

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.900 OF 2014

The Kapole Co-operative Bank Ltd.] ... Applicant

Versus

Mrs. Nayanaben H. Kakadia.] ... Respondent

Mr. R. M. Haridas for Applicant.
Mr. N. P. Dalvi for Respondent.

CORAM :- M. S. SONAK, J.
DATE :- JUNE 18, 2015

P. C. :-

1. Rule.
2. With the consent of and at the request of learned Counsel for parties, Rule is made returnable forthwith.
3. This petition challenges order dated 07/05/2014 made by the Appellate Bench of the Small Causes Court, the operative portion of which reads thus :

“(1) *The appeal is allowed.*

(2) *The judgment and order dated 10.06.2013 passed in Misc. Notice No.622 of 2007 in*

R.A.E. Suit No.1031/1869 of 2004 is set aside.

- (3) Misc. Notice No.622 of 2007 is allowed.*
- (4) Ex-parte decree passed in R.A.E. Suit No. 1031/1869 of 2004 dated 04.09.2007 is set aside.*
- (5) R.A.E. Suit No.1031/1869 of 2004 is restored before the trial Court for decision on merits.*
- (6) The respondent shall restore possession to the appellant in respect of the suit premises viz: Room No.102, Kapol Co-operative Bank Building, 19/21, Picket Cross Road, Ratanshi Chapsi Marg, Mumbai - 400 002.*
- (7) The parties shall bear their own costs.”*

4. Taking into consideration the circumstance that the delay in applying for setting aside of the *ex-parte* decree was hardly 82 days and the fact that sufficient cause was shown by the Respondent, there is no reason to interfere with the impugned order insofar as it sets aside the *ex-parte* decree dated 04/09/2007. There is neither any jurisdictional error nor any perversity insofar as this aspect of the impugned order is concerned.

5. The impugned order, however, in its clause (6) of the operative portion, directs the Petitioner to restore the possession of the suit premises to the Respondent. Whilst the Appellate Court may

not be entirely powerless to issue a direction of this nature, normally, it should be left to the party concerned to apply for restitution under Section 144 of the CPC, trial Court which had made the *ex-parte* decree dated 04/09/2007, which has since been set aside by the Appellate Bench. This is because restitution, is not invariably automatic or consequential to the setting aside of the *ex-parte* decree. There are several aspects which are required to be considered, including, *inter alia*, the aspect that the decree has been set aside after 7 years and the erstwhile decree holder which is a bank, had obtained possession of the suit premises in the meanwhile. Accordingly, clause (6) of the operative portion of the impugned order is set aside.

6. The learned Counsel for Respondent submits that application for restitution has already been filed by the Respondent before the trial Court. It is possible that such application was filed merely because the possession of the suit premises was not restored despite the direction contained in the impugned order dated 07/05/2014. Now, that such direction is being interfered with, the Respondent shall be at liberty to either amend the application already filed or even to file a fresh application under Section 144 of the CPC seeking restoration of the possession to the suit premises. Accordingly, such pending application/amended application/fresh application under Section 144 of the CPC to be decided by the trial Court as expeditiously as possible and in any case, within a period of four months from the date on which the amended/fresh application is filed. In case, the Respondent wants to pursue the application which

is already filed, then the same to be disposed of within a period of four months from today.

7. That apart, the trial Court is also directed to dispose of R.A.E. Suit No.1031/1869 of 2004 as expeditiously as possible and in any case, within a period of two years from today.

8. Rule is disposed of in the aforesaid terms. There shall be no order as to costs.

9. It is clarified that this Court has not expressed any opinion on the merits of the matter and therefore, the application for restitution under Section 144 of the CPC which the Respondent has instituted or may institute, may be decided by the trial Court on its own merits and in accordance with law.

(M. S. SONAK, J.)