making service in person. When the defendant is absent from the residential place, service can be made on

adult member of his family provided that there are circumstances as mentioned in rule 15 of this Order.

27. The provision of Order 5 Rule 17 gives power to the serving officer to use other mode of service than making service in person. He has power

to paste copy of summons on the door of the residential place of the defendant. Relevant provision of Order 5 Rule 20 CPC reads as under:-

20. Substituted service.-- (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out of the way for the

purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to



be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in

which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court

thinks fit.

(1-A) Where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper

circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for

gain.

(2) Effect of substituted service.-- Service substituted by order of the Court shall be as effectual as if it had been made on the defendant

personally.

28. Provisions of Order 5 Rule 20(1-A) and (2) show that publication is to be done in the locality in which the defendant is last known to have

actually and voluntarily resided or carried on business or had worked for gain. This provision also needs to be read along with Rule 14 of Order 5

which is already mentioned. The plaintiff was stranger to the defendants and there is no record to show that address of the legal representatives of

defendant No. 2 was supplied to the plaintiff. Bailiff reports are already mentioned. Provision of Order 5 Rule 20 has two parts. Firstly Court can

order substituted service when it is satisfied that the defendant is keeping out of the way for the purpose of avoiding service and secondly when

there is any other reason for which summons cannot be served in ordinary way. Even if the contention of the appellants that there is no record to

show that the appellants were avoiding service is accepted there was still power with the Court to use the second part of Rule 20. The reports of

the bailiff show that there were circumstance and there was record for the Court to believe that there were reasons due to which it was not

possible to serve summons in ordinary way on the legal representatives of the defendant No. 2. After using all the possible recourses such order

was made by the Court.

29. The terms used in rule 20 of Order 5 CPC like ""for any other reason"" and ""or in such other manner as the Court thinks fit"" show that the Court

making such order has discretion in this regard. The procedure laid down in Order 5 CPC cast duty on the Court to summon defendant in the

proceeding. For procuring attendance of the defendant Court is given power to pass various orders under the Rules of Order 5. As the use of

power is within discretion of the Court, the Appellate Court is not expected to interfere lightly in the order made by exercising such discretionary

power by the trial Court. This Court can only ascertain that there was material for forming opinion or for satisfaction as required under Rule 20 for

the Court ordering substituted service. This Court has already discussed relevant material and in view of the said material, this Court finds no

reason to interfere in the order made by the trial Court to order substituted service and then proceed ex parte against the present appellants.

30. The provision of Order 9 Rule 6(1)(a) CPC shows the power of the Court to make order that suit be heard ex parte. The trial Court has

considered relevant material and the pleadings of the defendant No. 2 and on that basis the suit is decreed against the appellants. The discussion of

the material made already shows that nothing can be achieved by setting aside the ex parte decree made against the present appellants. Possession

was with plaintiff on the date of the suit and all the other defendants have admitted that there was agreement and consideration was received. The

defence taken by defendant No. 2 was similar to the defence of the defendant No. 1 and it can be said that there is no material to substantiate the

defence taken by the defendant Nos. 1 and 2. Nothing was shown to this Court on the basis of which it can be said that there is some case with

the appellants to defend. Due to this circumstance also this Court holds that interference in the decision of the trial Court is not warranted.

31. Learned counsel for the appellants placed reliance on some reported cases. In the case reported as Prahlad Singh Vs. Col. Sukhdev Singh, the

Apex Court has considered provision of Section 11 and provision of Order 9 Rule 13 of the CPC. It is observed that, finding recorded by Court

at an earlier interlocutory stage in a proceeding, such as while setting aside ex parte decree, would be binding at a later stage in the same

proceeding in absence of appeal against that finding. There is no dispute over this proposition. In the present case it was submitted by the learned

counsel for the appellants that when this Court allowed application for condonation of delay, this Court considered the same ground raised by the

appellants, absence of service of summons, and so the order made by this Court accepting the said ground in delay condonation application needs

to be used u/s 11 of the CPC. This contention is not at all acceptable. At the time of deciding application for condonation of delay in matter like

present one the Court is expected to consider the things like sufficient cause and the Court is expected to consider as to whether there is arguable

case in the appeal for the applicant. In the present matter for getting the relief of setting aside ex parte decree it was necessary for the present

appellants to satisfy that the summons was not duly served. If such contention was considered at the time of considering the delay condonation

application that was considered only to ascertain as to whether there was some arguable case on this point with the appellant. The order made in

the delay condonation application after coming to the conclusion that there is some arguable case cannot become res judicata for deciding the

appeal itself. So, this case is of no help to the appellants.

32. Learned counsel for the appellants placed reliance on a case reported as Baburao Soma Bhoi Vs. Abdul Raheman Abdul Rajjack Khatik,

This case is totally on different point. Here only it needs to be observed that there is record to show that at least on two legal representatives there

was service. There was service in person on one legal representative of defendant No. 2 and there was service as provided under Order 5 Rule

13, by pasting the summons on the door of residential place. All the legal representatives have come to this Court together, the address of

appellant No. 1-A is the same as was given in the plaint and the appellant Nos. 1-D and 1-E are shown to be residents of Aurangabad. Due to

these circumstances it can be said that there is no force in their contention that there was no due service on them. Reliance is placed by learned

counsel for appellant on a case reported as Devayani Yeshwant Shivkar, Satyajeet Yeshwant Shivkar and Vaibhav Yeshwant Shivkar Vs.

Bhaskar Chavan and Others, In this case this Court has discussed Order 5 Rule 20 CPC. This Court has already observed that there are two

parts in Rule 20 and in the present case it needs to be presumed that second part of Rule 20 was used by the trial Court for ordering substituted

service. So, this reported case is of no help to the appellants.

33. Learned counsel for the respondent, plaintiff, placed reliance on a case reported as Parimal Vs. Veena @ Bharti, In this case also the terms

like "sufficient cause" etc. given in Order 9 Rule 13 are discussed. This Court has already discussed the provision, two parts of Rule 13. This Court

has ascertained as to whether the discretion has been exercised judiciously by the trial Court. In this case the Apex Court has also discussed the

provision of Order 41 Rule 31 of the CPC. It is observed that, while passing order under this provision the Court is expected to note all relevant

aspects. There cannot be dispute over the proposition that the first appellate Court should not disturb and interfere with valuable rights of parties

which stood crystallized by trial Court's judgment without considering whole case on question of facts and law. This Court has considered relevant

material to ascertain as to whether there is some case to defend for the present appellants. It is also observed by Apex Court that unless finding of

the trial Court in respect of service of summons, either by regular service or by substituted service, is required to be set aside, the Court will not

interfere in the ex parte decree. In view of this position of law, this Court holds that no interference is possible in the judgment and decree delivered

by the trial Court.

34. In the result, the appeal stands dismissed. No order as to cost.