
(1957) 12 BOM CK 0021

In the Bombay High Court

Case No : Civil Application No. 2449 of 1957 for stay in Second Appeal No. 1775 of 1957

Krishna Awaji Ghadge

APPELLANT

Vs

Bapu Kalu Ghadge and Others

RESPONDENT

Date of Decision : 20-12-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, 144, 144(1)

Citation : AIR 1959 Bom 490 : (1958) 60 BOMLR 487 : (1958) ILR (Bom) 786

Hon'ble Judges : Tendolkar, J

Bench : Single Bench

Advocate : L.P. Pendse, for the Appellant; V.V. Albal, for the Respondent

Judgement

1. This is an application for stay of a degree and the application has been referred to me by the Registrar because a question of law on which there is no authority has been raised on behalf of the opponents.

2. The facts are that one Awaji died leaving the respondents as his illegitimate heirs and the plaintiff as his legitimate heir. The trial Court held that Awaji was a Kshatriya and as the respondents were illegitimate they could not succeed as a legitimate heir was available, and he, therefore, decreed the suit in favour of the plaintiff. In pursuance of this decree the plaintiff-appellant obtained possession of the immovable property from the respondents who were then in possession. Upon appeal the Assistant Judge of Satara held that Awaji was a Shudra and, therefore, illegitimate children could inherit along with the legitimate children.

He, therefore, allowed the appeal and dismissed the applicant's suit. It is against the dismissal of the suit by the Assistant Judge, Satara, that this appeal has been filed and Mr. Pendse, who appears for the appellant, urges in favour of the stay application that his client is in possession, great loss will be caused to him if stay is not granted and that he is prepared to give security for the due performance of such decree as may be passed in the second appeal. He says - it is admitted by Mr. Albal - that normally he would have been entitled to a stay if we were dealing

with a case where to principle of restitution was involved.

Mr. Albal opposes the application for stay on the ground that his clients have become entitled to restitution u/s 144 of the Civil Procedure Code, that they were originally in possession, they were dispossessed by the decree of the trial Court, and since that decree is now reversed, they are entitled to restitution of the property which was in their possession and which went into the possession of the appellant only as a result of an erroneous judgment.

3. Both Counsel appearing before me have intimated to me that they have been unable to find any decided case on this question of law; and the question must, therefore, be determined, unhampered by any authority, on the provision of the Code, Section 144, Sub-section (1), in so far as it is relevant, enacts:-

"Where and in so far as a decree is varied or reversed, the Court of first instance 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 such part thereof as has been varied on reversed;....."

Now, it is clear from the language of the section that the right to restitution is absolute and the Court of first instance has not discretion in the matter. It is bound to grant restitution if the conditions laid down by section are satisfied. The principle on which restitution is granted in such cases was stated by their Lordships of the Supreme Court in Lal Bhagwant Singh Vs. Rai Sahib Lala Sri Kishen Das,

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

Therefore, the moment we have a case where a party obtained possession of property in execution of a decree of the first Court and such decree is reversed by the appeal Court, the person who was dispossessed by the trial Court gets an immediate right of restitution. Mr. Pendse contends that this right, although absolute in character, does not become a right if the judgment by virtue of which it arises is subject to a second appeal. I cannot countenance any such suggestion. The filing or admission of the second appeal does not make the decree appealed from wrong or erroneous.

Until the decree is set aside in second appeal, the decree of the First appeal Court is valid and effective, and the right to restitution given u/s 144 accrues to the party in whose favour the judgment of the appeal Court is an who had been originally dispossessed. As I have said earlier, the very language of the section shows that the Court of first instance is bound to grant restitution and the Court has no discretion in the matter. IN such a situation then, has this Court in second

appeal the right to grant a stay the effect of which is to deprive the party who has the judgment of the Court of appeal in his favour of his right of restitution?

There is obviously a difference between a case where a decree for possession is passed, whether by the trial Court or by the Court of appeal, and a stay is applied for either before the Court of appeal or before this Court of second appeal as the case may be, and a case where the property involved was in the possession of one party and went into the possession of another by reason of a judgment and decree which judgment or decree was reversed in appeal, and the stay is asked for in the second appeal. In the former class of cases the discretion of the Court to grant stay will be exercised in accordance with the provisions of Order 41, Rule 5; but in the latter class it appears to me that the effect of the Court's granting a stay would be to deprive the party who succeeded before the Court of first appeal of a right of restitution which is conferred upon him in absolute terms by Section 144. Indeed, I should think that the Court has no jurisdiction to deprive such a party of the right conferred upon him by statute. Therefore, in my opinion, the submission of Mr. Albal must succeed, and because if a stay is ordered it would negative the right of restitution which the respondents have acquired in this case, rule for stay will be discharged.

4. Costs in the Second appeal.

5. Order accordingly.