

: ORDER BELOW EXH.5 IN CIVIL APPEAL NO.47/2018 :

- 1) This is application for stay of an execution of decree, in Regular Civil Suit No.115/2013 passed by Civil Judge, Jr. Division, Mangaon on 03.05.2018, vide provisions of Order 41 Rule 5 of Code of Civil Procedure, 1908.
- 2) Heard Advocate Shri. K. J. Gandhi for the appellants/original defendants no. 1 & 2 and Advocate Shri. Kamble for the respondent/original plaintiff.
- 3) Ld. Advocate for the appellants submitted that in R.C.S.No.115/2013, the Ld. Lower Court has directed to deliver vacant possession of encroached portion of 14 R of the suit property as shown in map Exh.51 with alphabets A to N, within 2 months from the date of order. Accordingly, the plaintiff has filed Darkhast before Ld. Lower Court and has been applied for delivery of possession. According to him, before purchase of the property by the plaintiff in year 2012, the defendants had constructed tower in the suit property in year 2008. The appellants have hopes to succeed in the appeal. Therefore, it is prayed to stay the decree of delivery of possession.
- 4) On the other hand, Advocate Kamble for the plaintiff submitted that the Ld. Trial Court has rightly held that the defendants have made encroachment in the suit property, owned by the plaintiff. The appellants cannot pray for stay of decree of delivery of possession. Therefore, he prayed to reject the application.

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5) Perused Judgment and Decree. The Ld. Trial Court has held that the defendants have made encroachment to the extent of 14 R in the suit property. However, it is pointed out by the Ld. Advocate for the appellants that mobile tower was constructed in 2008 and thereafter plaintiff had purchased the suit property. If, as per decree, the possession of encroached portion is given to the plaintiff, then appellants will cause substantial loss.

6) Dispossession, during the pendency of an appeal of a party in possession, is generally considered to be 'substantial loss' to the party applying for stay of execution within the meaning of clause (a) of sub-rule (3) of Rule 5 of Order 41 of the Code. Clause (c) of the same provision mandates security for the due performance of the decree or order as may ultimately be passed being furnished by the applicant for stay as a condition precedent to the grant of order of stay. At this stage the appellants have apprehension of losing possession of the suit property. If the decree is executed and possession is delivered to the Plaintiff, the appellants would cause substantial loss. Considering all these facts & circumstances and nature of decree, this Court is of opinion that it is necessary to stay the execution of decree about delivery of possession. Hence, the following order is passed.

: O R D E R :

- 1) Application below Exh.5 is allowed.
- 2) An execution of decree in Regular Civil Suit No.115/2013 passed by Civil Judge, Division, Mangaon on 03.05.2018, is

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hereby stayed for the period of 6 months from the date of this order on following condition :-

- (i) The appellants shall furnish security of immovable property of Rs.1,00,000/- within a week from the date of this order.
- (ii) If the appellants failed to fulfill the condition, this application will stand rejected.

(Dictated and pronounced in open Court)

Mangaon.
Date : 04.01.2019.

(R. V. Lokhande)
Adhoc District Judge-1
Mangaon-Raigad