

(2010) 09 BOM CK 0158

In the Bombay High Court

Case No : Second Appeal No. 68 of 2000

Mr. Datta Raghoba Sawant (since deceased through L.rs. Mrs. Bhanumati Datta Sawant and Others) APPELLANT

Vs

Mr. Ashok Tukaram Naik Salgaonkar and Mr. Uday Tukaram Naik Salgaonkar, Both Partners of Laxmi Moto Service RESPONDENT

Date of Decision : 15-09-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 144(1), 144(2), 151

Citation : (2011) 7 ALLMR 166 : (2011) 1 BomCR 209

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : Shivan Dessai, for the Appellant; S.D. Lotlikar and P. Lotlikar, for the Respondent

Final Decision : Allowed

Judgement

A.P. Lavande, J.—By this appeal, the appellants/defendants have challenged Judgment and decree dated 21.3.2000 passed by the Additional District Judge-II, North Goa, Panaji, in Miscellaneous Civil Appeal No. 142 of 1999 setting aside the order dated 14.10.1999 passed by the Civil Judge Senior Division, Mapusa allowing an application u/s 144 of CPC filed by the appellants/defendants.

2. Briefly, the facts relating to filing of the present appeal are as under:

The respondents filed Civil Suit No. 51/1978 in the Court of Civil Judge Senior Division, Mapusa seeking permanent injunction in respect of the suit shop situated in Mascarenhas building near Municipal garden Mapusa, against the original appellant No. 1 Datta Raghoba Sawant and appellant No. 2. In the suit, the respondents claimed that they were in possession of the suit shop and the appellants had trespassed in the said shop. Along with the suit, an application for temporary injunction was filed. The learned trial Judge granted ex parte injunction restraining the defendants from entering the suit shop and from interfering in any manner and from obstructing the plaintiffs from their

enjoyment of the suit shop. On the same date, the plaintiffs/respondents sought police protection which was granted. The appellants contested the suit. Against the order of injunction, the appellants/defendants preferred Miscellaneous Civil Appeal No. 41/1978 before the Judicial Commissioner's Court at Panaji. The Judicial Commissioner's Court by order dated 12.10.1978 directed that out of the two rooms of the suit shop, the respondents would operate their business in the front room and the defendants would operate their business in the rear room with right to access to the said room. The said arrangement was to continue till the disposal of the appeal. By order dated 13.3.1979, Miscellaneous Civil Appeal No. 41/1978 was disposed of by maintaining the earlier order, till dismissal of the suit. Thereafter, on 3.3.1996 the defendants filed an application for amendment of the written statement and also sought a prayer seeking direction against plaintiff to put the defendants in possession of the shop. The said application was dismissed. Both the parties led evidence. The learned Civil Judge, Senior Division, Mapusa, by Judgment and Decree dated 9.4.1987, dismissed the suit holding that the plaintiffs had failed to prove that they were in possession of the suit shop on the date of filing of the suit. The learned trial Judge in paragraph 44 of the judgment held that the defendants were in possession of the suit shop on the date of filing of the suit and the plaintiffs under the garb of protecting their possession with the aid of the order of the Court used ex parte injunction to dispossess the defendants from the suit shop. Consequently, the trial Judge dismissed the suit filed by the plaintiffs simplicitor for injunction. Regular Civil Appeal No. 18/87 preferred to the District Court was dismissed by the learned Additional District Judge, Mapusa, by judgment and order dated 27.11.1995. In paragraph 8 of the judgment, the Appellate Court observed that PW.1 Ashok T. Naik Salgaonkar (plaintiff No. 1) had admitted in cross examination that they had thrown the defendant No. 1 out of the suit premises after obtaining injunction from the Court and after taking police assistance. The Appellate Court held that the plaintiffs were dispossessed from the suit shop by obtaining ex parte injunction from the Court. Thereafter, Second Appeal preferred by the respondents was dismissed by order dated 15.3.1996 holding that no substantial question of law was involved.

3. On 19.9.1996 the appellants filed an application u/s 144 and/or Section 151 of CPC for restitution seeking eviction of the plaintiffs from the front room of the suit premises. The said application was contested by the respondents herein. The learned Civil Judge, Senior Division, Mapusa by order dated 14.10.1999 allowed the application and directed the respondents to hand over possession of the front room to the appellants herein.

4. The respondents preferred Miscellaneous Civil Appeal No. 142/1999 before the District Judge, North Goa, Panaji which was made over to the Additional District Judge, Panaji. The Appellate Court by judgment and order dated 21.3.2000 allowed the appeal holding that Section 144 of C.P.C was not attracted and appropriate remedy for the appellants was to file a suit. Aggrieved by the judgment and decree passed by the Appellate Court, the appellants/defendants

filed the present second appeal.

5. The second appeal was admitted on the following substantial questions of law:

- 1) Whether application u/s 144 C.P.C. was barred by law of limitation?
- 2) Whether application u/s 144 of C.P.C. was maintainable in view of rejection of the amendment application dated 3/3/1986 moved by the Appellants in the suit and whether the said rejection amounts to rejection of counter-claim?
- 3) Whether Appellants' remedy was by way of separate suit?
- 4) Whether findings reached in the impugned appellate decree are perverse?

6. Mr. Shivan Dessai, learned Counsel for the Appellants took me through the entire record and submitted that the finding given by the Appellate Court that the application u/s 144 of C.P.C is not maintainable is patently unsustainable in law. He further submitted that dismissal of amendment application dated 26.6.1986 filed by the appellants cannot operate as *res judicata* and come in the way of appellants from filing the application u/s 144 of C.P.C. He further submitted that dismissal of cross appeal filed by the appellants in the appeal filed by the plaintiffs/respondents would not also come in the way of the appellants from seeking relief u/s 144 C.P.C. He further submitted that the findings recorded by the Appellate Court are patently unsustainable in law and, therefore, the impugned judgment and decree passed by the Appellant Court is liable to be set aside. Learned Counsel submitted that trial Court had correctly appreciated the factual and legal position and granted relief claimed by the appellants u/s 144 of C.P.C. In support of his submissions, the learned Counsel placed reliance upon the following judgments:

1. Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, .
2. South Eastern Coalfields Ltd. v. State of M.P. and Ors. (2003) 8 SC 648.
3. Jai Berham and others V. Kedar Nath Marwari and others, 49 Indian Appeals 351 .

7. Per contra, Mr. Lotlikar, learned Senior Counsel appearing for the respondents submitted that since the amendment sought by the appellants by way of counter claim was dismissed by the trial Court and the cross appeal filed by the appellants in appeal preferred by the respondents against the decree passed by the trial Court was also dismissed, the application u/s 144 of C.P.C. was not maintainable. According to the learned Counsel the suit was simplicitor for permanent injunction and the respondents/plaintiffs had not sought eviction of the appellants and therefore the application filed by the appellants u/s 144 was not maintainable. According to the learned Counsel, even assuming that the case of the appellants that they were dispossessed by the respondents by abusing the *ex parte* order dated 14.8.1978 is accepted, application for restitution u/s 144 of C.P.C. would not be maintainable. According to the learned Counsel, it is only if the appellants were dispossessed pursuant to the order passed by the Court and

not because the respondents abused the order passed by the court, the application for restitution would be maintainable. Learned Counsel urged that since the application for amendment filed by the appellants in the suit to raise counter claim was dismissed and the same was upheld in appeal by dismissal of the cross appeal preferred by the appellants, the application u/s 144 of C.P.C was not maintainable. Learned Counsel further submitted that according to the appellants at the most it can be said that they were forcibly dispossessed by the respondents otherwise than by due course of law and therefore, the proper remedy for the appellants would be to file a suit based on title. Learned Counsel therefore, submitted that the appeal deserves to be dismissed.

8. I have carefully considered the rival submissions and perused the record and judgments relied upon.

9. The trial Court in its order dated 14.10.1999 after making reference to the various orders passed from time to time in the proceedings between the parties held that respondent No. 1 had admitted in his cross examination that they had been thrown out by defendant No. 1 from the suit premises after obtaining injunction in the suit and taking police assistance. He further stated that the plaintiffs forcibly entered the suit premises after obtaining injunction from the court and taking police aid, dispossessed defendant No. 1 from the suit premises. The trial Court also held that the appellants were in possession of the suit premises until they were evicted by the order of the Court dated 14.8.1978.

10. The Appellate Court heavily relied on the fact that the application for amendment seeking counter claim was dismissed by the trial Court by order dated 26.8.1986 and that the cross appeal filed by the appellants was also dismissed along with the appeal preferred by the respondents. The Appellate Court held that the order dated 26.6.1986 passed by the trial Court had become final and, as such, was binding on the appellants. The Appellate Court also held that in terms of Section 144 C.P.C., having regard to the factual background, suit was the appropriate remedy for the appellants. The Appellate Court further held that it was not the case of the appellants that by the order of the Court, they had been dispossessed and therefore, application u/s 144 of C.P.C. for restitution was not maintainable.

11. In order to appreciate the rival contentions it would be appropriate to quote Section 144 of the Civil Procedure Code, which reads thus:

Section 144. Application for restitution- (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 purposes, 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.

(Explanation? For the purposes of Sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include,-

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit).

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under Sub-section (1).

12. In terms of Section 144, if a decree or order is varied or reversed either in appeal, revision or other proceedings, or order is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order is bound at the first instance, 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 or reversed 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 or reversal. In terms of Sub-section (2), no suit for the purpose of obtaining any restitution or other relief which could be obtained by application under Sub-section (1) would lie.

13. In the present case, as stated above, the trial Court while dismissing Special Civil Suit No. 51 of 1978 held that the defendants were in possession of the suit shop and the plaintiffs under the garb of protecting their possession, with the aid of the order of the Court used ex parte order to dispossess the defendants from the suit shop. The Appellate Court after referring to the admission made by the plaintiff No. 1 in his cross examination held that the plaintiffs had thrown the defendant No. 1 out from the suit property after obtaining the injunction from the court and after taking police assistance. The Appellate Court also held that the plaintiffs were not in possession of the suit shop on the date of filing of the suit.

14. At this stage, I would deal with the authorities relied upon by Mr. Dessai. In the case of Mahajibhai Mohanbhai Barot (supra), the Apex Court in paragraph 23 referred to the decision of Privy Council AIR 1922 269 (Privy Council) , which reads as follows:

It is the duty of the court u/s 144 of the CPC to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

The section, to avoid the earlier conflict prescribes the procedure, defines the powers of the Court and expressly bars the maintainability of a suit in respect of a relief obtainable under this section. The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of the restitution clear and unambiguous. It does not say that an application for restitution, which till the new Procedure Code was enacted, was an application for execution, should be treated as an original petition. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party, who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceedings, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enable him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. Prima facie, therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree.

15. The Apex Court further held that application u/s 144 of the code could not be considered as application for execution. In the case of South Eastern Coalfields Ltd. (supra), the Apex Court in paragraph 26 observed thus:

The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see *Zafar Khan v. Board of Revenue, U.P.*). In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss caused to another (see *Black's Law Dictionary, 7th Edn., p.1315*)

16. The Apex Court further observed thus:

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the court merges into a final

decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

17. As stated above, the trial as well as the Appellate Court gave the finding that under the garb of ex parte injunction order the plaintiffs dispossessed the defendants from the suit shop. This finding has reached finality. It is quite evident that on the date of filing of the suit the plaintiffs were not in possession of the suit shop. This being the position, in my considered opinion, the ratio laid down in the case of Mahijibhai Mohanbhai Barot (supra), and in the case of South Eastern Coalfields Ltd. (supra) is squarely applicable in the present case. The plaintiffs obtained ex parte injunction order against the defendants who were in possession of the suit shop and with the aid of the said order dispossessed the defendants from the suit shop. I am unable to accept the submission of Mr. Lotlikar that the respondents/plaintiffs did not dispossess the defendants by virtue of ex parte injunction order. The record clearly discloses that the plaintiffs claimed that they were in possession of the suit shop and represented to the Court that the defendants had just trespassed in the suit shop and on this pleading obtained an ex parte injunction order. This was nothing, but a clear fraud played by the plaintiffs on the Court and the same is clearly borne out from the findings given by both the Courts below to which I have already made reference herein above. It is, therefore more than evident that by misleading the Court, the respondents obtained an ex-parte injunction against the defendants and evicted them from suit shop. In such a situation, in my considered opinion, Section 144 of the Code is squarely attracted. It was only pursuant to the ex parte order dated 14.8.1978 and the order granting police protection passed by the trial Court that the defendants were dispossessed from the suit shop. Therefore, the defendants were entitled to file an application u/s 144 of C.P.C since they were dispossessed pursuant to the order passed by the Court, which was obtained by the defendants by misleading the Court.

18. I am unable to accept any of the submissions of Mr. Lotlikar made on behalf

of the respondents. Although the suit filed by the plaintiffs was for permanent injunction simplicitor, the fact remains that pursuant to the ex parte injunction order the defendants were dispossessed from the suit shop. Therefore, the submission of Mr. Lotlikar that the application u/s 144 of the Code was not maintainable or that the proper remedy for the defendants was to file a suit, has absolutely no merit.

19. In so far as the submission of Mr. Lotlikar that since the application for amendment seeking counter claim filed by the defendants was dismissed by the trial Court by an order passed in the year 1986 and the cross-appeal filed was also dismissed, and therefore, the present application is not maintainable is concerned, I find absolutely no merit therein. In terms of Sub-section (2) of Section 144, no suit could have been instituted for obtaining any restitution or other relief which could be obtained by application under Sub-section (1). I have already held that the defendants were dispossessed by the plaintiffs pursuant to the ex parte order passed by the trial Court at the instance of the plaintiffs. Therefore, the defendants could not have filed the suit for recovery of possession of the suit shop or any part thereof. Therefore, an application for amendment by way of counter claim filed by the defendants seeking recovery of possession was not maintainable since the defendants were dispossessed only pursuant to an order passed by the Court and not de hors the order. Therefore, the dismissal of the amendment application and dismissal of the cross appeal filed by the defendants would not advance the case of the plaintiffs/respondents. Even if the dismissal of the amendment application by way of counter claim filed by the defendants is considered on merits, the same was dismissed on the ground that it was filed belatedly at the fag end of the trial. No doubt the cross appeal filed by the appellants was also dismissed. But in my considered opinion, the dismissal of the amendment application and the cross appeal filed by the defendants would not come in the way of the appellants from seeking restitution u/s 144 of the Code. In the case of South Eastern Coalfields Ltd. (supra), the Apex Court has held that the successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court or (b) to make restitution for what it has lost and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice would rather defeat the same. The Apex Court further held that undoing the effect of an interim order by resorting to principles of restitution is an obligation on the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

20. In view of the above discussion, I am of the considered opinion that the findings recorded by the Appellate Court are patently unsustainable in law. The Appellate Court has clearly misconstrued the scope of Section 144 of the code

and reversed a well reasoned order passed by the trial Court.

21. Mr. Dessai learned Counsel for the Appellants nor Mr. S.D. Lotlikar, learned Senior Counsel for the Respondents have advanced any argument on the substantial question of law formulated at serial No. 1. All the substantial questions of law are answered against the respondents.

22. In the result, therefore, the impugned judgment and decree dated 21.3.2000 passed by the Additional District Judge, Panaji, in Miscellaneous Civil Appeal No. 142 of 1999 is quashed and set aside. The order dated 14.10.1999 passed by the Civil Judge, Senior Division, Mapusa, in Civil Miscellaneous Application No. 331 of 1996 is maintained. The respondents are directed to hand over possession of the front room of the suit premises to the appellants within a period of two months from today.

23. The appeal is allowed in the above terms with costs which are quantified at Rs. 2500/- (Rupees Two thousand five hundred only).