

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.511 OF 2002

ALONG WITH

CIVIL APPLICATION NO.882 OF 2002

- | | |
|---------------------------------|------------------------------|
| 1. Ukadiben Budhiabhai Patel, |] |
| Widow of late Budhiabhai Sukla, |] |
| Aged Adult. |] |
| 2. Dhirubhai Budhia Patel, |] |
| s/o late Budhiabhai Sukla, |] |
| Aged Adult. |] |
| 3. Chimanbhai Budhiabhai Patel, |] |
| s/o late Budhiabhai Sukla, |] |
| Aged Adult. |] |
| 4. Parvatiben Jairambhai Patel, |] |
| d/o late Budhiabhai Sukla, |] |
| Aged Adult. |] |
| 5. Chaganbhai Budhiabhai Patel, |] |
| s/o late Budhiabhai Sukla, |] |
| Aged Adult. |] |
| 6. Jairambhai Patel, |] |
| husband of Parvatiben. |] |
| All residing at Magarwada, |] |
| Kakra Khadi, Daman. |] Appellants-Applicants |

Versus

- | | |
|-------------------------------------|---|
| 1. Olga Ferriera Mascarenhas, |] |
| Aged Adult, residing at Panaji Goa. |] |
| 2. Antonio F. Alfredo Mascarenhas, |] |
| Aged Adult. |] |

3. Maria M. D'Costa Mascarenhas,]
Adult,]
Respondent Nos.2 and 3 residing at]
Bangalore, Karnataka State.]
4. Alvaro F.A. Mascarenhas,]
Aged Adult,]
Residing at Panaji, Goa.]
5. Maria Zinia A.DaConha Mascarenhas]
6. Maria A.H. Mascarenhas Ribeiro,]
Adult.]
7. Jose Olavao Robario (*Since Deceased*),]
By his Heirs and Legal Representatives :]
- 7/1 Maurileen Eurico Riborio,]
Aged Adult.]
- 7/2 Dr. Danilt Olavo Riberio,]
Aged Adult.]
- 7/3 Maureen Ruse Riberio,]
Aged Adult.]
- 7/4 Dr. Edagar Olavo Riberio,]
Aged Adult.]
- 7/5 Datricia E. Riberio,]
Aged Adult.]
- 7/6 Eng Osswald O. Riberio,]
Aged Adult.]
- 7/7 Matildes O. Riberio,]
Aged Adult.]
- 7/8 Alberto O. Riberio,]
Aged Adult.]
- 7/9 Maria Con Riberio,]
Aged Adult.]

7/10 Carmen O. Riberio,	]
Aged Adult.	]
7/11 Amolita Riberio,	]
Aged Adult.	]
7/12 Arnaldo Riberio,	]
Aged Adult.	]
7/13 Sarah A. Riberio,	]
Aged Adult.	]
7/14 Dr. Jose Alavo Riberio,	]
Aged Adult.	]
7/15 Dr. Mrs. Shirly Riberio,	]
Aged Adult.	]
All residing at Dr. Olvaro Hospital,	]
Mapusa, Goa.	]
All the Respondents represented	]
through their duly Constituted	]
Attorney Holder Mr. Kesorichand	]
Motichand Shah, Major, Landlord,	]
resident of Vaniawao, Nani Daman,	]
Daman.	] Respondents

Smt. Usha Purohit for the Appellants.

Mr. Rajendra Desai, a/w. Mr. Akshay Pawar, I/by Mr. Kunal Bhanage, for Respondent Nos.1 to 4.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 23RD JULY 2018.

ORAL JUDGMENT :

1. Appeal is placed today for final hearing. Mr. Desai, learned counsel appearing on behalf of Respondent Nos.1 to 4, however, submits that, as

per the order passed by this Court on 24th January 2008, the Appellants were directed to file private paper-book within a period of one year from the date of the order. As per the 'Office Remark', the paper-book was not filed within the stipulated time and, therefore, the Second Appeal stood dismissed automatically for want of prosecution, without further reference to the Court. It is submitted that, in that view of the matter, hearing of this Second Appeal cannot be proceeded further.

2. However, the order passed by this Court on 12th February 2016 clearly goes to show that, the Appellants were permitted to file compilation of documents within a period of eight weeks from the date of the said order and, accordingly, the hearing of this Second Appeal was expedited and it was to be placed for direction after six weeks to fix the early date of hearing. Thereafter, also on 28th March 2016, the order is passed by this Court directing the Registry to examine whether this Second Appeal is ready for final hearing and, accordingly, add it to the 'Final Hearing Board' in the week commencing from 4th April 2016. There are subsequent orders, including the remark of the Registrar, which shows that the Second Appeal is ready for final hearing. Therefore, this contention no more can be availed.

3. As regards the Respondents, it is submitted that Respondent No.1 is dead. Learned counsel for the Respondents, on instructions of his

clients, submits that, Respondent No.1 is no more and she is dead; however, he has no concrete knowledge about the same and he is ready to argue the matter on merits.

4. In view thereof, with consent of learned counsel for the parties, the Appeal is taken up for final hearing. Heard Smt. Usha Purohit, learned counsel for the Appellants, and Mr. Rajendra Desai, learned counsel for the Respondents.

5. This Second Appeal is directed against the 'Judgment and Order' dated 28th March 2002 passed by the District Judge, North Goa, Panaji, in Regular Civil Appeal No.149 of 1989.

6. The said Appeal was preferred by the present Appellants, being aggrieved by the 'Judgment and Order' dated 24th January 1989 passed by the Civil Judge, Senior Division at Panaji in Civil Miscellaneous Application No.158/88/A in Special Civil Suit No.69 of 1974, by which the learned Trial Court has rejected the application for restitution filed, under Section 144 of the Civil Procedure Code, 1908, by the Appellants.

7. The submission of learned counsel for the Appellants is to the effect that, by the impugned order passed by the first Appellate Court, the Appellants have only consented for expeditious disposal of the Suit, but so far as Appellants' application for restitution, filed under Section

144 of CPC, there was no agreement or mutual agreement arrived at between the parties and hence, it was incumbent on the part of the first Appellate Court to direct the Trial Court to decide the said application. However, the order passed by the first Appellate Court is conspicuously silent about the same.

8. In view of this submission, the Second Appeal came to be admitted by this Court on the following substantial question of law :-

“Whether the Appellate Court completely ignored the mandatory nature of the provisions of Section 144 of the Code of Civil Procedure, 1908?”

9. Now in order to appreciate the submissions advanced by learned counsel for the Appellants, it is necessary to reproduce the impugned order passed by the first Appellate Court. It reads as follows :-

“Heard Counsel. Appellant No.2-Dhirubhai is also present in person. Parties agree that direction be given to the Ld. Trial Judge to expedite the hearing of Suit and to complete the hearing of argument herein by 30/9/2002. R & P is already sent to P.C. Parties and their counsel state that this appeal be disposed of with the above direction. Hence, this order.

Appeal is disposed of. The Ld. Trial Judge shall dispose of the suit by 30th September 2002. Parties and their counsel to cooperate and not to seek any adjournment on the grounds of ill-health of counsel or.

No order as to costs.”

10. The Appeal was, admittedly, filed against the order passed by the Trial Court, rejecting the application filed under Section 144 of the CPC and by this consent order, the parties had arrived at the mutual agreement to the effect that, direction be given to the learned Trial Judge to expedite hearing of the Suit and to complete the hearing by 30th September 2002. The impugned order further shows that, both the parties and their counsels stated that, the Appeal be disposed of with the above direction. Accordingly, the Appeal is disposed of with a direction to the Trial Court to dispose of the Suit by 30th September 2002.

11. In view thereof, if the very Appeal was preferred against rejection of the application for restitution, filed under Section 144 of the CPC, and therein the parties arrived at the mutual agreement to dispose of the Suit in time bound manner, then it clearly indicates that, they had arrived at an understanding that, instead of proceeding with the hearing of the application filed under Section 144 of CPC, the Suit itself be disposed of within the time bound period and, accordingly, the Suit was directed to be disposed of by expeditiously hearing it; then, in my considered opinion, no fault can be found in the impugned order of the first Appellate Court. There also does not arise the question of the first Appellate Court ignoring the mandatory nature of the provisions of Section 144 of CPC?

12. It is true that, Section 144 of the CPC, which gives the right of restitution, is a very important provision and is of a mandatory nature, leaving no discretion to the Court to grant or refuse to grant restitution in case of the variation or the reversal of the decree and that, it is obligatory on the part of the Court to order restitution, as held by the Hon'ble Apex Court in the case of *Ganesh Parshad Vs. Adi Hindu Social Service*, 1975 AIR(AP) 310, relied upon by learned counsel for the Appellants. However, if the parties themselves are giving up that right, by arriving at an understanding and mutual agreement, which agreement is recorded by the first Appellate Court, that the Suit itself be decided expeditiously and Appeal may be disposed of with that direction, then, it automatically follows that the Appellants had not pressed that right of restitution before the first Appellate Court. It is pertinent to note that, though the very Appeal was preferred against the order passed by the Trial Court of rejecting their application for restitution, the Appellants had agreed that, instead of touching to the merits of the order passed by the Trial Court on the application filed under Section 144 of the CPC, that Suit itself be decided.

13. Things would have been different, if the Appellants had approached the first Appellate Court against some other order like dismissal of the Suit and in that Appeal, the first Appellate Court had ignored or missed the application filed under Section 144 of CPC.

Conversely, the Appellants have challenged the very order of rejection of the application filed under Section 144 of CPC, and they allowed that Appeal to be disposed of by giving direction to the Trial Court to decide the Suit expeditiously. Therefore, if any order is passed by way of mutual agreement and understanding arrived at between the parties, then, such order is immune from challenge in this Court; especially when the Second Appeal can be admitted only on the substantial question of law and there is no substantial question of law raised herein, as whatever order is passed by the first Appellate Court is purely and simply on the basis of the mutual agreement arrived at between the parties and on their statements that the Appeal be disposed of with a direction to the Trial Court to decide the Suit itself.

14. In my considered opinion, therefore, the impugned order passed by the first Appellate Court does not call for any interference. The Second Appeal, therefore, being devoid of merits, stands dismissed.

15. Considering that the Suit is of the year 1974 and the first Appellate Court has already expedited the hearing of the said Suit, the Trial Court is directed to make every endeavour to dispose of the Suit within the stipulated period of six months from the date of receipt of the order of this Court.

16. In view of dismissal of the Second Appeal, Civil Application No.882 of 2002 pending therein does not survive and the same stands disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]