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HIGH COURT OF DELHI AT NEW DELHI

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R.S.A. No.223/2014 & C.M. No.13975/2014

Decided on : 12th February, 2015

KASHMIRI LAL BHUTANI

..... Appellant

Through: Mr. R.K. Saini, Mr. Ayush Arora &
Ms. Aastha Chopra, Advocates.

Versus

ARVIND KUMAR ADUKIA

..... Respondent

Through: Mr. Jugal Wadhwa, Mr. Rishabh
Wadhwa, Mr. Parth Kaushik &
Mr. Shashank Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

V.K. SHALI, J. (ORAL)

1. This is a regular second appeal filed by the appellant. Mr. Saini, the learned counsel for the appellant has formulated following questions in the appeal:-

“(i) Whether the court is not required to look into and consider the rights and interests of both the parties and the current position and the subsequent events which may have taken place in the meanwhile while considering an application for restoration under Section 144 CPC and decide it accordingly?”

“(ii) Whether the trial court is bound to order to restore back possession under all circumstances, pending

trial, which has already been taken by the plaintiff in execution of the ex-parte decree passed earlier, on setting aside of the said ex-parte decree, as 'restitution'?

- (iii) Whether the trial court should not have endeavoured to decide the suit itself during the period of 4 ½ years which it took to decide the application for restoration and whether doing so has not caused a grave prejudice to the rights and detriment to the interests of the plaintiff?*
- (iv) Whether the trial court committed an illegality in ordering restoration of possession after 8 ½ years, particularly when the rights and interests of the defendant already stood protected by an ad interim injunction directing the plaintiff not to create third party rights and interests in the suit property?*
- (v) Whether the first appellant court was not required to take into consideration the subsequent events and circumstances, particularly the one prevailing in the present case such as 8 years time gap between the taking of possession by the plaintiff in execution of the ex-parte decree and the order of restitution and four years time taken by the trial court in deciding the application for restitution itself, during which time the suit could very well have been decided?*
- (vi) Whether the first appellate court, under the circumstances of the case, should not have directed a speedy and expeditious disposal of the suit within a time bound frame instead of upholding the order of restoration after almost one year, and by not doing so, has committed an illegality?*

- (vii) *Whether both the courts below committed an illegality and did not act fairly by ordering restoring back possession to the defendant, after a time gap of 8 years and as such did not take into account the rights and interests of the plaintiff while ordering restitution?*
- (viii) *Whether both the courts below committing an illegality and did not act fairly in not realizing and appreciating that under the peculiar facts and circumstances of the case, the right, just and fair order to be made towards both the parties was to direct maintenance of status quo (which order in effect, already stood passed) rather than direct the plaintiff to restore back possession of the suit premises to the defendant and whether the same has not caused great detriment to the rights and interests of the plaintiff and prejudiced his position and given a lever to the defendant to harass and blackmail the plaintiff by protracting the trial, which he had already been doing so?"*

2. I have heard the learned counsel for the appellant with regard to these so-called substantial questions of law which are reproduced above from the appeal. I have also heard the learned counsel for the respondent.

3. Before dealing with the questions, it may be pertinent here to give brief background of the case. The present appellant filed a suit for possession and mesne profits/damages for the use and occupation in respect of the suit property against the respondent. The property in question was a second floor of premises No.4692-4694, Laxmi Bazar

Cloth Market, Fatehpuri, Chandni Chowk, Delhi 110006. The case which was setup by the present appellant was that he was the purchaser in respect of the aforesaid property from the previous owner and the said second floor was under the occupation of the respondent in the capacity of a licensee. His licence has been terminated and yet he had failed to vacate the premises. Accordingly, the suit for possession and damages/mesne profits was initiated.

4. The respondent could not be served by ordinary process and accordingly steps were taken for affecting substituted service by way of publication. As the respondent did not appear on the date specified in the publication, he was proceeded *ex parte* and an *ex parte* decree of possession was passed against him on 19.3.2001.

5. Pursuant to the aforesaid *ex parte* decree, the possession of the suit premises was retrieved by the present appellant. The respondent herein filed an application for setting aside *ex parte* decree to which reply was called for and thereafter, the court vide order dated 24.11.2004 set aside the *ex parte* decree against the respondent as he was able to show that he had not been served. Since the *ex parte* decree against the respondent was set aside and the possession had been retrieved by the present

appellant, the respondent filed an application on 24.12.2004 under Section 144 of the CPC for restitution of the vacant and peaceful possession of the suit premises. The aforesaid application was allowed by the learned trial court on 7.5.2013 after calling for the reply from the appellant and hearing the arguments.

6. In the meantime, the present appellant had also filed a petition being C.M. (M) No.1782/2004 against allowing of the application of the respondent under Order XI Rule 13 CPC for setting aside the *ex parte* decree which was also dismissed by this court on 7.8.2006 on account of non-prosecution because steps were not taken for service of the respondent.

7. So far as the order which was passed by the learned trial court on 7.5.2013 directing restitution of possession to the respondent is concerned, that was also taken by way of an appeal being R.C.A. No.26/2014 before the first appellate court. The appellate court after examining the entire matter, passed a detailed order on 22.3.2014 upholding the order of restitution passed by the trial court by observing that in case possession of the suit premises is not restored to the respondent then conducting of trial in respect of his suit for possession

become meaningless because the possession of the suit premises has not only been retrieved by the appellant, but also continues to be with him. While holding so, the learned first appellate court referred to the judgments of the Supreme Court in *Binayak Swain vs. Ramesh Chand Panigrahi*; AIR 1966 SC 948 and *Mohan Lal Khemka vs. Harihar Prasad & Ors*; 1 (1997) CLT 367 to support his reasoning.

8. The appellant, feeling aggrieved by the aforesaid two concurrent orders directing the restitution of the possession of the suit premises to the respondent, has filed the present regular second appeal. The questions which are formulated by the appellant are essentially not questions of law but questions of facts much less substantial questions of law.

9. The contention of Mr. Saini, the learned counsel for the appellant, has been that the case of the respondent has been that he was living at the address in respect of which the suit was filed and had he been living there then there would have been no difficulty in serving him. In respect of the first round of litigation as well as in the C.M. (Main), the process server's report shows that on visiting the premises, the respondent was not found available at such an address. The second submission of the learned

counsel has been that it has taken eight years for the court to decide the application for restitution and that too after retrieving the possession almost 11 years back while as this suit itself could have been decided within a period of 2-3 months itself. Therefore, because of these intervening and supervening facts instead of restoring the possession back to the respondent today, it would be just and proper to keep the interest of the appellant also in view and not compel the appellant to restore back the possession of the suit premises to the respondent. It has been contended by Mr. Saini that all these aspects have not been taken care of by both the courts below and thus, there is an illegality with regard to the orders which have been passed by the courts below.

10. I have carefully considered the submissions as well as the questions which are purportedly formulated by Mr. Saini. The question of balancing of interest is a question of fact which the two courts below have considered. The very fact that the first appellate court has specifically taken note of the fact that if the possession of the suit premises continues to be with the appellant and yet he is permitted to pursue his suit for possession that will only be a meaningless exercise inasmuch as it will tantamount to putting cart before the horse. Assuming

for a moment that the possession continues with the appellant and the suit is ultimately decreed in favour of the appellant, the entire exercise becomes an exercise in futility with the court and a sheer wastage of time. The *ex parte* decree on the basis of which the appellant had retrieved the possession has itself been set aside, the necessary corollary is that the *status quo ante* ought to be restored as has been done by the two courts below. The two courts below have already exercised their judicial discretion in favour of the respondent and for valid and justified reasons. It is not open to the appellant to contend that merely because there is a considerable time gap between the retrieval of the possession and the order of restitution; it does not mean that the possession should not be restored. In case, such reasoning is given, the person who has taken the possession would have a vested interest in getting the matter adjourned repeatedly and would not permit any court to restore the possession by causing delay. Similarly, the High Court cannot be called upon to see the impugned order only by calling it illegal. The other questions raised regarding the fairness of the court or the court to decide the matter in a time bound manner cannot be said to be involving any substantial question of law. Therefore, merely because the High Court being a

superior court holds a different view, even if we assume for the sake of argument which should not substitute its own opinion in place of the opinion or the view expressed by the two courts below. That is precisely the reasons why Section 100 CPC also shows that at the stage of the second appeal, the appeal need not be entertained unless and until a substantial question of law is involved. I am not impressed with any of the submissions made by the learned counsel for the appellant that the present appeal involves any substantial question of law.

11. Accordingly, the appeal is dismissed. Interim order of *status quo* which is granted on 27.8.2014 stands vacated.

V.K. SHALI, J.

FEBRUARY 12, 2015
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