

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.5154 OF 2015

Veenaben Pramod Jhaveri ... Petitioner
Vs.
Kamlesh Singh Harnamsingh Chowhan ... Respondent

Ms Jyotsna Vyas i/b. Mr. Om Prakash Pandya for Petitioner.
Mr. Vivek Kantawala a/w. Mr. Amey Patil i/b. Vivek Kantawala & Co. for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 11, 2016

P.C. :

Heard Ms Vyas, learned Counsel for petitioner and Mr. Kantawala, learned Counsel for respondent at length. Rule. Mr. Kantawala waives service on behalf of the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as defendant, has challenged the judgment and order dated 20.03.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai below exhibit-16 in A1 Appeal No.414 of 2014 in R.A.E. Suit No.74/126 of 2000. By that order, the Appellate Bench rejected the application made by the defendant praying for restoration of the possession.

3. Ms Vyas strenuously contended that the Suit instituted by respondent, hereinafter referred to as plaintiff, was decreed on 10.07.2014. Defendant filed appeal against that decree. Since there was delay of 4 to 5 days in filing the Appeal, the application was made, the

delay was condoned and the appeal was admitted on 18.10.2014. She submitted that on 18.10.2014, defendant filed application for stay of the execution of the decree. Respondent is a practising Advocate and he had filed Caveat. On 18.10.2014, the Appellate Bench issued notice to the respondent as to why ad-interim stay to the execution and operation of the decree be not granted. The notice was made returnable on 28.10.2014. Plaintiff avoided service of notice till 28.10.2014. The said application was adjourned to 05.11.2014. The application was thereafter adjourned to 10.11.2014 when plaintiff filed reply.

4. Ms Vyas submitted that on 10.11.2014, plaintiff made statement that pending the hearing of the application for interim stay, he will not execute the decree. Defendant and his Advocate relied upon the said statement and did not insist for recording that statement by the Appellate Bench. She submitted that in fact, plaintiff filed reply to the said application and claimed compensation @ Rs.15,690/- per month in case the Court is inclined to grant stay. The matter was thereafter adjourned to 20.11.2014. Defendant sought time for filing rejoinder. The hearing was thereafter adjourned to 02.12.2014. On that day, defendant filed rejoinder. The hearing of the application was adjourned from time to time on 15.01.2015, 31.01.2015 and 25.02.2015. On 25.02.2015, plaintiff filed praecipe setting out therein that the Bailiff of the Court had executed the decree and handed over possession of the suit premises to him on 24.02.2015, and therefore, application for stay to the execution of the decree became infructuous.

5. Ms Vyas submitted that defendant, therefore, filed application exhibit-16 for restoration of the possession. She submitted that since the substantive First Appeal is already admitted and plaintiff made statement on 10.11.2014 that he will not execute the decree till the hearing of the

application for stay, defendant and his Advocate relied upon the statement and did not insist for recording the statement. She submitted that if the possession of the suit premises is not restored, remedy of appeal will be rendered infructuous. She submitted that under Section 144 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the Court has ample power to restore possession. She relied upon the decision of this Court in **First Appeal (St.) No.23815 of 1999 (Nand Kishor Narayan Joshi Vs. Sujeet Narendra Sharma)** decided on 12.08.1999 (Coram: H. L. Gokhale, J., as His Lordship then was), and in particular paragraphs 7 and 8 thereof.

6. On the other hand, Mr. Kantawala supported the impugned order. He invited my attention to paragraph 8 of the impugned order. In paragraph 8, the Appellate Bench, after perusing the entire record, found that no statement or assurance to the effect that plaintiff will not execute the decree was recorded. The statement made by the defendant in that regard is not supported by available record. He further submits that plaintiff is in possession. He has not created third party interest. He will hereafter neither create third party interest nor part with possession and to that effect, he will file affidavit on or before 18.01.2016. Statement made by Mr. Kantawala, on telephonic instructions, is recorded.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, plaintiff has instituted Suit in the year 2000 against the defendant for recovery of possession. The Suit was decreed on 10.07.2014. It is also not in dispute that the defendant preferred substantive Appeal challenging that decree. The delay in filing the appeal was thereafter condoned and the Appeal is admitted on 18.10.2014.

8. It is evident from record that on 18.10.2014, the Appellate Bench issued notice to the plaintiff as to why the ad-interim stay to the execution of the trial Court's decree may not be granted. The notice was made returnable on 28.10.2014.

9. It is the case of the defendant that the plaintiff avoided service of that notice till 28.10.2014. The said application was adjourned to 05.11.2014. It was thereafter adjourned to 10.11.2014. Plaintiff filed his reply on that day. It is the case of the defendant that plaintiff made statement that he would not execute the decree till application for stay is decided. The defendant, therefore, did not press for ad-interim stay. The matter was adjourned to 20.11.2014. Defendant sought time for filing rejoinder. The application for stay was adjourned to 02.12.2014. Again on this date, defendant did not press ad-interim stay to the execution of the decree as he relied upon the statement made by the respondent in the Court that he will not execute the decree. On 02.12.2014, defendant filed rejoinder. The application was thereafter heard on 15.01.2015 and 31.01.2015.

10. It is material to note that all along defendant did not insist the Appellate Bench for recording the statement of the plaintiff that he will not execute the decree till the application for stay is heard. It is also material to note that defendant's Advocate did not address a recording letter to the plaintiff. In paragraph 8 of the impugned order, the Appellate Bench has categorically recorded a finding that no such statement or assurance was ever made by the plaintiff. The statements made by the defendant in that regard are not supported by available record.

11. Thus, what emerges from the above discussion is that though the

application for stay was heard on 05.11.2014, 10.11.2014, 20.11.2014, 02.12.2014, 15.01.2015 and 31.01.2015, defendant did not insist on these dates for recording the statement of the plaintiff, if at all inadvertently, plaintiff's statement was not recorded on 10.11.2014. That apart, no letter was sent to the plaintiff recording statement made by him on 10.11.2014.

12. Ms Vyas relied upon the decision of this Court in **Nand Kishor Narayan Joshi** (*supra*). In that case, on 21.08.1998, ad-interim order restraining appellants from parting with possession of the suit premises was granted. The matter was thereafter adjourned to 03.09.1998. On that date, the learned trial Judge was on leave. The board was discharged and the matter was adjourned to 16.09.1998. As nobody was present for the defendants on 16.09.1998, the suit was adjourned to 08.12.1998 for passing ex-parte decree. On 08.12.1998, ex-parte was passed and the decree was executed on 29.04.1999 and the occupants were evicted from their business-cum-residential premises. In paragraph 7, this Court observed that the Suit was decided in a hurried manner on the third date and the possession was taken away from a party which was admittedly residing in the suit premises for a very long time.

13. In the present case, the Suit is instituted in the year 2000 and was decreed on 10.07.2014. That apart, the decree is passed on merits and is not an ex-parte decree. In view thereof, the reliance placed by Ms Vyas on the decision in **Nand Kishor Narayan Joshi** (*supra*) does not advance the case of the defendant. That apart, the Appellate Bench has also considered Section 144 C.P.C. In paragraph 7, the Appellate Bench observed that if the decree or order is varied in any appeal, revision or other proceedings or is set aside or modified in any Suit, the Court which has passed the decree or order shall cause such restoration. In the

present case, decree is neither set aside, varied nor modified in appeal. The Appellate Bench, therefore, held that Section 144 cannot be invoked.

14. I do not find that the Appellate Bench has committed any error in rejecting the application. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. More so, when, plaintiff filed affidavit in this Court to the effect that he is in possession. He has not created third party interest and that hereafter, he will neither create third party interest nor part with possession of the suit property. Having regard to the fact that the defendant's substantive Appeal is admitted on 18.10.2014 and that on 24.02.2015, plaintiff has taken possession, in my opinion, following order will meet the ends of justice:

- a. Plaintiff shall neither create third party interest nor part with possession of the suit property pending the hearing and disposal of the appeal;
- b. The Appellate Bench is requested to decide the Appeal within 3 months from the production of the authenticated copy of this order;
- c. All contentions of the parties on merits are expressly left open;
- d. Rule is discharged with no order as to costs.

15. List the Petition for 'direction' on 18.01.2016.

(R. G. KETKAR, J.)