

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

1919.

December 7.

M. K. SWAMIRAO (ORIGINAL APPLICANT), APPELLANT v. J. J. VALENTINE (ORIGINAL OPPONENT), RESPONDENT^o.

Civil Procedure Code (Act V of 1908), sections 17, 114—Decree passed ex parte—Application to set aside decree—Execution of decree and recovery of possession of property pending application—Setting aside of ex parte decree—Application for restitution of property—Court which passed the decree can hear the application.

A decree having been passed *ex parte* against the defendant in the Subordinate Judge's Court at Poona, he applied to the Court to have it set aside. Whilst the application was pending, the plaintiff recovered possession of the property in dispute in execution of the decree. Subsequently the *ex parte* decree was set aside, the suit was restored to file, and it was transferred to the Haveli Court for hearing. The defendant next applied to the Poona Court for restoration of the property to him : but the application was dismissed on the ground that it should be made to the Haveli Court. On appeal :—

Held, that the defendant, who applied for restitution, was entitled to have the property restored to him when the decree under which the plaintiff got possession of it had been set aside ; and that the Poona Court, which originally passed the decree, had jurisdiction to entertain the application.

SECOND appeal from the decision of P. E. Percival, District Judge of Poona, on appeal from an order passed by T. S. Taskar, Joint Subordinate Judge at Poona.

Execution proceedings.

On the 27th November 1915, Valentine (plaintiff) obtained a decree *ex parte* against the defendant in the Court of the First Class Subordinate Judge at Poona.

The defendant applied to the Court on the 25th March 1916 to set aside the decree. Whilst this application was pending, the plaintiff applied to the Court to execute the decree and recovered possession of the

^o Second Appeal No. 832 of 1918.

property in dispute on the 17th April 1916. On the 1st July 1916, the Court set aside the *ex parte* decree, restored the suit to file and transferred it to the Haveli Court for re-hearing.

On the 10th August 1916, the defendant applied to the Poona Court for the property to be restored to his possession ; but the Court dismissed the application on the ground that it should be made to the Haveli Court which alone could entertain it.

This order was confirmed on appeal by the District Judge.

The defendant appealed to the High Court.

Y. N. Nadkarni for *S. M. Warde*, for the appellant.

J. G. Rele, for the respondent.

SHAH, J.:—The plaintiff in this case obtained an *ex parte* decree against the defendant on the 27th of November 1915. On the 25th of March an application for setting aside the decree was made by the defendant. The plaintiff had applied for execution, and he executed the decree on the 17th of April 1916. On the 1st of July 1916 the *ex parte* decree was set aside upon certain terms as to costs and thereafter the suit was transferred from the Court of the First Class Subordinate Judge of Poona to the Haveli Court. On the 10th August 1916 the defendant applied for the restoration of the property which the plaintiff had recovered in execution of the *ex parte* decree. This application was made to the Court of the First Class Subordinate Judge at Poona. The Joint Subordinate Judge, who disposed of this application, was of opinion that the application ought to have been to the Haveli Court and that his Court had no jurisdiction to entertain the application. The defendant appealed to the District

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Court, and the learned District Judge held that section 144 of the Code of Civil Procedure under which the application was made for restitution had no application to the present case, and expressed his opinion that it was open to the defendant to apply to the Haveli Court. In the result he dismissed the appeal.

The defendant has appealed to this Court. It is urged on his behalf that his application is within the scope of section 144 and that in any event it is open to him to make the application under section 47 of the Code of Civil Procedure. It is not clear on the terms of section 144 that such an application would be within the scope of the section. It is quite clear in my opinion that the defendant, who applied for restitution, is entitled to have the property restored to him when the decree under which the plaintiff got possession of it has been set aside. If not under section 144 of the Code of Civil Procedure, under section 47 he can make the application for getting back the property; and in my opinion, the present application which purports to have been made under section 144, could be treated as an application relating to the execution of this decree. It is a matter not of any practical importance whether it falls under section 144 or section 47 of the Code of Civil Procedure. The appellant is entitled to the restitution of this property. I also feel clear that the Court which originally passed the decree had jurisdiction to entertain this application and that the application was properly made to that Court.

I would accordingly set aside the orders of the lower Courts and send back this application to the Court of the first instance to be disposed of according to law.

As the suit is still pending in the Haveli Court it may be convenient to have this application disposed of by that Court. If so advised, it will be open to either

party to get this application transferred to that Court by a proper application to the District Court.

Costs up to date to be costs in the application.

CRUMP, J.:—I concur.

Order accordingly.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Crump.

HARILAL LALLUBHAI (ORIGINAL PLAINTIFF), APPELLANT v. THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY (ORIGINAL DEFENDANT), RESPONDENT^o.

Indian Railways Act (IX of 1890), section 7—Level-crossing—Closing an old level crossing and opening a new one—Diverting a road—Powers of a Railway Company.

Plaintiff owned a bungalow on the west side of the defendant's Railway close to a Station. To go over to the east side, there was a level-crossing near the plaintiff's bungalow. The Railway Company, owing to the necessity of increasing sidings near the station, closed the level-crossing and opened a new one at a distance of few yards from the plaintiff's bungalow. This diversion of the road caused much inconvenience to the plaintiff as he had to go a longer distance if he wished to cross the Railway, and on the way there was a dip which made it impossible for the plaintiff to get at the new level-crossing during the monsoon. The plaintiff, therefore, brought a suit against the Railway Company claiming a mandatory injunction directing the Company to have the old gateway at the level-crossing re-opened, and he relied on section 7 of the Indian Railways Act, 1890.

Held, dismissing the suit, that the Railway Company were well within their powers in closing the old level-crossing and they had fulfilled all the requirements which the law imposed on them to provide another level-crossing.

A Railway Company has under the Statute very wide powers in order to carry on its business for public purposes, and it has got to consider not only the