

jsn

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3649 OF 2018

Smt. Urmila Bhagwanji Shah

...Petitioner

Versus

Smt. Gitanjali Girish Bamne & Ors.

...Respondents

Mr. Mandar Soman with Hardik Joshi for the Petitioner.

Mr. Kunal Bhanage, for the Respondent Nos.1 to 3.

CORAM : R.I. CHAGLA J

DATE : 25TH NOVEMBER, 2022

ORDER :

1. Heard learned Counsel for parties.
2. By order dated 22nd March, 2018, this Court had considered appropriate for the Petition to be disposed of finally at the stage of admission. In view thereof, the Petition is being heard and disposed of by this order.
3. The Writ Petition challenges the order dated 17th February, 2018 passed in Miscellaneous Appeal No.23 of 2014 in the

Execution Application No.53 of 2013 in RAE Suit No.300/560 of 2009 and seeks restoration of possession of Room No.2 to the Petitioners.

4. The Petitioner was a tenant of Room No.2 situated at 1st Floor, Om Shri Jogeshwari Nivas, Roshan Nagar, Chandravarkar Road, Borivali (W), Mumbai 400 092 (“the said Room”). The Respondents are the landlords in respect of the said Room.

5. The Petitioner’s case is that on 20th July, 2013 in the evening at about 3.30 p.m. when the Petitioner had gone to the Jain Temple in nearby area, the Respondents in the absence of the Petitioner took possession of the said Room between 4 p.m. to 5.30 p.m. in execution of the decree and judgment dated 25th November, 2011 passed in Execution Application No.53 of 2013. The bailiff Shri Tawde broke open the lock and also prepared an inventory of the articles belonging to the Petitioner which were inside the said Room.

6. In the trial before the lower Court, the Respondent had filed a photocopy of the counterfoil of Rent Bill No.250 for the period April, 2007 to May, 2007 by describing the said Room as Room No.3 issued in the name of the Petitioner. The Petitioner’s case is that the

receipt was created and illegally prepared by the Respondent. The Respondent had been issued all rent receipts form the year 2004 which described the said Room as Room No.2 or 2-A. The Petitioner was never issued any rent receipt describing the said Room No.3.

7. The Petitioner's contention is that she was not aware of the Suit being filed against her and that there is no proper and / or legal service of the Writ of Summons on the Petitioner. The Petitioner came to know about the Suit only when the Respondent illegally took possession of the Petitioner's said Room No.2.

8. The Petitioner had filed Marji Application No.220 of 2013 for setting aside the exparte decree and judgment dated 25th November, 2011 and for restoration of the possession of the said Room and for injunction. The Marji Application was rejected. Thereafter, the Petitioner filed Miscellaneous Appeal No.23 of 2014 against the said order dated 11th April, 2014. The Miscellaneous Appeal was partly allowed. However, the prayer for restoration of the possession of the said Room to the Petitioner was rejected. Being aggrieved by the order and judgment dated 17th February, 2018 passed by the Trial Court No.31, the Petitioner has filed the present Petition.

9. Mr Soman the learned Counsel for the Petitioner has referred to the impugned judgment and order and in particular paragraph 12 thereof, wherein the contention of Defendant is recorded that she is residing in the said Room no.2 and not Room no.3. The Plaintiffs have fraudulently shown suit premises as Room no.3 and tried to serve the suit summons at Room no.3. The Plaintiffs had thereafter obtained exparte decree and executed the decree against the said Room No.2.

10. Mr. Soman has further referred to paragraph 14 of the impugned judgment and order wherein the Trial Court has noted the contention of the Defendant that the Plaintiffs have filed RAE Suit No.559 of 2009 against another tenant Smt. Deepika Goradia in respect of Room no.3 in the suit building and obtained exparte decree therein. However, the rent receipt issued by the Plaintiffs to Smt. Deepika Goradia showed that she is a tenant of Room No.4. The Plaintiffs have not denied the filing of RAE Suit No.559 of 2009 mentioning Room no.3 being the suit premises against Mrs. Deepika Goradia and obtaining exparte decree in that Suit. Mr. Soman has thereafter referred to Paragraph 15 of the impugned judgment wherein the Court has considered that the Plaintiffs had not

explained how they filed the Suit against Mrs. Deepika Goradia regarding Room No.3, when in the present Suit they have contended that the Defendant is tenant of Room No.3. The submission of the learned Advocate for the Plaintiffs is noted in Paragraph 16 that the Suit building is a small one and there is only the Defendant by surname 'Shah' who is residing in the said building and the Defendant was very well knowing about the service of suit summons and filing of the Suit filed against him. This submission has not been accepted for want of proper service of suit summons on the Defendant at the address of the said Room No.2.

11. The Trial Court has thereafter held that, the Defendant had shown that she has not been duly served with the Suit summons and therefore remained absent for hearing of the Suit. In paragraph 19 of the impugned judgment, it has been held that though the Defendant has not been served with the Suit summons, the issue as to whether the Defendant is using the Suit premises or not using the Suit premises and kept it locked is a matter of merit. Accordingly, the Court has considered that merely the decree being executed against the Defendant illegally cannot give right to the Defendant to be restored the possession of the Suit premises. The

Court below ordered that restoration of possession of the Suit premises to the Defendant cannot be considered at this stage. Accordingly answer to issue Nos.4 and 5 which issues are whether the Defendant is entitled to be restored the possession of the Suit premises and whether the Order dated 11th April, 2014 in MARJI No.220 of 2013 is legal and proper are in the negative.

12. Mr. Soman has referred to the decision of this Court in ***Krishna Awaji Ghadge Vs. Bapu Kalu Ghadge***¹, wherein this Court in paragraph 4 has held that, it is clear from the language of Section 144 of the Code of Civil Procedure, 1908 that the right to restitution is absolute and the Court of first instance has no discretion in the matter. It is bound to grant restitution if the conditions laid down by the section are satisfied. This Court has referred to the decision of the Supreme Court in ***Lal Bhagwant Singh Vs. Rai Sahib Lala Sri Kishen Das***² wherein it has been held that “the doctrine of restitution ... is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that

¹ 1957 SCC OnLine Bom 261.

² (1953) S.C.R. 559.

obligation unless it is shown that restitution would be clearly contrary to the real justice of the case”.

13. Mr. Soman has also relied upon the decision of this Court in the case of *S.M. Deshmukh Vs. Ganesh Krishna Khare*³ wherein this Court in paragraphs 20 and 21 have considered the application for restitution arising out of setting aside of an ex parte decree under Order 9, Rule 13 and held that such an application falls within the purview of Section 144 which has received liberal construction. He has submitted that the Division Bench of this Court in paragraph 21 of the said decision has referred to the prior law including the decision in *Krishna V. Bapur Kalu*⁴ and held that it was obligatory on the Trial Court to grant restitution in the manner provided by Section 144 including restoration of the possession of the property to the landlord.

14. In that case both Trial Court and Appellate Court of Small Cause Court had taken an erroneous view that Section 151 applied and failed to exercise their jurisdiction under Section 144. Further, it can be seen from the facts of that case, that the Respondent landlord had been confined to a lunatic asylum wanted

³ 1973 SCC OnLine Bom 38.

⁴ 60 Bom LR 487

the premises for his bona fide use. However, it was considered that the Respondent having relapsed into insanity was not residing in the suit premises but was removed to the lunatic asylum. It was pointed out that prior to the filing of the Suit by the Respondent the Petitioner had left the premises, having acquired a suitable flat elsewhere and that the Petitioner had also got his ration card issued in his name at his new place. However, inspite of the Petitioner not staying in the said premises, the Court had restored the possession of the Petitioner and members of the family on reversal of ex-parte decree as restoration arises automatically. The Respondent landlord was accordingly directed to handover possession of the said premises to the Petitioner.

15. Mr. Soman has accordingly submitted that the Court below had erroneously observed in paragraph 19 of the impugned judgment that whether the Defendant is using the Suit premises or not is a matter of merit. It was submitted that following the law laid down by this Court in the above decisions, once the Court has reversed the ex-parte order by which the possession had been taken from the Defendant, restoration arises automatically and the Trial Court had no discretion in the matter.

16. Mr. Bhanage learned Counsel for the Respondents has submitted that there is a dispute as to whether the Petitioners (Defendant in the said Suit before the Trial Court) were residing in the said Room No.2. He has submitted that the Court below considered that the Defendant is not using the said Room, since many years. The Court below accordingly held that the issue as to whether the Defendant is using the Suit premises or not using the Suit premises and kept it locked is a matter of merit. Accordingly, the said Room was not restored to the Defendant in view of it being a subject matter of trial. He has submitted that Section 144 of the Code of Civil Procedure which provides for an application of restoration is necessarily on the premise that by way of restoration, the party shall be placed as far as may be in a possession that the party would have occupied but for such decree. In view of there being an issue raised as to whether the Petitioner was in fact in possession of the said Room No.2 which requires trial, restitution does not follow.

17. Mr. Bhanage has submitted that the application could not have been made for restoration under Order 9 Rule 13 of the Code of Civil Procedure and a separate application should have been filed under Section 144 of the Code of Civil Procedure for

restoration as Order 9 Rule 13 only contemplates setting aside the decree. The Petitioners have not taken any steps to file a separate application under Section 144 and thus the trial Court could not have granted restoration.

18. Having considered the rival submissions, it is noted that the Court below had arrived at a finding that the Petitioner / Defendant was not duly served with the Suit summons and therefore, remained absent at the hearing of the Suit. Accordingly, the exparte decree passed against the Defendants was set aside. However, restoration of possession to the Defendant was not granted though the bailiff had executed the possession warrant in respect of the said Room No.2.

19. Section 144 of the Code of Civil Procedure is required to be set out which as under:-

“(1) Where and in so far as a decree [or an Order] is [varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose the Court which passed the decree or Order] shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree [or Order] or

[such part thereof as has been varied, reversed, set aside or modified], and, for this purpose, the Court may make any Orders, including Orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly [consequential on such variation, reversal, setting aside or modification of the decree or Order.]”

20. By the said provision, an application for restitution can be made by the party who is entitled to benefit by way of restitution where the decree is set aside and the Court upon entertaining such application requires restitution to be made by placing the parties in the position which they would have occupied be but for such decree.

21. The decisions of this Court in *Krishna Awaji Ghadge (Supra)* and *S.M. Deshmukh (Supra)* have considered Section 144 of the Code of Civil Procedure. Reliance has been placed upon the *Lal Bhagwant Singh (Supra)*, wherein the Supreme Court has held that on reversal of judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost. It is the duty of the Court to enforce that obligation unless it is shown that the restitution was clearly contrary to the real justice of the case. This Court has in the above decisions held that the right to restitution is absolute and the Court of first instance has no discretion in the

matter.

22. In the present case as the lower Court had set aside the ex-parte decree, the Court had an obligation to grant restoration to the Defendants / Petitioners herein, particularly considering that the possession warrant had been executed against the Defendant in respect of the said Room No.2.

23. The view taken by the lower Court that merely because the decree in execution is illegal cannot give a right to the Defendant to be restored possession of the Suit premises is erroneous apart from being contrary to the law laid down by the Supreme Court and followed by this Court. The judgment and order of the Appellate Bench of the Small Causes Court dated 17th February, 2018 accordingly requires to be set aside to the extent of non grant of restoration to the Defendant. Hence, the following order is passed:-

(i) The impugned order dated 17th February, 2018 of the Appellate Bench of the Court of Small Causes at Bombay to the extent of non grant of restoration of the Suit premises to the Defendant is set aside.

(ii) The Petitioners are directed to restore the possession of the

said Room No.2 on the Ground Floor, Om Shri Jogeshwari Niwas, Roshan Nagar, Chandavarkar Road, Borivali (W), Mumbai 400 092 along with articles as per the inventory made by the bailiff on 20th July, 2013 to the Defendant / Petitioner herein within a period of two weeks from the date of uploading of this Order.

(ii) The Writ Petition is accordingly disposed of.

[R.I. CHAGLA J.]