

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

APPEAL FROM ORDER NO. 44 OF 2015
WITH
CIVIL APPLICATION NO. 4954 OF 2015

Maroti s/o. Ramji Khade **....Appellant.**

Versus

Vandana w/o. Maroti Thorat
and others **....Respondents.**

Mr. M.B. Ubale, Advocate for appellant.

Mr. V.P. Latange, Advocate for respondent Nos. 1 to 4.

CORAM : T.V. NALAWADE, J.

DATED : 3rd August, 2015.

ORDER :

1. The appeal is filed to challenge the judgment and order of Regular Civil Appeal No. 1/2011 which was pending in the Court of learned District Judge -1, Basmathnagar. The appeal filed by respondents to challenge the judgment and decree of R.C.S. No. 177/2008 which was pending in the Court of Civil Judge, Senior Division, Basmathnagar is allowed partly by the appellate Court. The appeal was filed by original defendants as decree of declaration was given and decree of injunction was also given in favour of plaintiff, present appellant. Both the sides are heard.

2. It appears that written statement was not filed by the defendants and the suit was virtually decided *exparte* in favour of present appellant/plaintiff. In view of this circumstance, the District Court has observed that the opportunity needs to be given to the original defendants to file written statement and contest the suit. The appellate Court has set aside the aforesaid judgment and decree of the trial Court. But, while setting aside the decree, separate finding is given in the appeal that original plaintiff has failed to prove his ownership and possession. When the appellate Court wanted to remand the matter back to the trial Court and when it was setting aside the judgment and decree of the trial Court, it was unwarranted on the part of the appellate Court to give separate finding on the aforesaid points. When the matter is remanded back for fresh trial, each issue needs to be dealt with. The appellate Court is not expected to give such finding. After filing of written statement, the issues will be framed and then the parties will be giving evidence.

3. The aforesaid limited point is involved in the present matter and the learned counsel for appellant, original plaintiff submitted that if this finding of the appellate Court is set aside, it will be sufficient for the original plaintiff and both the parties can contest the matter and the trial Court will also not get

influenced due to the observation made by the appellate Court. There is force in the submissions made by the learned counsel for the appellant.

4. In the result, the appeal is allowed. The findings given by the appellate Court in aforesaid appeal on the point Nos. 1 and 2 framed are set aside. The other part of the order of appellate Court of remanding the matter back to the trial Court and giving opportunity to the defendants to file written statement is kept intact. The Trial Court is not to get influenced by the observations made by this Court or by the District Court. The trial Court is to decide the suit afresh.

5. Civil Application is disposed of.

[T.V. NALAWADE, J.]

ssc/