

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

APPEAL FROM ORDER NO. 98 OF 2016

WITH CA/16638/2016 IN AO/98/2016

JYOTIRAM LIMBA SURWASE AND OTHERS
VERSUS
PRALHADRAO MADHAVRAO PATHAK DIED
THROUGH LRS PRABHAKAR PRALHADRAO PATHAK AND OTHERS

...
Advocate for Petitioners : Mr. Vikram S. Undre.
...

CORAM : **V. K. JADHAV, J.**
DATE : 09th January, 2017.

ORDER:

. Being aggrieved by the judgment and order dated 25th November, 2016 passed by the learned District Judge-4, Osmanabad in Regular Civil Appeal No.284 of 2013 to the extent of clause (6) of the operative part of the order, the original Defendants preferred this appeal from order.

2 Brief facts giving rise to the present appeal from order as follows:

The Appellants are the original Defendants in Regular Civil Suit No.129 of 1980. The Respondents / Plaintiffs instituted the said suit for recovery of possession. The learned Trial Court has decreed the said suit and thereby directed the present Appellants to deliver possession of the encroached portion to the

Respondents / Plaintiffs within two months from the date of the order. Being aggrieved by the same, the Appellants / original Defendants preferred Regular Civil Appeal No.284 of 2013 and the learned District Judge-4, Osmanabad by impugned judgment and order dated 25th November, 2016 partly allowed the said appeal and quashed and set aside the order passed by the 2nd Joint Civil Judge Junior Division, Osmanabad in Regular Civil Suit No.129 of 1980 and remanded the matter to the Trial Court for fresh hearing with certain directions. Aggrieved by clause (6) of the operative part of the order, the Appellants / original Defendants approached to this Court by filing the present appeal from order.

3 The learned counsel for Appellants submits that no opportunity to lead evidence is granted to the Appellants / Defendants and further as per clause (6) of the operative part of the order, if the Plaintiffs fail to deposit the amount within stipulated period, the District Judge has directed the Trial Court to decide the matter on the basis of available evidence.

4 As per clause (3) of the operative part of the order, the matter is remanded to the Trial Court for fresh hearing. It does mean that both the parties are at liberty to lead evidence in support of

their rival contentions as the matter has been remanded to the Trial Court for fresh hearing. Further, in paragraph No.34 of the judgment, the lower Appellate Court has observed that the Trial Court held that the Plaintiff has proved encroachment on the basis of measurement map Exhibit – 97 and the said measurement dated 27th May, 1997 was carried in the absence of Defendants. Therefore, it is not legal one.

5 In view of the above, even if the Plaintiff fails to deposit the amount of measurement fees within stipulated period, the Appellants / Defendants need not worry about the same because in view of the observations of lower Appellate Court in paragraph No.34 of the judgment, the earlier measurement is not legal one.

6 In view of the above, this appeal from order deserves no consideration. The same is accordingly rejected.

7 Pending civil application for stay also stands disposed of.

[V. K. JADHAV, J.]

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