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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.567 OF 2014

WITH
CIVIL APPLICATION NO.1407 OF 2016
IN
SECOND APPEAL NO.567 OF 2014

Dhanyakumar J. Patil	...Appellant
V/s.	
Aniket R. Malvade & Anr.	...Respondents

Mr.P.M. Arjunwadkar for the Appellant.

Mr.Chetan G. Patil for the Respondent No.1

CORAM : R.D. DHANUKA, J.
DATE : 1ST DECEMBER, 2016.

P.C. :-

1. The papers are allowed to be produced at 3:00 p.m. to enable the decree holder to file an affidavit to the civil application.
2. By this civil application, the applicant seeks condonation of delay in filing the civil application and seeks restoration of the second appeal along with civil application to its original position.
3. I have heard the learned counsel for the parties and have perused the averments made in the civil application and also in the affidavit in reply. The second appeal is dismissed due to non-

compliance of the conditional order passed by this Court by not filing the paper book within a period of one year from the date of admitting the second appeal i.e. 24th November, 2014.

4. In my view, the applicant has made out a case for restoration of the second appeal along with civil application therein on the condition that the applicant files private paper book within a period of one week from today and a copy thereof shall be served upon the learned advocate representing the respondents simultaneously.

5. The civil application is accordingly disposed of in aforesaid terms. The second appeal along with Civil Application No.1389 of 2014 are restored to file.

6. There is no dispute that the second appeal filed by the appellant has been admitted by this Court on 24th November, 2014. This Court passed a separate order in Civil Application No.1389 of 2014 by granting rule and granting liberty to the applicant to move for *ad-interim* relief before the returnable date after service on all the respondents.

7. Mr.Arjunwadkar, learned counsel appearing for the applicant invited my attention to the order passed by the Executing Court on 15th November, 2016 appointing Shri N.B. Kolekar, advocate as a Court Commissioner to suggest the partition of the house

property as per the decree passed in Regular Civil Suit No.191 of 2009 modified in Regular Civil Appeal No.211 of 2004. By the said order, the Court Commissioner is directed to visit the house properties after issuing prior notices to both the parties and prepare detailed map suggesting partition and submit his detailed report on or before the next date.

8. Pursuant to the said order passed by the Executing Court, the Court Commissioner issued a notice to the parties on 21st November, 2016 informing the parties that he would visit the suit premises on 26th November, 2016 and instructed both the parties to remain present.

9. It is the case of the applicant that the said notice dated 21st November, 2016 was not received by the applicant from the learned Court Commissioner and thus he could not remain present.

10. In this civil application, the papers were produced yesterday at 3:00 p.m. This Court passed an order directing that possession of the suit property shall not be taken in execution of the decree which is the subject matter of the second appeal till 2nd December, 2016.

11. The respondent no.1 has filed an affidavit in this civil application today which indicates that it is the case of the respondent no.1 that on 26th November, 2016, the learned Court Commissioner

visited the suit premises and having found the respondent nos.1 and 2 in possession of the portion of the suit property, the learned Court Commissioner allotted the said portion of the suit property 1-C and 1-D to the respondent no.1 and respondent no.2. A copy of the report, if any, prepared by the learned Court Commissioner is not annexed to the affidavit in reply.

12. Mr.Patil, learned counsel appearing for the respondent no.1 submits that since the applicant did not appear in response to the notice issued by the learned Court Commissioner, the learned Court Commissioner has handed over possession of the part of the suit property to the respondent no.1 and respondent no.2.

13. A perusal of the order passed by the Executing Court on 15th November, 2016 clearly indicates that the learned Court Commissioner was directed to visit the suit properties after issuing prior notices to both the parties and to prepare detailed map suggesting the partition and submit his detailed report on or before the next date. It is not in dispute that the said learned Court Commissioner did not prepare and submit any report suggesting partition by preparing detailed map or otherwise as directed by the Executing Court.

14. In my view, the learned Court Commissioner has acted beyond his powers and duties and in violation of the order passed by

the Executing Court on 15th November, 2016. In my view, the action on the part of the learned Court Commissioner is high handed and irresponsible. The Executing Court is accordingly directed to cancel the appointment of the said Mr.N.B. Kolekar, Advocate as the Court Commissioner forthwith.

15. The learned Court Commissioner is directed to file an affidavit before this Court whether he had handed over possession of the suit property or any part thereof to the respondent no.1 or respondent no.2 or jointly, as alleged in the affidavit in reply dated 1st December, 2016 filed by the respondent no.1 within one week from today. In the said affidavit, he should also indicate whether he has submitted any map and made any suggestions regarding partition of the property to the Executing Court and whether any further permission of the Executing Court has been obtained before allegedly handing over possession of the suit property to the respondent no.1 and respondent no.2.

16. The respondent no.1 and respondent no.2 are directed to hand over the keys of the suit property and possession thereof to the Executing Court within 48 hours from today. Further orders would be passed by this Court after report from the learned Court Commissioner is received by this Court.

17. Place the second appeal on board on production board on

21st December, 2016 for compliance and further orders.

19. Parties, the Court Commissioner and the Executing Court to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)