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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.175 OF 2020
WITH
INTERIM APPLICATION (I.A.) NO.1 OF 2020
IN
SECOND APPEAL NO.175 OF 2020**

Mrs. Inderjit Kaur Matharu Appellant.

V/s

Mrs. Revolan Campos Respondent.

Mr. Sandesh D. Patil with Mr. Anush Pravin Amin for the Appellant/Applicant.

Mr. Uzair Kazi i/b Mr. Yogendra M. Kanchan for the Respondent.

CORAM: NITIN W. SAMBRE, J.

DATE: FEBRUARY 17, 2020

P.C.:-

1] Based on oral agreement entered into sometime in second week of August 2007, Respondent initiated suit for specific performance, which came to be decreed and judgment and order of the Trial Court was further confirmed in first appeal. Hence, this second appeal.

2] So as to establish onus of readiness and willingness, Respondent has moved an application under Order 41 Rule 27 of Civil Procedure Code seeking production of documentary evidence. Said application

was ordered to be considered at the time of final hearing of the appeal. Instead of deciding the said application-Exhibit-13 moved under Order 41 Rule 27, lower Appellate Court appears to have considered the documents produced with the said application as if they are proved without any oral evidence in support thereof and has recorded finding of readiness and willingness of the Respondent-Plaintiff.

3] The Scheme as contemplated under Order 41 Rule 27 is, if party moving such application satisfies the Appellate Court that sufficient cause exists for non-production of such documentary evidence during course of trial of the suit, Appellate Court is required to grant such application, and invite findings of the Trial Court after giving an opportunity to prove such documents to the party concerned on the documents so produced.

4] In the case in hand, admittedly, no such procedure is adopted by the lower Appellate Court and about three documents which are produced with the said application-Exhibit-13 are considered to be proved without any oral evidence. Based on the same incorrect

findings of readiness and willingness to perform the contract on the part of Respondent came to be recorded. Such finding goes contrary to the Scheme of Order 41 Rule 27 of Civil Procedure Code and that being so, lower Appellate Court, in my opinion, committed an error of law in dismissing the appeal.

5] In the aforesaid backdrop, impugned judgment delivered in Regular Civil Appeal No.247 of 2016 by learned District Judge-10, Thane, dismissing the Appeal preferred by the Appellant is hereby quashed and set aside. Appeal stands restored to the file of District Judge, Thane who is expected to decide Application-Exhibit-13 moved by the Respondent under Order 41 Rule 27 of Civil Procedure Code.

6] As such, second appeal stands partly allowed in the above terms.

7] Parties hereto agree that they shall appear before the lower Appellate Court on 16th March, 2020 and shall on same day submit their written notes on Application-Exhibit-13 i.e. one moved under Order 41 Rule 27 of Civil Procedure Code. The lower Appellate Court is expected to decide the said application within four weeks thereafter.

In case, if such application is rejected, lower Appellate Court shall proceed with the hearing of the appeal expeditiously.

8] In case, if such application is allowed, lower Appellate Court shall invite finding after giving opportunity to lead evidence before the Trial Court from the Trial Court within a period of ten weeks from such order. The lower Appellate Court shall thereafter decide the appeal considering the finding recorded by the Trial Court within a period of eight weeks from receipt of such finding from the Trial court.

9] Appellant agrees that till first appeal is decided, no third party interest will be created in regard to the suit property. As such, decree shall remain stayed till decision of the first appeal.

10] As a consequence of disposal of the second appeal in the aforesaid terms, no order is required to be passed in Interim Application No.1 of 2020 taken out in the Second Appeal, which also stands disposed of.

(NITIN W. SAMBRE, J.)