

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APEAL FROM ORDER NO. 14 OF 2016
WITH CA/1930/2014 IN AO/14/2016

DNYANOBA SHAMRAO KAGDE DIED LRS RADHABAI AND OTHERS
VERSUS
SANTOSH TUKARAM KAGDE AND OTHERS

.....
Advocate for Appellants : Mr. Vikaran S. Undre
Advocate for Respondents : Mr. M. A. Thorbole
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CORAM : V. K. JADHAV, J.
DATED : 25th APRIL, 2016

PER COURT:-

1. Heard finally with consent of the parties.
2. Being aggrieved by the judgment and order dated 10.4.2012 passed by learned Principal District Judge, Osmanabad in Regular Civil Appeal No.134 of 2004, the original defendant Nos. 1 to 4 (appellants before the lower appellate court) preferred this appeal from order.

3. Brief facts, giving rise to the present appeal, are as follows:-

Respondent Nos. 1 to 3 & 5 instituted a suit bring R.C.S. No.169 of 2002 before learned C.J.J.D. Bhoom for partition and separate possession. (subsequently transferred to C.J.J.D. Washi). Learned Judge of the trial court, by its judgment and decree dated

28.9.2004, decreed the suit. Being aggrieved by the same, original defendant Nos. 1 to 4 preferred appeal before District Court, Osmanabad. Learned Principal District Judge, Osmanabad, by impugned judgment and order dated 10.4.2012, remanded the matter to trial court with certain directions. Hence, this appeal.

4. Learned counsel for the appellants-original defendant Nos. 1 to 4 submits that the lower appellate court, in paragraph Nos. 11 and 12 of the judgment, has observed that defendants themselves may also get a chance to establish that the property at Mumbai has been purchased from joint family funds, to bring it into hotchpotch, and also in paragraph No. 12, specifically observed that the parties would get opportunity as if it is *de-novo* trial, however, failed to issue directions in that regard in the operative part of the order. Learned counsel submits that the appellants-original defendants 1 to 4 therefore, apprehend that the trial court, during the course of trial of the suit, may not permit the appellants-original defendant Nos. 1 to 4 to lead oral or documentary evidence to substantiate their case.

5. Learned counsel for the respondents-original plaintiffs submits that the Principal District Judge, Osmanabad, in the impugned judgment and order specifically made observations and accordingly remanded the matter. Learned counsel submits that the impugned

order thus call for no interference and appeal may be dismissed.

6. Learned Principal District Judge, Osmanabad, in its impugned judgment and order dated 10.4.2012, and more specifically in paragraph Nos. 11 and 12 of the judgment, has made the following observations:-

11. Defendants claim that, there is a property at Mumbai. They have accordingly pleaded in the written statement. Defendants may also get a chance to establish that, the property at Mumbai has been purchased from joint family funds, to bring it in to hotchpot.

12. In any case however, Smt. Manda being necessary party, now it is necessary to give her an opportunity and for that purpose, matter requires to be remanded. Parties would get opportunity as if it is de-novo-trial."

7. Further it appears from the operative part of the judgment and order that, even though the lower appellate court has observed that the parties would get opportunity as it is do-novo trial, but failed to mention the same in the operative part of the order. It thus appears that the apprehension expressed by the appellants is well founded. In absence of any specific direction in the operative part of the order, the trial court may not permit the appellants-original defendant Nos. 1 to 4 to lead oral and documentary evidence to substantiate their

case. Thus, this appeal can be disposed of by modifying the order impugned in this appeal. Hence, the following order:-

O R D E R

- I. The appeal from order is hereby partly allowed.
- II. The judgment and order dated 10.4.2012 passed by learned Principal District Judge, Osmanabad in R.C.A. No.134 of 2004 is hereby modified in the following manner:

“The defendant Nos. 1 to 4 are hereby permitted to lead oral and documentary evidence in support of the rival contentions in the suit.”
- III. The rest of the impugned judgment and order dated 10.4.2012 stands confirmed.
- IV. The appeal from order is accordingly disposed. No costs.
- V. Pending civil application also stands disposed of.

(V. K. JADHAV, J.)