

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2639 OF 2019

Mahendra V. Rathod

...Petitioner

Versus

Shyamsunder V. Naring (since deceased)

Through LRs and others.

...Respondents

....

Mr. S.M. Vyas, Advocate for the Petitioner.

Mr. Bipin J. Joshi, Advocate for Respondents No.1(a) & 1(b).

....

CORAM : R. G. KETKAR, J.

DATE : 15th APRIL, 2019

P.C.

1. Not on board. At the request of Mr.Vyas taken up in the production board.
2. Heard Mr. S.M. Vyas, learned counsel for the petitioner and Mr.Bipin J. Joshi, learned counsel for respondents No.1(a) & 1(b), at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'defendant No.3', has challenged the judgment and order dated 18.10.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai in 2b(iv) Appeal No.317/2004 as also the order dated 16.11.2018 passed by the Appellate Bench in Review Application No.14/2016.
4. Mr. Vyas, on instructions, seeks leave to delete respondents

No.2 to 4. Leave to delete respondents No.2 to 4 is granted. Amendment shall be carried out forthwith.

5. Rule. Mr.Joshi waives service on behalf of respondents No.1(a) & 1(b). Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing

6. Respondents No.1(a) and 1(b), the legal heirs and representatives of Shamsunder V. Naring, hereinafter referred to as the 'plaintiffs', had instituted R.A.E. Suit No.965/3493 of 1982 against present petitioner and others. By order dated 14.10.2002 the suit was decreed exparte. Defendant No.3 took out Misc. Notice No.97/2003 for setting aside exparte decree as also for restitution of the possession as contemplated by Section 144 of Code of Civil Procedure, 1908 (for short, 'C.P.C.'). By order dated 18.11.2003, the learned trial Judge partly made Notice absolute. Exparte decree dated 14.10.2002 was set aside after condoning the delay. The prayer made by defendant No.3 for restitution of the suit premises was rejected.

7. Aggrieved by this order, defendant No.3 preferred appeal being 2b(iv) Appeal No.317/2004 before the Appellate Court. By the impugned order dated 18.10.2014, the Appellate Court allowed the appeal and set aside the judgment and order dated 18.11.2003 passed by the trial Court in Misc. Notice No.97/2003. The Appellate Court gave

liberty to defendant No.3 to approach the Court of first instance to seek restitution of possession of the suit premises vide Section 144(1) Explanation (a) of C.P.C.

8. Defendant No.3 filed Review Application No.14/2016 on the ground that by clause-2 of the operative part of the order the Appellate Court set aside the order of the trial Court order setting aside trial Court's order exparte decreeing the suit. Result of setting aside trial Court's order amounted to dismissal of his application under Order IX Rule 13 of C.P.C. for setting aside exparte decree. In that event, clause-3 of the operative part of the impugned order will be an exercise in futility. The Appellate Court, however, rejected Review Application on the ground that under Order XLVII of C.P.C. unless there is an error apparent on the face of the record, the order cannot be reviewed. He, therefore, submitted that the order dated 18.10.2014 and 16.11.2018 passed in Review Petition deserves to be set aside. He submitted that the prayer for restitution of the suit premises may be granted.

9. On the other hand, Mr. Joshi supported the impugned orders. He submitted that the learned trial Judge, after considering the fact that defendant No.3 alone is not in exclusive possession of the suit premises but defendants No.1, 2 and 4 were also in possession of the suit premises, declined to order restitution. The learned trial Judge was further of the view that it will be unjust and inequitable to handover the possession of

the suit premises in favour of defendant No.3 alone. He submitted that the Appellate Court has considered the decision of **Binayak Swain Vs. Ramesh Chandra Panigrahi and another**, AIR 1966 S.C. 948. The Appellate Court also considered the decision in **The State Bank of Saurashtra Vs. Chittaranjan Rangnath Raja and another**, AIR 1980 SC 1528 and observed in paragraph-24 that it is the discretion of the Court of first instance to determine the issue of restitution of possession. The Appellate Court cannot confer itself with that power. He submitted that a bare reading of the operative part of the impugned order passed by the Appellate Court demonstrate that the Appellate Court reserved liberty to defendant No.3 to approach the Court of first instance to seek restitution of possession of the suit premises.

10. Insofar as the order in Review Application is concerned, he submitted that as there is no error apparent on the face of record, the Appellate Court was justified in dismissing Review Application. He, therefore, submitted that no case is made out for interfering with the impugned orders.

11. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As mentioned earlier, the suit instituted by the plaintiffs was decreed *ex parte* on 14.10.2002. Defendant No.3 took out Misc. Notice No.97/2003 *inter alia* praying for setting aside *ex parte* decree after

condoning the delay and for restitution of possession of the suit premises.

12. By order dated 18.11.2003, the learned trial Judge made Misc. Notice partly absolute. Exparte decree dated 14.10.2002 was set aside after condoning the delay. The prayer-C of defendant No.3 to order restitution of possession of the suit premises was rejected. It is material to note that the plaintiffs did not challenge setting aside exparte decree by the trial Court. In other words, the plaintiffs accepted setting aside exparte decree dated 14.10.2002. It is only defendant No.3 preferred appeal. The Appellate Court considered Section 144 with Explanation thereto and the decisions of Apex Court in **Binayak Swain** (supra) and **The State Bank of Saurashtra** (supra). In paragraph-24, the Appellate Court observed thus :

“24. In the light of above it has become crystal clear that it is the discretion of the court first instance to determine the issue of restitution of possession. Accordingly this Court can not confer itself with that powers.”

13. A perusal of the impugned order of the Appellate Court shows that the Appellate Court has not recorded any finding as to whether the discretion exercised by the Court of first instance was properly exercised or not. The Appellate Court also failed to appreciate that defendant No.3 has prayed for restitution of possession by approaching the Court of first instance. The operative part of the order dated 18.10.2014 and in particular clauses -1 to 3 read thus :

- “1. The Appeal is allowed.
2. Judgment and order in Misc. Notice No.97 of 2003 is quashed and set aside.
3. The Appellate is at liberty to approach the 'Court of first instance' to seek restitution of the possession of the suit premises, Vide Section 144(1) Explanation (a) of the Code of Civil Procedure, 1908.”

14. A perusal of clause-1 of the operative part of the order shows that the Appellate Court allowed the appeal preferred by defendant No.3. Clause-2 thereof shows that the judgment and order of the trial Court in Misc. Notice No.97/2003 was quashed and set aside. I fail to understand how after having allowed the appeal preferred by defendant No.3 the Appellate Court can set set aside the trial Court's order which was not challenged by the plaintiffs. That apart the effect of clause-2 of the operative of the order is that though the trial Court set aside exparte decree after condoning the delay, the Notice filed by defendant No.3 stands dismissed. If that is the effect of clause-2 of the operative part of the order in that event, liberty given by the Appellate Court to defendant No.3 to approach the Court of first instance to seek restitution of possession of the suit premises as per Section 144 of C.P.C. is an exercise of empty formality as unless exparte decree is set aside defendant No.3 cannot seek restitution of possession. In short, the order passed by the Appellate Court shows total non-application of mind and cannot allow to stand.

15. A perusal of the order on Review Application shows that

instead of correcting the error the Appellate Court observed that no ground was made out under Order XLVII for reviewing the order. The approach of the Appellate Court in that regard is perverse to say the least. The orders impugned in the present petition are liable to be set aside. Hence, the petition is disposed of as under :

- i. The impugned judgment and order dated 18.10.2014 passed by the Appellate Bench of the Small Causes Court at Mumbai in 2b(iv) Appeal No.317/2004 is set aside. The order dated 16.11.2018 passed by the Appellate Bench in Review Application No.14/2016 is also set aside.
- ii. 2b(iv) Appeal No.317/2004 is restored to its original position. The learned Counsel appearing for Defendant No.3 and plaintiffs No.1(a) & 1(b) assure that they will appear before the Appellate Court on 30.4.2019 and for that purpose no fresh notice be issued to them.
- iii. The Appellate Court will examine whether the learned trial Judge has exercised the discretion properly and validly and whether defendant No.3 has made out a case for restitution of the possession of the suit premises.
- iv. All contentions of the parties in that regard are expressly kept open.
- v. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)