

(1980) 02 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition No. 284 and C.A. No. 4254 of 1979

Nivrutti Nana Waghmare

APPELLANT

Vs

Narayan Mahadeo Mokal and Others

RESPONDENT

Date of Decision : 04-02-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 5, Order 9 Rule 13, 144, 151
Limitation Act, 1963 — Article 123, 29, 5

Citation : AIR 1980 Bom 250

Hon'ble Judges : Sharad Manohar, J

Bench : Single Bench

Advocate : M.P. Vashi, for the Appellant; N.A. Shah, Kedvani and Co. and V.V. Tulzapurkar, instructed by Bharat and Co., for the Respondent

Judgement

1. The petitioner before this Court was admittedly a tenant in respect of the suit premises which consist of a single room tenement, being room No. 12, Chawl No. 42, situate at Kol Dongri, Andheri, Bombay. The Chawl belongs to the present respondent No. 1, who will be referred to hereinafter as "the respondent",

2. By a notice dated 15-10-1969 the respondent terminated the petitioner's tenancy and demanded the arrears of rent due from the petitioner. However, it is clear that even before this notice, an application was filed by the petitioner, along with the other tenants of the chawl, for fixation of standard rent in respect of the various tenements in the chawl including the suit premises. In those proceedings for fixation of standard rent, the Court also passed an order fixing interim rent with effect from 1-5-1969 at the rate of Rupees 8-00 P. M.

3. Later on, on 1st February, 1971, the respondent gave another notice to the petitioner. In the notice the fact that the tenancy was terminated previously by his notice dated 15th Oct. 1969 was referred to. Likewise the fact that the Court had fixed interim rent with effect from 1-5-1969 was also referred to. By that notice dated 1st Feb., 1971, the respondent alleged that the petitioner had unlawfully sublet the suit premises to another person and that he was not

staying in the suit premises. Statement was made in the said notice that the respondent would file a suit for ejectment against the petitioner in those circumstances.

4. Thereafter on 14-4-1971 an ejectment suit was filed by the respondent in the Court of Small Causes at Bombay, The grounds urged in the said suit were that : (1) the petitioner was in arrears of rent from 1-3-1969 till 13-9-1969 and that (2) the petitioner had unlawfully sublet the suit premises to another person, However, it is common ground before me that this averment regarding arrears of rent was manifestly a mistake, Mr. Vashi, appearing for the petitioner has placed before this Court, a chart showing the various dates on which the amounts of interim rent as fixed by the Court were deposited by the petitioner. Mr. Shah, appearing for the respondent, has admitted the statement as correct. From the said statement it is clear that the petitioner-tenant had gone on depositing the interim rent in the Court mostly from month to month. But this is not all. As a matter of fact, the respondent has even withdrawn the amounts deposited by the petitioner in the Court from time to time. In view of this position the averment in the plaint that the petitioner was in arrears on the date of the suit was clearly erroneous.

5. The petitioner filed his written statement in the said suit on 13-1-1972, He denied that he was in arrears of rent and he pointed out that the application for fixation of standard rent was actually pending in the same Court and that he had gone on depositing the amounts in the said Court. He also denied that he had sublet the suit premises to any other person.

6. This suit was on board on 21-1-1972 for scrutiny. What is meant by this is that this is the first date of hearing on which the Court examines the nature of the contentions of the rival parties in the suit and decides the time when the suit should be fixed for hearing. On that date the suit was ordered to be placed on the priority warned list However, there is no dispute that this means practically nothing. A suit which is on the priority warned list may take any number of years for reaching final hearing and this position is not disputed before me.

7. On 20-9-1973 the respondent took out a motion before the Court for expeditious hearing of the suit. In that application the respondent specifically stated that the petitioner was not staying in the suit premises and that his whereabouts were not known. In the said application it was also stated that the petitioner's application for fixation of standard rent has been dismissed by the Court on 14-9-1973 and that the petitioner was in arrears of rent from April, 1972. The prayer made in the said application was as follows:--

"The plaintiff, therefore prays that Your Honour may be pleased to issue notice against the defendant to show cause why he should not be ordered to deposit all the arrears in Court and in the alternative the suit be not expedited."

8. A glance at the statement regarding deposit of rent made by the petitioner in the Court, which statement is produced before me by Mr. Vashi and which is

referred to by me above, shows that on 11-9-1973 the petitioner had deposited a sum of Rs. 136/- in the Court. The statement, therefore, that on that date the petitioner was in arrears was not correct. The only question, therefore, remained to be seen was as to whether the petitioner had sublet the suit premises. Whatever that may be, on that day the Court ordered notices to be issued. There is no dispute again that at this time the petitioner was represented by his learned Advocate Mr. Sheti. On the respondent's own showing the petitioner was not staying in the suit premises at that time. However, in spite of this position, the respondent, it is contended, got notices addressed to the petitioner issued on the address of the suit premises. Neither any notice nor any intimation was given to the petitioner's Advocate, who was there on record to the knowledge of the respondent or his advocate.

9. In these circumstances the notice came up for hearing before the Court on 6-11-1973, when it was found that the petitioner was not present and the notice was made absolute by the Court in his absence. The suit was directed to be heard in the month of January, 1974. The suit reached for hearing on 26-2-1974. No intimation was given by the respondent's Advocate to the petitioner's Advocate even as a matter of professional courtesy.

10. On 26-2-1974, however, the respondent himself remained absent and, hence, the suit was dismissed for default. On 25-4-1974 the respondent made an application for restoration of the suit. On this application once again the Court passed an order for notice to issue. Once again the respondent got the notice issued to the petitioner on the address of the suit premises and not even any intimation was given in respect of this application to the Advocate of the petitioner. The summons in respect of the application was sought to be served upon the petitioner on 17-6-1974 and ultimately, it is alleged, it was pasted on the door of the suit premises on 19-6-1974. Not only this but the respondent took an order from the Court for the service of the notice on the petitioner on the address of the suit premises also by registered post and the notice was once again sent on the same address by the registered post and this was done by the respondent knowing full well that the petitioner was not at that time residing in the suit premises. On 17th September, 1974 an order for substituted service was made and the summons in respect of the application in question was served by substituted service; but once again on the address of the suit premises. On 9-9-1974 the application for restoration came up for final hearing before the Court and the notice in that behalf was made absolute by the Court in the absence of the petitioner, who had no knowledge whatsoever about this application.

11. Thereafter the suit was once again on Board on 9-9-1974 when it was adjourned to 16-10-1974. On 16-10-1974 the Court once again found that the petitioner was not present in the Court and, hence, an ex parte decree for petitioner's eviction from the suit premises was passed by the Court on that date.

12. It is alleged that this decree was sought to be executed by the respondent on

2-1-1975. It is further alleged that on that day one Apa Bhiva obstructed the execution and, hence, on 7-1-1975 an obstructionist notice was taken out by the respondent. On the date of the hearing of the same no one remained present and, hence, the notice was made absolute by the Court. On 4-10-1975 the respondent executed the decree for possession and recovered possession of the suit premises. Immediately thereafter on 8-10-1975 an application was made by the petitioner for setting aside the said ex parte decree. The present writ petition arises out of the proceedings commenced pursuant to the said application.

13. The contention of the petitioner in the application was that he had been depositing the rent in the Court as per the order of the Court fixing the interim rent. It was pointed out by him that he had never received any notice in respect of the application dated 20-9-1973 for expediting the suit or in respect of the application dated 25-3-1974 regarding the restoration of the suit. The contention was that the petitioner was wholly unaware of both these applications and that, hence, he never knew that the suit would be coming up for hearing so soon as that. He, therefore, contended that he had sufficient ground for remaining absent on the dates in question.

14. In reply to this application it was contended by the respondent that he had learnt about the petitioner having gone to reside in other premises about 5 years before that date, that is to say, about 5 years before February, 1976. He contended that the petitioner was duly served in respect of both the applications in question and that, hence, the petitioner had no sufficient reason for remaining absent on the date when the ex parte order was passed. It was further contended that the application for setting aside the ex parte decree was hopelessly barred by the law of limitation.

15. On these rival contentions, the learned trial Judge formulated points for consideration. The first point was whether the petitioner's application was barred by limitation. The second point was whether a case for setting aside the ex parte decree was made out. On the first point the learned Judge recorded a finding that the application was barred by limitation. On the second point the learned Judge held that no sufficient ground for setting aside the ex parte decree was made out. The application was, therefore, dismissed by the trial Court.

16. The petitioner filed an appeal against the said order of the trial Court. The appellate Court also formulated points for consideration in the similar manner in which they were formulated by the trial Court. The points formulated were whether :

- (a) the application was barred by limitation;
- (b) if so, whether the petitioner had just and sufficient cause for condonation of delay, and
- (c) whether the possession of the premises should be restored to the petitioner.

The learned Judge held that the application was barred by limitation. The learned

Judge also held that the petitioner could not be said to be having no knowledge about the ex parte decree. This conclusion was arrived at by him from the fact that the summons was sought to be served upon the plaintiff on the address of the suit premises both by personal service as well as by registered post. The learned Judge also held that since Apa Bhima had obstructed the execution, the petitioner could not be said to be having no knowledge about the execution of the decree at least after 25-1-1975. The learned Judge also made evident confusion between Apa Bhima, who is one of the tenants in the chawl and who is party to the standard rent application, and Apa Bhiva, who obstructed. The contention of the petitioner was that he did not know who Appa Bhima was and that there was no question of his setting up said Appa Bhima to obstruction. The learned Judge on the other hand, observed that Appa Bhima, the obstructionist was none other than petitioner's neighbour in the same chawl. The learned Judge observed that if the petitioner's neighbour caused the obstruction it was impossible that the petitioner would have no knowledge about the same. The learned Judge, therefore, held that the petitioner has made out no case for condonation of delay. The learned Judge also relied upon the fact that the respondent had pointed out the petitioner's address, viz. R. No. 31, Block No. 3, Dockyard Road B. P. T. Colony, Bombay-10. The learned Judge, therefore, held that the petitioner was not worried about the developments in the suit because he had already acquired other premises. On this ground the learned Judge came to the conclusion that there was no case for condonation of delay. In these circumstances, the appeal was dismissed by the Appellate Bench of the Court of Small Causes. It is against this order that the present writ petition is filed by the petitioner.

17. Number of arguments were advanced on both the sides; but the entire question can be really resolved in a limited compass. On the respondent's own showing the petitioner was not residing in the suit premises at the time when he made his application dated 20-9-1973 for expedition of the suit. There is also no dispute that on that date the petitioner was duly represented by his learned Advocate Shri Sheti. In spite of this position, however, the respondent chose to serve the notice in respect of the application upon the petitioner at the address of the suit premises only and he chose not to give any intimation to the learned Advocate for the petitioner. Such device could only be resorted to if the real intention was to keep the defendant in the dark regarding the application. There is really no other explanation possible for such a behaviour,

18. Mr. Shah, appearing for the respondent before me, has conceded that the Civil P. C. is fully applicable to the proceedings under the Bombay Rent Act in the Court of Small Causes at Bombay. He invited my attention to the provisions of Order 3, Rule 5 of the Code under which any process served upon a party's pleader is as effectual for all purposes, as if the same had been given to or served upon the party in person, unless the Court otherwise directs. Mr. Shah invited my attention to the fact that upon the application dated 25-3-1974 court had passed an order that notice be issued to the defendant. Mr. Shah wants to

contend that this is an order to the contrary as contemplated by the said Rule 5 of Order 3 of the Code. It is impossible to accept this contention. When the Court directed that the notice be issued to the defendant there was no prohibition against issue of the notice to the defendant through his learned Advocate, who was already on record. But this is further made clear by the order passed by the Court on the respondent's application dated 20-9-1973. That was really the crucial application made by the respondent for fixing a date for the hearing of the suit. On that application the Court passed an order, "issue notice". So far as this application was concerned, therefore, there was no question of notice to the Advocate having been ruled out. The respondent, however, chose to follow the more cumbersome procedure of serving the petitioner on the suit premises where, as per his own contention, the petitioner is not staying. This was bound to result in the present petitioner's being kept in the dark regarding the application for expedition and regarding the application for restoration of the suit. It is really unintelligible why the simple task of giving notice to the defendant through his Advocate, who was already on record, was made complicated and difficult by trying to serve the petitioner personally when the respondent himself was clamoring that the petitioner was not residing in the suit premises. Moreover, it appears that the respondent was himself aware of the exact address of the petitioner. In his reply to the petitioner's application for setting aside the ex parte decree, the respondent has set out the petitioner's address in so many words. No doubt he has laconically stated that he came to know about the address of the petitioner "recently", but significantly has not stated as to when he has learnt about the petitioner's address. In any event he cannot run away from the fact that service of the notice upon the petitioner's Advocate would as well have served his purpose. It is not his case that the petitioner's learned Advocate had no authority to receive the notice in respect of the said application. Mr. Shah appearing for the respondent contended before me that Order 3, Rule 5 of the Code is just an enabling provision and that it does not make mandatory upon the party concerned to serve the requisite process upon the opposite party through its Advocate. The learned counsel may be right on this point; but that does not solve his difficulty. Once Mr. Shah admits that the said Rule 5 of Order 3 serves at least as an enabling provision, he has to explain as to why this provision was not resorted to, if the real intention was to make the petitioner aware of the said two proceedings instituted by the respondent pursuant to his application dated 20-9-1973 and 25-3-1974 respectively. The only conclusion that can be drawn, therefore, is that every method was sought to be followed by the respondent for serving the petitioner excepting the simplest one, the just one and the only effective one. Conclusion, therefore, is irresistible that the real intendment was to keep the petitioner in the dark regarding the said two proceedings. If that is so, it can hardly be said: (a) that the petitioner was aware of the proceedings in question, and (b) that the petitioner had no sufficient cause for remaining absent on the date when the ex parte decree was passed.

19. Mr. Shah nextly argued that the application for setting aside the ex parte decree was hopelessly barred by limitation. He contended that the relevant Article of the Limitation Act was Article 123. The petitioner was admittedly served with the summons of the suit. Hence terminus a quo for limitation would start from the date of the ex parte decree itself. Mr. Shah contends that the application, therefore, should have been made within 30 days from 16-10-1974 when the ex parte decree was passed. I really find no difficulty in accepting this contention of Mr. Shah. To my mind it is impossible to hold that the limitation did not start from 16-10-1974. But the next contention of Mr. Shah is something which eludes comprehension. It is his contention that the application is barred by limitation and the delay cannot be condoned in such a case because, suggests Mr. Shah, the provision of Section 5 of the Limitation Act could not apply to these proceedings. Now, to my mind such a contention needs just be stated to be rejected. The question as to what is the starting point of limitation is an entirely independent question. It has no relation to the question whether Section 5 of the Limitation Act applies or not. No reason is given why Section 5 should not apply in the instant case. As we are all aware the provisions of Section 29 of the Old Limitation Act provided that in certain cases the provisions of Section 5 did not apply unless they were made specifically applicable by the special statute providing for the limitation. But even under the Old Act, the provision of Section 5 applied uniformly to all the applications which were made under the Civil P. C. So far as the present Limitation Act is concerned, the provisions of Section 5 applied in all cases, even in the cases of limitation provided for by special statutes, unless the special statute in question excluded the application of the said section. It is, therefore, impossible to agree with Mr. Shah that the delay could not be condoned in the instant case because Section 5 had no application to the facts of the case.

20. Mr. Shah next contended that even assuming that Section 5 of the Limitation Act applied no ground was made out for condonation of delay. Now, it is to be noted that this is one of the cases where the ground for setting aside the ex parte decree is identically the same as is the ground for condonation of delay. If the petitioner was not aware of the date of the hearing of the suit, there is no reason why it should be assumed that he was aware of the date of the ex parte decree, and if he was not aware of the date of the ex parte decree, for no fault of his, it is impossible for me to conclude that he had no sufficient ground for condonation of delay.

21. At this stage it will be worth while referring to very important averments made by the petitioner in his application for setting aside the ex parte decree. It is stated in his application that similar ex parte decree was passed in favour of self-same landlord, the present respondent, against another tenant in the same chawl, one Appa Bhima, The modus operandi adopted by the landlord was similar in that case also. Appa Bhima too had his Advocate on record. Application was made by the landlord for fixation of early date of hearing in that case just as in the present case. The notice of the said application could have been given to the

Advocate on record, but even in that case the landlord chose not to give notice to the Advocate and he sought to serve the notice upon said Appa Bhima personally, Appa Bhima contended that he never got the notice. In the circumstances, the Court passed strictures against the present respondent. The Court held that there was no reason why the learned Advocate of Appa Bhima could not have been given intimation about the date of the application in question in which the order fixing the date was passed. The Court held in those circumstances that Appa Bhima could not be said to be having knowledge of the date of the suit nor his Advocate could be said to be having knowledge in that behalf. On that ground, therefore, the ex parte decree passed against Appa Bhima has been set aside by another learned Judge of the Court of Small Causes.

22. Mr. Vashi appearing for the petitioner invited my attention to the fact that this position was brought to the notice of the Court by way of averment in that behalf in the application for setting aside the ex parte decree itself. He has said that he urged this aspect even before the Appellate Court and he complained that both the Courts have failed to apply their mind to this aspect at the case. I am of the opinion that Mr. Vashi's contention is well founded. To my mind the Court should try to avoid the procedural rigmarole and in the matter of service of the process it is really unintelligible why service upon the parties personally should be resorted to when the parties are represented by Advocates and the service could be effected as well upon the Advocate concerned. It may be a different situation demanding different procedure, if the Advocate concerned refused to accept notice on account of want of instructions. In such a case perhaps the party entitled to receive the process may not be able to complain the inconvenience caused to him by the personal service. But normal presumption is that every Advocate has got power to accept service of process on behalf of his client, once he has filed Vakalatnama on behalf of the party in question. In the instant case, it is common ground that Mr. Shetti had not only filed his appearance but even Vakalatnama on behalf of the petitioner. In the case of Appa Bhima, therefore, the Court was perfectly justified in setting aside the ex parte decree when the simplest method of service to Advocate was not resorted to and when the Advocate of the defendant was not even given an intimation in respect of the date of the suit. If that was the view taken by one Court in a similar matter, there is really no reason why the trial Court in the instant case should not have taken the same view which is a view based upon healthy practice and healthy procedure. To my mind the Courts below had fallen in error involving irregular exercise of its jurisdiction in not applying its mind to this simple aspect of the case.

23. Before parting with this matter, I must mention two important misstatements made by the respondent in the Courts below, to which my attention has been invited by Mr. Vashi, appearing for the petitioner, and which probably went a long way for influencing the Court's mind for refusing to set aside the ex parte order. Mr. Vashi has pointed out that in the plaint as well as in the application dated 20-9-1973 a statement was made by the respondent that the petitioner had not

paid rent and was in arrears thereof. In the plaint it is stated that the defendant was in arrears of rent from 1-3-1969 till 13-9-1969. It is impossible to see how such an averment could be made. It is admitted before me that long before the filing of the suit the petitioner had filed an application for fixation of standard rent in which interim rent was fixed by the trial Court at Rs. 8/- per month, and the amount of the interim rent was being deposited by the petitioner in the Court from month to month. No doubt from 18-4-1973 till 10-9-1973 no amount appears to have been deposited by the petitioner, but on 11-9-1973 the petitioner has deposited a sum of Rs. 136/- in the Court. In the circumstances, it cannot be said that on the date of the suit, i.e. on 13-1-1972, the petitioner was in arrears of rent. As a matter of fact on 12-1-1972 the petitioner had deposited a sum of Rs. 32/-, being the rent for 4 months i.e. September to December, 1971, in the Court, On 14-2-1972 and 13-2-1972 he deposited Rs. 8/- each in the Court and the total amount of Rs. 48/- has in fact been withdrawn by the respondent on 5-4-1972. Previous to that the respondent had withdrawn a sum of Rs. 24/- on 10-11-1971. This means that the averments in the plaint that the petitioner was in arrears from 1-3-1969 to 13-9-1969 cannot be said to be borne out by the record. What the respondent has done is that he had kept this fact concealed from the Court and has managed to obtain a surreptitious ex parte decree from the Court.

24. Secondly in the application dated 20-9-1973 the respondent stated that the petitioner's application for fixation of standard rent was dismissed by the Court. The same statement was reiterated before me by Mr. Shah, I called upon him to produce the order in that behalf. He did not have any with him. He stated that in his application the actual date of the dismissal of the standard rent application has been mentioned. The date of the dismissal of the standard rent application as mentioned by the respondent in his application is shown to be 14-9-1973. Mr. Shah stated that this fact was stated by the respondent on affidavit. However, he had to admit that on 11-9-1973 a sum of Rupees 136/- has been deposited by the petitioner in the Court. He also further admitted that the application for standard rent was a conjoint application filed by the various tenants and not by the petitioner alone. He had further to admit that from time to time thereafter various payments have been made by the petitioner in the Court towards the payment of the interim rent. He conceded that no such payment could have been accepted by the office of the Court, if the standard rent application was dismissed. Mr. Shah was unable to throw any light upon this position. To my mind, all these facts go to show that the respondent has not been very careful in making correct statements before the Court and he has been keen on snatching a decree from the Court behind the petitioner's back.

25. Mr. Vashi has also invited my attention to another grave irregularity which has crept in the judgment of the lower Court. In paragraph 11 of the judgment the learned Judge has observed as follows:--

"In any event the appellant ought to have known about the decree when the

same was sought to be executed on 21-1-1975 and obstructed by Appa Bhima. Appa Bhima was his neighbour in the same building. The appellant, Appa Bhima and other tenants were prosecuting the proceedings against the respondent. There was also a decree against Appa Bhima in the suit filed by the respondent against him which Appa Bhima had got set aside as averred by the appellant in his affidavit in support of the notice for setting aside the ex parte decree."

Mr. Shah appearing for the respondent has candidly conceded before me that the reference in the said judgment to Appa Bhima is a patent error because admittedly the so-called obstructionist against whom obstructionist notice was taken out by the respondent was Appa Bhiva and not Appa Bhima. Appa Bhima was no doubt a tenant in the same chawl but the person who is alleged to have obstructed the execution was a totally different person from said Appa Bhima, Now, what the learned Judge should have seen is that not only Appa Bhiva has nothing to do with Appa Bhima but also that the obstructionist proceeding is of a suspicious character. It is contended by the respondent that Appa Bhiva had obstructed the execution on 2-1-1975 and hence he took out obstructionist notice for removal of the obstruction. But admittedly on the date of the hearing of the notice no one appeared on behalf of the alleged obstructionist and the notice was made just absolute. Mr. Vashi for the petitioner justifiably contends that this entire proceeding is of an extremely suspicious character and it is quite possible that the same has been engineered by the respondent himself in order to create evidence about the petitioner's knowledge regarding the ex parte decree. Instead of applying its mind to this aspect of the matter, the Appellate Bench of the Court of Small Causes confused the identity of Appa Bhiva with Appa Bhima and has raised inferences against the petitioner on that basis. Such a reasoning certainly vitiated the Judgment and order passed by the Court.

26. Having regard to all these facts I am of the opinion that the judgments of the Courts below suffer from errors mentioned above, which are apparent on the face of the record. Both the Courts have exercised their jurisdiction with grave irregularity as mentioned above. It is therefore, necessary that both the Judgments should be set aside and likewise should be set aside the ex parte decree obtained by the respondent against the petitioner.

27. The judgments of both the Courts below are therefore set aside. Ex parte decree passed by the trial Court is likewise set aside. The rule earlier issued is hereby made absolute.

28. The petitioner had also filed Civil Application No. 4254 of 1979 for impleading opponent therein as party respondent to the writ petition. The application is occasioned in the following circumstances:

After the present writ petition was filed and rule was issued therein on 16-11-1979 the petitioner filed a Civil Application for injunction restraining the respondent from parting with possession of the suit premises. Rule therein was issued by this Court. At the time When the same came up for hearing an affidavit

was filed on behalf of the respondent that he had parted with possession of the suit premises in favour of one Girish Sawla as tenant. In view of that statement the Civil Application was withdrawn by the petitioner and the present Civil Application No. 4254 of 1979 has been filed by the petitioner for impleading the said Girish Sawla, as a party respondent to the writ petition so as to enable the petitioner to avoid ultimate obstruction by the said Girish Sawla, if and when the present petition was allowed by this Court. Rule on the said application was issued by this Court and Mr. Tulzapurkar appears on behalf of the said person. At the time Of the hearing of the petition Mr. Tulzapurkar contended that there was no basis for this application and he was at a loss to know on what basis he could be impleaded. Such an argument hardly merits any examination or consideration. The reason why the said party is sought to be impleaded is obvious on the face Of it. No doubt by virtue of my present order the petitioner will be entitled to restitution u/s 144 and/or 151 Of the Civil P. C. and if said Girish Sawla is not made a party to this petition and he is not heard in support of the orders passed by the Courts below that will be another hurdle for the petitioner in the application for restitution. I have, therefore, allowed this application and have made the rule absolute. Mr. Tulzapurkar had no additional arguments to be advanced as to why the decree should not be set aside and why the writ petition should not be allowed. The present decision in the writ petition shall, therefore, be binding as such upon the said freshly inducted opponent Girish Sawla as upon the present respondent. In the circumstances mentioned above rule earlier issued is hereby made absolute.

29. In the circumstances of the case there shall be no order as to costs. Mr. Vashi appearing for the petitioner prayed that the order for restoration u/s 144 and/or 151, C. P. C. be passed by this Court and it be directed that the possession of the suit premises may be restored by respondent No. 1 and by the added respondent Girish Sawla or any other person claiming through either of them to the petitioner forthwith. He relied upon the provisions of newly amended Section 144 of C. P. C. for that purpose. I have no doubt that the petitioner is entitled to restitution of the suit premises but from the plain reading of the said section, I am of the opinion that the petitioner must move the Court which passed the ex parte decree, which is hereby set aside by me. I do not, therefore, think that I can pass an order of restitution myself. In the circumstances, however, I direct that the Court to which such an application shall be ultimately made shall dispose of the same with due despatch and in any event within 15 days from the date of the application.

30. Order accordingly.