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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO. 53 OF 2013

1. Namdeo s/o Maruti Bandal,
Age: 63 years, Occu: Agri.,
R/o Khatgaon Takali,
Taluka and Dist. Ahmednagar

2. Bhausahab @ Bhagwat s/o Maruti Bandal,
Age: 63 years, Occu: Agri.,
R/o Khatgaon Takali,
Taluka and Dist. Ahmednagar

..APPELLANTS
(Orig.Deft.Nos.1 & 2)

VERSUS

1. Bhausahab s/o Radhuji Bandal,
Age: 75 years, Occu: Agri.,
R/o Khatgaon Takali,
Taluka and Dist. Ahmednagar

2. Tukaram s/o Radhuji Bandal,
Age: 77 years, Occu: Agri.,
R/o Khatgaon Takali,
Taluka and Dist. Ahmednagar

..RESPONDENTS

Mr N. K. Kakade, Advocate for appellants;
Mr V. S. Bedre, Advocate for respondent No.1

CORAM : N.W. SAMBRE, J.

DATE : 19th July, 2017

ORAL ORDER

One Genu was blessed with two sons, namely, Tukaram and Raghuji. Tukaram was blessed with son Maruti, who filed suit, being Regular Civil Suit No. 294 of 1966 on 26th September, 1966, in which the learned 2nd Joint Civil Judge Junior Division, Ahmednagar, vide judgment and decree dated 31st July, 1969 directed Madhav, Tukaram and Bhausahab, sons of Raghuji, to deliver the share to the extent of half of the property out of Survey No. 39/1 and 39/2, situated at Khatgaon Takali, Dist. Ahmednagar.

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2. Subsequent thereto, Bhausahab – defendant No.3 to the said suit filed another suit being Regular Civil Suit No. 51 of 2004, whereby an injunction is sought against present appellants-original defendants not to interfere with possession to the extent of 1/3rd share in the said suit property i.e. survey No. 39/1 and 39/2, which got new Gat Nos. 103/1 and 103/2.

3. In an appeal, being Appeal No. 32 of 2007, preferred by the present appellants, the learned District Judge, on 9th August, 2012, dismissed the same. As such, this second appeal.

4. Mr Kakade, learned Counsel appearing on behalf of appellants – original defendant Nos.1 and 2 would urge that the judgment in earlier suit i.e. Regular Civil Suit No. 294 of 1966, decided on 31st July, 1969 was produced before the learned appellate Court and same was allowed and taken on record by the learned District Judge, vide order dated 16th November, 2009. According to him, the least that was expected of the lower appellate Court was to deal with the said judgment, particularly in the light of provisions of Section 41, 42 and 43 of the Evidence Act. While inviting attention of this Court to the impugned judgment and order passed by the lower appellate Court, he would urge that the lower appellate Court lost sight of the said judgment and has delivered the judgment under challenge, by taking contrary view to the said judgment.

5. According to him, the question of law that is required to be considered is, whether lower appellate Court has committed an error of law by not appreciating the judgment delivered in Regular Civil Suit No.294 of 1966, decided on 31st July, 1969.

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6. Per contra, Mr Bedre, learned Counsel appearing on behalf of respondent No.1, while inviting attention of this Court to the observations made by the learned lower appellate Court would urge that execution proceedings, being Regular Darkhast No. 3 of 1959 was properly appreciated. According to him, the issue in between one Vyankatesh and the present appellants was adjudicated and as such, the judgment of the Trial Court in Regular Civil Suit No. 294 of 1966 was rightly ignored. According to him, against concurrent findings, no case for interference is made out, as such, appeal is liable to be dismissed.

7. Having considered rival submissions, it is required to be noted that though not any specific terms, i.e. under Order XLI, Rule 27 of the Code of Civil Procedure, appellants have not produced the documents i.e. judgment delivered in Regular Civil Suit No.294 of 1966, however, by a simplicitor application for production of documents, the appellate Court has permitted production of documents on 16th November, 2009. In the said judgment, it was decided between the parties to the said proceedings and directed that the plaintiff to the said suit, namely, Maruti Tukaram Bandal will be entitled for half share in the suit property.

8. Findings in the said judgment, if appreciated, particularly in the backdrop of the findings recorded in the Regular Civil Suit No.51 of 2004, which was preferred by Bhausahab – defendant No.3 in which, it has to be held that in both the suits contradictory judgments have been delivered in relation to the same property.

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9. It was expected of the lower appellate Court to consider the judgment delivered in Regular Civil Suit No. 294 of 1966 and reconcile the findings recorded therein with that of issue, which is sought to be canvassed before it in the later suit, being Regular Civil Suit No. 51 of 2004.

10. A clear case for interference in the second appellate jurisdiction, in my opinion, is made out.

11. As such, the judgment of the lower appellate Court delivered in Regular Civil Appeal No. 32 of 2007, decided by the learned Principal District Judge, Ahmednagar on 9th August, 2012, is hereby quashed and set aside.

The said appeal stands restored to the file of learned District Judge, Ahmednagar, before whom the parties herein agree that they shall appear on 21st August, 2017.

The appellants will be at liberty to take out an application under Order XLI, Rule 27 of the Code of Civil Procedure and if required, may lead additional evidence since the application to produce documents is already allowed by the lower appellate Court.

It is expected of the lower appellate Court to decide the appeal expeditiously and in any case, within a period of six months from the date of appearance of the parties before it.

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As such, second appeal stands partly allowed.

(N.W. SAMBRE, J.)

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