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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
INTERIM APPLICATION NO. 8495 OF 2024
WITH
INTERIM APPLICATION NO. 8499 OF 2024
IN
SECOND APPEAL NO. 84 of 2017**

Jagannath Shankar Shinde ... Applicant/Appellant

vs.

Pandurang Namdev Shinde and Anr ... Respondents

Mr. Avirat Sonawane for Applicant.

CORAM : GAURI GODSE, J.

DATED : 16th DECEMBER 2024

ORDER:

INTERIM APPLICATION NO. 8495 OF 2024

1. This application is for restoration of the second appeal. The appeal was dismissed for non prosecution on 18th January 2024 as none appeared for the appellant.

2. Learned counsel for the appellant submits that the advocate who was appearing for the appellant missed the matter on 18th January 2024 and hence, could not appear. He submits that non appearance was unintentional. He, therefore, submits that the order be recalled and the appeal be restored. He further submits that the

application for restoration is filed within time.

3. In the facts and circumstances of the case, the order dated 18th January 2024 is recalled and the appeal is restored.

4. The application is allowed in the aforesaid terms.

SECOND APPEAL NO. 84 of 2017

5. Heard learned counsel for the appellant. The second appeal is admitted on the following substantial questions of law:

I) When admittedly the suit property was an ancestral property, whether in the absence of any findings recorded with regard to the partition and separate possession by metes and bounds, whether the prayer for the removal of encroachment could have been decreed against the defendants who also claimed to have a share in the suit property?

II) When the relations between the parties are not in dispute and the nature of the property being ancestral property is also not in dispute, whether the plaintiffs would be entitled to seek removal of encroachment in the absence of any findings recorded for partition and separate possession by metes and bounds giving any exclusive rights to plaintiff in respect of the suit property?

III) Whether the findings recorded by both the courts for grant of

decree for removal of encroachment and possession only based on Court Commissioner's report would be sustainable in the absence of any exclusive rights proved by plaintiff?

6. Office is directed to issue notice to respondent no.1 and heirs of deceased respondent no.2 as stated in Interim Application No.8499 of 2024.

7. In addition to Court notice, learned advocate for the appellant to serve the respondents, by private notice and file affidavit of service.

8. Call for records and proceedings.

9. Printing is dispensed with.

10. Learned advocate for the appellant shall file private paper-book within a period of one year from today.

11. Issue of abatement, if any, against respondent no.2 is kept open.

INTERIM APPLICATION NO. 8499 OF 2024

12. Not on board. Taken on board.

13. Issue notice to heirs and legal representatives of deceased respondent no.2, returnable on 10th March 2025.

14. In addition to Court notice, learned advocate for the applicant to serve the respondents, by private notice and file affidavit of service, before the next date.

(GAURI GODSE, J.)