

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.418 OF 2011
WITH
CIVIL APPLICATION NO.2099 OF 2012**

Rashid Sultan Sayyad
(Since deceased through LRs)
1a. Sayyad Halima Rashid & Ors. ... Appellants

V/s.

Prabhakar Shankar Kalyani & Ors. ... Respondents

.....
Mr.Madhav Jamdar, Advocate for the Appellants.
Mr.Uday Warunjikar, Advocate for the Respondents.
.....

**WITH
SECOND APPEAL NO.1046 OF 2012
WITH
CIVIL APPLICATION NO.2074 OF 2012**

Prabhakar Shankar Kalyani ... Appellant

Vs.

Yakub Sultan Sayyad & Ors. ... Respondents

.....
Mr.Uday Warunjikar, Advocate for the Appellant.
.....

CORAM : R.K. DESHPANDE, J.

DATED : JULY 16, 2015.

P.C.

In Regular Civil Suit No.147 of 1980 a decree for partition and separate possession was passed by the trial Court on 28th February, 1992. This decree was put to execution in Regular Darkhast No.52 of 2001. The Judgment Debtor and decree holders filed a pursis dated 27th June, 2006 at Exhibit-154 in the said Darkhast, recording their settlement arrived at in respect of partition and separate possession of the suit property. The appellant in Second Appeal No.1046 of 2012 filed on applications dated 21st September, 2002 at Exhibit-89, 23rd September, 2002 at Exhibit-90 and one more application at Exhibit-94, directing to execution as an obstructionist, who was not party to the suit for partition and separate possession. The said appellant also filed another application dated 4th May, 2005 at Exhibit-151 for possession of Final Plot No.458. The executing Court has decided all the three applications by a common order dated 11th May, 2005, the operative portion of the which is reproduced below:

“A. The obstruction applicants (exhibit 89 and 94) succeeds.

B. In respect of Final Plot No.458, the decree shall be enforceable in respect of portion admeasuirng 140 feet (east west) x 24 feet (south north) only, as suggested in commission report exhibit 104. The report exhibit 104 is accepted so far as partition of Final Plot No.458 is concerned.

C. In respect of rest properties mentioned in decree, the decree shall be executable with full force as suggested in commission report exhibit 51. Report exhibit 51 is accepted in respect of these rest proportionates, except Final Plot No.458.

D. Request of obstructionist Prabhakar made in application exhibit 151 to deliver the vacant possession of the rest portion of Flat No.458, is rejected.

E. No costs."

Both the parties namely, the judgment debtor and the decree holders on one hand and the obstructionist who is the appellant in Second Appeal No.1046 of 2012, preferred separate Appeals being Regular Civil Appeal Nos.53 and 55 of 2005, before the Lower Appellate Court. The Appeals have been dismissed by the Lower Appellate Court and, therefore, these two Second Appeals are preferred by the judgment debtors, decree

holder and the obstructionist.

3 Both the learned counsel appearing for the parties submit that the Second Appeal can be disposed of by consent order as under and there would be no need to record any reasons for that.

- (i) The judgment and order passed by the Lower Appellant Court in Regular Civil Appeal No.53 of 2005 and 55 of 2005, are hereby quashed and set aside and the matter is remanded back to the Lower Appellate Court.
- (ii) The application dated 4th May, 2005 at Exhibit-151 filed in Regular Darkhast No.52 of 2001 by the appellant in Second Appeal No.1046 of 2012, is permitted to be withdrawn.
- (iii) The Lower Appellate Court shall decide both the Appeals on their own merits ignoring the pursis at Exhibit-154 filed by the appellants in the Second Appeal No.418 of 2011.

- (iv) The appellant in Second Appeal No.1046 of 2012 claim to be in possession of some portion of F.B.No.458, which fact is disputed by the appellants in Second Appeal No.418 of 2011. The Lower Appellate Court therefore, shall record its finding on the aspect of possession of the parties and if ultimately it is found that the appellants in Second Appeal 1046 of 2012 are in possession of the same portion of the property, then the executing Court shall entertain any application filed by the said appellants creating obstruction to execute the decree and the same shall be decided in accordance with law.
- (v) Both the Second Appeals stand disposed of.
- (vi) The parties to appear before the Lower Appellate Court on 3rd August, 2015. It is made clear that this Court has not gone into the merits of the matter and all the contentions

are left open to be decided by the Lower Appellate Court.

(vii) In view of the order passed in the Second Appeals, Civil Application Nos.2099 of 2012 and 2074 of 2012 do not survive and are disposed of accordingly.

(R.K. DESHPANDE, J.)