

mm

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

WRIT PETITION NO. 10059 OF 2014

Shamsuddin Nizamuddin Ansari ...Petitioner

Vs.

Salamat Ali Mohammed Islam & Anr. ...Respondents

Mr. F.A. Ansari, Advocate for the Petitioner

Mr.S.S. Kanetkar, Advocate for Respondent No.2

Mr. PP. Kakade, AGP for the State

CORAM : SHANTANU S. KEMKAR &

M.S. KARNIK, JJ.

DATED : 16TH SEPTEMBER, 2016

P.C. :

1. By way of the present Petition, the Petitioner prays that appropriate action may be initiated against the Respondent No.2 for accepting the filing of Second Appeal No.183 of 2013 though the same was not accompanied by the impugned order and decree. According to the Petitioner the registry ought not to have placed the said Second Appeal for admission before the learned Single Judge as the memo of the Second Appeal was not accompanied by the impugned order and decree.

2. The Petitioner claims to be the original landlord of Room No.11 admeasuring about 10 ft. x 12 ft. situated at M.H. No. 297/4, Sama Nagar, Bhiwandi, District: Thane. The Petitioner filed Regular Civil Suit No.406 of 2004 for recovery of possession, which suit came to be decreed in his favour by a judgment and decree dated 23rd February, 2011 passed by the Civil Judge, (J.D.), Bhiwandi.
3. The Respondent No.1 herein (original Defendant) filed Civil Appeal No.68 of 2011 before the Court of District Judge, Thane at Thane against the said judgment and decree dated 23rd February, 2011. The said Appeal came to be dismissed by the judgment and decree dated 5th December, 2012 passed by the District Judge – IV Thane at Thane.
4. Being aggrieved by the said judgment and decree passed by the Appellate Court the Respondent No.1 filed a Second Appeal bearing No.183 of 2013 before this Court.

5. According to the Petitioner the actual possession of the suit premises was handed over by the Respondent No.1 to the Petitioner on 26th August, 2013 and the decree was thus duly executed. It is the contention of the Petitioner that though the Respondent No.1 had handed over the suit premises to the Petitioner, nevertheless, the Respondent No.1 filed the Second Appeal No. 183 of 2013 and that too without annexing any impugned order and judgment. According to the Petitioner the Registry ought not to have allowed the filing of the Second Appeal and has thus committed a gross illegality.

6. The Registry placed the Second Appeal for admission before the learned Single Judge. The learned Single Judge was pleased to issue notice before admission upon hearing the Respondent No.1 herein. Upon receipt of the notice the Petitioner filed his Vakalatnama and by his Advocate's letter dated 20th November, 2013 protested the filing of the Appeal as the same was filed without annexing the impugned judgment and decree of the trial Court and that of the lower

Appellate Court.

7. The said Second Appeal came up for orders before the learned Single Judge and on 25th November, 2013 following order came to be passed:

“ 1. None for the appellant. Mr. Ansari for the respondent. Office note shows that advocate for the appellant has not removed the office objections. Hence, four weeks time is granted to remove all office objections. If the office objections are not removed within the stipulated time as stated hereinabove, the Second Appeal shall stand dismissed without further reference to the Court.

2. Stand over to 6th January, 2014.”

8. Heard the learned Counsel for the Petitioner. According to the learned Counsel for the Petitioner Respondent No.2 ought not to have entertained and accepted the filing of the Second Appeal as the certified copy of the judgment and decree of the trial Court as well as the Appellate Court was not filed along with the memo of appeal. According to the learned Counsel for the Petitioner the Second Appeal can be

admitted only on substantial question of law and since the judgment and decree of the lower Court was not filed along with the memo of Appeal the question of entertaining and filing of the Second Appeal does not arise and hence, the Registry has committed gross illegality in accepting the filing of the Second Appeal and thereafter placing the same for admission before the learned Single Judge, The learned Counsel for the Petitioner, therefore, prayed that apart from initiation of appropriate action, exemplary damages of Rs.5 lakhs be awarded to the Petitioner, which should be recovered from the landlord.

9. Having considered the submissions advanced on behalf of the Petitioner it is useful to refer to some of the provisions of the Bombay High Court Appellate Side Rules 1960 (hereinafter referred to as the Rules for short). Rule **12(ii)** and Rule **31 of Chapter IV** of the Rules read thus:

“CHAPTER-IV”

**“Rule 12(ii) Accompaniments to
memorandum of appeal in appeals from appellate**

decrees.- *In the case of appeals from appellate decrees, the memorandum of appeal shall also be accompanied by the certified copy of the ¹[*] judgment ²[or order] of the trial Court and of the grounds of appeal and cross-objections, if any, in the lower appellate Court, together with one typed copy of each of the same.*

The Office may, however, accept the memorandum of appeal without such typed copy, provided the Advocate for the appellant gives an undertaking to file the same if the appeal is required to be placed before the Court for orders before the prints are received.

Rule 31. Registrar's power to accept a matter not complying with the Rules and to grant time for such compliance.- *Notwithstanding rules 6, 10, 12, 17, 19 and 27 in this Chapter, the Registrar may, if he deems fit, on application of a party, or his Advocate, direct the office to accept a matter not complying with the above rules and grant time to the party or his Advocate not exceeding 14 days for such compliance”.*

1. The words “the decree or order and” were deleted by G.No.P/3601/2007, dated 18-8-2007, M.G. 2007, Pt. IV-C, p. 279.

2. These words were inserted by after the word “judgment” by G.No.P/3601/2007, dated 18-8-2007, M.G.2007, Pt. IV-C, p.279

10. A bare reading of the said Rules indicate that Rule 31 clearly empower the Registrar to direct the office to accept the matter not complying with Rule 12 and grant time to the party or its Advocate not exceeding 14 days for compliance. Moreover on 25th November, 2013 the learned single Judge had granted 4 weeks time to remove all office objections failing which the Second Appeal was to stand dismissed without further reference to the Court.

11. According to us, the Petitioner having appeared in the Second Appeal, ought to have pursued his grievance before the learned Single Judge who was already seized of the Second Appeal. By filing the Petition under Article 226 and praying that appropriate action may be initiated against the Respondent No.2, the Petitioner is virtually expecting this Court to sit in appeal over the order dated 25th November, 2013 passed by the learned Single Judge, and hence we are not inclined to exercise the extraordinary writ jurisdiction.

12. In any case we find that there is no illegality committed by the Registry in accepting the filing of the Second Appeal, the memo of which was not accompanied by the judgment and decree of the Appellate Court and that of the trial Court, in view of the provisions of Rule 12(ii) read with Rule 31` of Chapter IV of the said Rules. In fact as stated earlier, by the order dated 25th November 2013, the learned Single Judge had granted 4 weeks time to remove all the office objections failing which the Second Appeal was to be dismissed without further reference to the Court. In these circumstances in our opinion the present Petition is completely misconceived and deserves to be dismissed. The present Petition is accordingly dismissed with no orders as to costs.

(M.S. KARNIK, J.)

(SHANTANU S. KEMKAR, J.)