

(1995) 07 BOM CK 0022
In the Bombay High Court
Case No : Writ Petition No. 3219 of 1995

V.T. Hundlani

APPELLANT

Vs

Robert C. Kenny

RESPONDENT

Date of Decision : 20-07-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 5 Rule 20, 144, 151
Constitution of India, 1950 — Article 226 , 227

Citation : AIR 1996 Bom 48 : (1996) 1 BomCR 452 : (1995) 97 BOMLR 176 :
(1995) 2 MhLj 592

Hon'ble Judges : R.G. Vaidyanatha, J

Bench : Single Bench

Advocate : Abhay S. Oka, for the Appellant; A.L. Kumar, for the Respondent

Judgement

1. This is a writ petition directed against the judgment dated 30-6-1995 in Civil Appeal No. 258 of 1995 on the file of VIth Additional district Judge, Thane Heard both the sides.

2. The petitioner-landlord filed a suit for eviction against the respondent-tenant in the trial court. It appears, the summons could not be served on the respondent-tenant. Hence the summons was served by affixture by resorting to substituted service under O. V, R. 20 of the Code of Civil Procedure. Ex parte decree came to be passed. During execution, the tenant was thrown out and the decree holder got possession of the suit premises.

After coming to know of the decree, when the tenant was dispossessed, the tenant filed an appeal against the ex parte decree in the appellate Court. The appellate Court heard both the sides and found that the summons has not been duly served and that there are illegalities in effecting service and, therefore, set aside the decree passed by the trial Court and further ordered restitution of the premises to the tenant. Being aggrieved by this judgment, the landlord has come up with this petition.

3. The learned counsel for the petitioner landlord has attacked the judgment of the appellate Court on the ground of irregularity in the procedure adopted by the appellate Court in referring to bailiff report etc., in considering the question of limitation in filing the appeal etc.

4. After having heard both the sides, even if another view is possible I am not inclined to interfere with the judgment in question on merits. The appellate Court has done substantial justice in directing the setting aside of the decree and that the tenant should be heard in the trial Court. One of the principles of natural justice is that nobody should be condemned without being heard. Therefore, when the appellate Court has passed a judgment giving direction that both the parties should be heard before any order of eviction is passed, even if there are some irregularities in the impugned order as contended by the learned counsel for the petitioner, I am not inclined to exercise extraordinary jurisdiction vested in this Court under Art. 227 of the Constitution of India. It is purely a discretionary remedy and the Court may in a given case refuse to exercise jurisdiction when substantial justice has been done between the parties. The landlord moved the Court for eviction. Now his eviction suit is still there and the tenant is given an opportunity to show cause as to why he should not be evicted. Both the parties can adduce evidence and the decision of the trial Court will be given on merits. Therefore, it is not a fit case to interfere with the order passed by the appellate Court on merits.

5. Another grievance was made that after setting aside the ex parte decree, the learned appellate Judge has granted restitution of the premises to the tenant. On this short ground, rule is granted and both the parties are heard finally on this question.

Under S. 144 C. P. C. when a decree or order of a trial Court has been set aside in appeal or revision, it is only the Court of first instance which is given power to order restitution. That is the law which has been laid down by the Supreme Court in the case of State Bank of Saurashtra Vs. Chitranjan Rangnath Raja and Another, . The Section itself is very clear that the application for restitution should be filed to the Court of first instance. Here in his enthusiasm to do justice, the learned appellate Judge has himself granted an order of restitution which cannot be strictly sustainable within the four corners of S. 144 C. P. C. It is true that in a given case the Court may exercise inherent jurisdiction under S. 151, C.P.C. to order restitution provided the relief does not fall within the four corners of S. 144, C.P. C. Here, when an ex parte decree has been passed and it has been reversed by the appellate Court then S. 144, C. P. C. is directly applicable, and therefore, there is no scope for invoking S. 151, C.P. C. It is well settled that s,. 151 cannot be invoked when there is a specific provision in the C. P. C. Therefore, the appellate Court was not right in ordering restitution though it could have given direction to the trial court to pass appropriate orders according to law. I, therefore, feel that this part of the order should be set aside and liberty should be given to the tenant to move the trial Court with an application under S.

144 C. P. C. and on such application being filed, the trial Court should be directed to dispose of the same expeditiously.

6. In the result, the writ petition is partly allowed. The direction for restoration in the impugned judgment is hereby set aside, without prejudice to the right of the tenant to file an application in the trial court for restitution under S. 144, C. P. C. On such application being filed, the trial court shall hear both the parties and then pass appropriate orders according to law expeditiously and preferably within a period of six weeks from the date of the application. Send a copy of this order to the trial Court immediately. C. C. expedited.

7. Petition partly allowed.