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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.4 OF 2015

Jadabai w/o Ananta Kale
(Died) Through Legal Heir
Rangnath Ananta Kale,
Age - 71 years, Occ - Agriculture
R/o Gosaviwadi (Donja),
Taluka - Paranda, District - Osmanabad

APPELLANT

VERSUS

1. Chandrakant Ananta Kale
Age - 75 years, Occ - Agriculture
R/o Aleshwar, Taluka - Paranda
District - Osmanabad

RESPONDENTS

2. Jadabai Ananta Kale
(Since deceased) Through her LRs

Gangubai Jagannath Koli
(Since Deceased) Through LR

Bapu Jagannath Koli,
Age - 31 years, Occ - Agriculture
R/o Domgaon, Taluka - Paranda
District - Osmanabad

3. Talku Ganpat Koli (Surwase)
(Since deceased) Through LRs

3A- Baban Talku Koli (Surwase)
Age - 39 years, Occ - Agriculture
R/o Aleshwar,
Taluka - Paranda, District - Osmanabad

3B- Babusha Talku Koli (Surwase)
Age - 37 years, Occ - Agriculture
R/o As above

3C- Dilip Talku Koli (Surwase)
Age - 35 years, Occ - Service

As police Constable at Karmala,
Taluka - Karmala, District - Solapur

3D- Mithu Talku Koli (Surwase)
Age - 33 years, Occ - Service
As driver in MSRTC, Karmala,
Taluka - Karmala, District - Solapur

3E- Sanjay Talku Koli (Surwase)
Age - 31 years, Occ - Service
As watchman in MSRTC, Karmala
Taluka - Karmala, District - Solapur

3F- Subabai Talku Koli (Surwase)
Age - 79 years, Occ - Household
R/o Aleshwar, Taluka - Paranda,
District - Osmanabad

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Mr. Anant R. Devakate, Advocate for the appellant

Mr. S. S. Choudhari, Advocate for respondent N.1

Mr. Abhijit S. More, Advocate for respondents No.3A,3B,3D to 3F

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 20th SEPTEMBER, 2016

ORAL JUDGMENT :

1. This second appeal comes up for consideration in very peculiar facts and circumstances. Regular Civil Suit No.137 of 1987 had been instituted by one Jadabai against respondents No.1 and 3 - original defendants No.1 and 2 for cancellation of sale deed executed in favour of defendant No.1 and for declaration of ownership over the suit property and for injunction against defendant No.1 from interfering with her possession. A

decree came to be passed by the trial court about plaintiff and defendant No.2 being joint owners and placing restraint on defendant No.1 from interfering with their possession and the sale deed in favour of defendant No.1 had been cancelled.

2. It is against aforesaid decision, Regular Civil Appeal No.41 of 1991 had been preferred and the same came to be decided under order dated 16th October, 2012 dismissing the suit. Jadabai died during pendency of said Regular Civil Appeal and present appellant, who happens to be her one of the sons and his one more sister had been brought on record as legal heirs of deceased Jadabai. Appellant in Regular Civil Appeal - original defendant No.1 happens to be other son of Jadabai.

3. After hearing learned advocates, it emerges that during pendency of suit, although defendant No.1 Chandrakant had been served and had put in appearance, "*no written statement*" order had been passed against him, which came to be set aside, albeit, subject to payment of costs. Chandrakant had faltered in depositing said cost and, as such, written statement could not come on record and the suit went on. Chandrakant, thereafter did not participate in the suit proceedings, as stated above, the suit came to be decreed.

4. In Regular Civil Appeal, present appellant, legal heir of deceased Jadabai, in spite of service did not participate and the appeal came to be decided deducing that since present appellant had not come before the court, to claim that sale deed executed by deceased Jadabai to be fraudulent and without consideration and further that being one of the legal heirs, defendant No.1 - Chandrakant would be entitled to half of the suit land, even in absence of sale deed and defendant No.1 being in possession since 1976, it would not be necessary to remand the case. The appellate court further has considered that since fraud or misrepresentation is pleaded, though suit went *ex-parte*, it was expected from the trial court to call for expert's evidence to know that the signature on the sale deed whether really belonged to plaintiff or not and such pleas cannot be accepted as proved only on affidavit. The appellate court thus went on to dismiss the suit.

5. **Admit.**

6. The substantial questions that may arise for consideration are -

i. Whether the inference drawn by the appellate court, as observed aforesaid, is

sustainable in facts and circumstances of the case?

ii. Whether the present appellant would be absolutely excluded from suit property after death of original plaintiff Jadabai, taking away his legitimate share by inheritance to the property left behind by Jadabai under sale deed which had been cancelled by the trial court?

7. Heard learned advocates for the appearing parties finally with consent.

8. As it would emerge in the facts and legal position, there is no written statement and resistance to the pleadings in the plaint and as such, the suit went uncontested without there being any issue having been framed. In the circumstances, the considerations which appear to have swayed the appellate court for dismissal of the suit may not be an approach in the facts and circumstances of the case, which can be sustained and further that while the matter went uncontested for want of cognizable written statement, deduction being drawn from the absence of present appellant before first appellate court that defendant No.1 would succeed to half share in absence of sale deed, the court appears to have fallen oblivious of that by dismissal of the suit,

present appellant's share would be totally done away with, since defendant No.1 would gain ownership over the suit property. In the circumstances, contest on merits appear to be necessary and for the same the matter ought to be remanded.

9. In view of aforesaid, remand of the matter appears to have been called for. The substantial questions are answered accordingly.

10. The impugned order passed by the first appellate court dated 16th October, 2012 is set aside, subject to payment of costs of Rs.10,000/- to be paid by the appellant, to be equally shared amongst two original defendants, for the inconvenience caused to them in the process due to his non appearance before first appellate court. The costs should be deposited in the trial court. It is further directed that the written statement as filed by defendant No.1 be taken on record with enhancement of costs to Rs.1000/- from Rs.50/-, as had been directed by the trial court earlier on, for showing callous disregard to obey order of court. Costs on either side be deposited within a period of six weeks from the date of receipt of writ of this order to the trial court. Suit is accordingly expected to be proceeded with expeditiously and disposed of preferably within a period of six months from

the date of receipt of writ of this order.

11. The second appeal as such, stands allowed to aforesaid extent.

[SUNIL P. DESHMUKH, J.]

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