

**IN THE COURT OF II Addl. CIVIL JUDGE AND JMFC,
CHIKODI.**

Present : Shri. Nagesh Patil.,
B.com., L.L.B.,
II Addl. Civil Judge and JMFC.,
Chikodi.

Civil Misc.No.3/2021

Dated this 02nd day of November 2022

Petitioner:

1: Smt.Parawati W/o. Mahadev Khot
and another.

(By Shri.K.R.Tangade, Advocate)

-V/s-

Respondents:

1: Smt. Sumitra W/o. Bhimara Gouli,
and others.

(By Shri.M.B.Patil, Advocate)

Parties to IA No.II

Applicants:

1: Smt.Parawati W/o. Mahadev
Khot and another.

(By Shri.K.R.Tangade Advocate)

-V/s-

Opponents:

1: Smt.Sumitra W/o.Bhimara Gouli
and others

(By **Shri.M.B.Patil, Advocate**)

ORDERS ON I.A NO.II

I.A.No.2 is filed by the applicant/Petitioner U/sec. 151 of CPC to stay the execution and operation of judgment and preliminary decree passed in OS.NO.360/2017 dated 06.02.2021, till disposal of the suit.

2. In support of the application petitioner No.1 filed an affidavit, wherein stated that, the respondent has filed the suit in OS.No.360/2017 before this court for partition and separate possession of 1/6th share in the suit properties. But the said suit itself is not maintainable and after filing of the said suit, the summons was issued to the defendant and on 02.02.2018 the defendant no.2 and 5 were placed Ex-parte and the defendant no.3 was personally present and prayed time to engage counsel and on 28.04.2018 the court re-issued the summons and the defendants no.6 and 7 were placed Ex-parte. The summons of the defendant no.1 is returned with shara that addressee is not in such address and case was adjourned for steps for defendant no.1 and the summons to the defendants no.6 and 7 were never served and they did not appeared and same do not bear the signature of

defendant no.1, 6 and 7. But the respondent colluding with each other have got managed to sign on the postal acknowledgment. But on 05.05.2018 she went to bangalore and the defendant no.7 was serving in Indian Army and when the summons were issued to the defendant no.6 and 7 are not in station and no body was there in house. But the defendants colluded with each other managed to serve summons to others and obtained ex-parte decree against the petitioner and after coming to know about the decree passed by this court, the present petition is filed. But now the defendants are taking advantage of the decree are in hurry to file FDP proceedings and to dispossess and disturb the lawful possession of the petitioners over the suit property. Hence filed the present petition and also the present application.

3. The respondent No.1 has filed objection to the main petition and filed memo stating that, objection to main petition may be treated as objection to this application. In the objection the respondent No.1 has contended that, the petition is not maintainable in the eye of law and denied the entire petition paras and specifically contended that, the petition filed by the petitioner on the ground of wait and see principle since the notices of O.S. No.360/2017 are duly served on the petitioners and the aggrieved party about the judgment and decree passed in the said suit cannot be modified or alter or set aside by this court.

The court which passed the decree is not set aside its own judgment. The suit O.S.No.360/2017 is already decreed and appeal period is lapsed and from the date of cause of action the 5 years has been completed, when a window i.e., the respondent No.1 has touched the door of this court for want of justice and her rights. Further contended that, the reasons mentioned about non serving of notice to the applicant is created story of the applicant and the aggrieved party can approach the appellate Court, but not this court after lapse of time. Accordingly prays to the dismiss the application.

4. Heard arguments on both sides.

5. On hearing both sides the points for Consideration of this court is as under:

1. Whether the applicant has made out sufficient grounds to allow the application?

2. What Order?

6. My answer to the above point No.1 and 2 are as under.

Point No: 1 Negative.

**Point No: 2 As per final order,
for the following:**

:: R E A S O N S ::

7. Point No.1:- The petitioner have filed this petition to set aside the decree passed on OS No.360/2017 dated: 06.02.2021. The petitioners are the defendant No.6 & 7 in the said suit. According to petitioners the summons was not served upon them as the petitioner No.1 is at Bangalore and petitioner No.2 is serving in Army and residing at Uttar Pradesh, when the summons was issued to the petitioners and the respondent No.1 got managed to sign on the postal acknowledgment and to place exparte them and recently when the respondent No.1 started threatening to dispossess the petitioner from the suit property and on enquiry she came to about the passing of decree in said suit and she has immediately obtained the certified copies of judgment and decree passed in the said suit and filed this petition to set aside exparte decree passed against them and accordingly filed this application to stay the operation and execution of decree passed in OS.No.360/2017 dated 06.02.2021. On the other hand the respondents contended that, the petitioners have filed this application after lapse of appeal period and the reasons mentioned in the petition about the non-serving of notice to the petitioners are created story and accordingly prays to dismiss the application.

8. On perusal of the materials placed on record the respondent No.1 has filed suit for partition and separate possession in O.S.No.360/2017 wherein the present petitioners are the defendant No.6 and 7 and they were place exparte and the said suit came to be decreed on 06.02.2021. According to petitioners the summons was not served upon them as the petitioner No.1 is at Bangalore and petitioner No.2 is serving in Army and residing at Uttar Pradesh when the summons was issued to the petitioners and the respondent No.1 got managed to sign on the postal acknowledgment and to place exparte them and recently when the respondent No.1 started threatening to dispossess the petitioner from the suit property and on enquiry she came to about the passing of decree in said suit and she has immediately obtained the certified copies of judgment and decree passed in the said suit and filed this petition to set aside exparte decree passed against them and accordingly filed this application to stay the operation and execution of decree passed in OS.No.306/2017 dated 06.02.2021.

9. The plaintiffs have the filed the suit against the defendants for the relief of partition and separate possession in respect of the suit properties and the same came to be decreed on 06.02.2021. The grievance of the petitioner is that the suit summons was not served on them and the plaintiff is not in possession of the suit property and taking disadvantage of the

Ex-parte decree, the plaintiff is in hurry to file FDP petition and trying to disturb the possession of the plaintiff over the suit property on the basis of the judgment and decree passed in the said suit. The judgment and decree passed in OS.No.360/2017 is a preliminary decree and it is not a executable one. Under these circumstances, even the judgment and decree passed in the said suit is not stayed. No consequences arise. Therefore the petitioners have not made out sufficient grounds to stay the judgment and decree. **Accordingly I answer Point No.1 in the Negative.**

10. Point No.2 : In view of the aforesaid reasons, I proceed to pass the following:

ORDER

**I.A.No.2 is filed by the
applicant/Petitioners under section
Sec.151 of CPC is here by rejected.**

(Dictated to the Stenographer directly on computer and typed by him, the same is corrected and then pronounced by me in the Open Court on this 02nd day November 2022)

sd/-

**(Nagesh Patil)
II Addl.Civil Judge and J.M.F.C.,
Chikodi.**