

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CIVIL APPLICATION (F) NO. 576 OF 2021
IN
FIRST APPEAL NO. 556 OF 2021

RAJESH S/O KEWAL KRISHAN DHAWAN
VERSUS
SMT. NAMRATA KUMAR W/O COL. ACHAL KUMAR

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri Masood Shareef, Advocate for appellant.
Shri S. S. Dewani, Advocate for respondent-sole.

CORAM: V. G. BISHT, J.

ORDER RESERVED ON : **21/03/2022.**
ORDER PRONOUNCED ON : **25/03/2022.**

1. By this application, the appellant (original defendant) seeks stay to the effect and operation of the Judgment and Decree dated 18/03/2020 passed in Special Civil Suit No.258/2013 by learned 11th Joint Civil Judge, Senior Division, Nagpur pending disposal of the present appeal.

2. The respondent (original plaintiff) had filed a suit for declaration, permanent injunction and separate possession or in the alternative, for partition and separate possession of the suit properties-A and B as described in Paragraph Nos.2 and 3 of the plaint on the ground that her father had bequeathed the suit property-A in her favour by virtue of Will dated 09/08/1995 and in the alternative, prayed for partition and separate

possession of the suit property. The appellant -defendant, who is the brother of the respondent - plaintiff resisted the suit on the ground that the suit properties exclusively belong to him.

3. The learned Trial Judge after hearing both the parties declared that the respondent -plaintiff is entitled for Ground Floor of suit property-A in terms of Will dated 09/08/1995 and also to get half share of suit property-B by way of partition and separate possession.

4. Being aggrieved by the said impugned Judgment and Decree, the appellant - brother is before this Court in the present appeal.

5. Learned counsel for the appellant submits that he has taken various grounds in the Appeal Memo in support of his appeal and the impugned Judgment and Decree being decree of possession, the appellant needs protection at the hands of this Court inasmuch as the respondent - plaintiff may execute the decree against him. According to the learned counsel, first appeal has already been admitted and no prejudice would be caused to the respondent - defendant, if the appeal is heard on merits.

6. Shri S. S. Dewani, learned counsel for the respondent has vehemently opposed the submission by submitting that the decree is in favour of respondent and there are no specific reasons given in the application for stay. The application rather,

according to the learned counsel, does not satisfy the ingredients of Order 41 Rule 5 of the Code of Civil Procedure. According to the learned counsel, the appellant should show his bonafides by depositing rent amount which he has all along been enjoying from the suit properties and in that eventuality only, this Court may consider the prayer made in the application.

7. I have given anxious thoughts to the rival submissions. By virtue of impugned Judgment and Decree, the appellant - defendant has been asked to deliver the vacant possession of the Ground Floor of the suit property-A and at the same time, it has been declared that the plaintiff is entitled to get half share in the suit property-B by way of partition and separate possession. Thus, essentially, it is a decree of possession.

8. I am also mindful of the fact that the appeal against the impugned Judgment and Decree has been duly admitted by this Court on 08/09/2021 and it further appears that the learned counsel for the appellant on the said date had undertaken to file paper book within a period of six months. However, it seems that thereafter, the matter was referred to the Mediator but the matter could not be settled in the said mediation process, which is apparent from the report dated 04/03/2022 submitted by Co-ordinator, Mediation Center, High Court, Nagpur. Probably, because of initiation of mediation process, the paper book could not be filed in time.

9. Be that as it may, learned counsel for the appellant is permitted to file paper book within six weeks from today. Since the appeal has already been admitted, it would be in the interest of both the parties to expedite the hearing of First Appeal.

10. The appellant in the present application has requested to refer and rely upon the grounds of Appeal Memo while deciding the present application. I have also gone through the grounds of appeal and in my considered opinion, the appellant has made out sufficient cause for the purposes of present application and in such circumstances, it would not be proper to say that the application lacks ingredients of Order 41 Rule 5 of the Code of Civil Procedure.

11. As far as submission of learned counsel for the respondent regarding depositing of rent earned from the suit properties by the appellant is concerned, similar issue was raised before the learned Trial Judge vide Issue No.7. Learned Trial Judge held that the respondent - plaintiff had failed to prove the entitlement of Rs.18,16,513/- towards rent. Therefore, at this stage, it is not desirable, in the light of findings recorded by the learned Trial Judge, to take some security or direct the appellant to deposit amount of rent.

12. For the aforesaid reasons, I pass the following order.

ORDER

- i] The application is allowed.
- ii] The impugned Judgment and Decree dated 18/03/2020 passed in Special Civil Suit No.258/2013 by learned 11th Joint Civil Judge, Senior Division, Nagpur is stayed until further orders.
- iii] Both the parties are directed to co-operate in expeditious hearing of First Appeal.
- iv] Civil application is disposed of accordingly.

FIRST APPEAL NO. 556 OF 2021

In view of directions given in the civil application, learned counsel for the appellant is directed to file paper book within six weeks from today.

Place this matter after six weeks.

[V. G. BISHT, J.]

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Date: 2022.03.25
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