

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Civil Application (CAS) No.69 of 2016
In
Second Appeal Stamp No.23108 of 2015
(Sukhdeo s/o Charandas Thakare and another v. Shrirang s/o Shalikram
Thakre)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri U.J. Deshpande, Advocate, holding for Shri V.R. Mundra,
Advocate for Applicants/Appellants.
Shri N. Bhishikar, Advocate for Respondent.

Coram : R.K. Deshpande, J.
Date : 1st March, 2017

Civil Application (CAS) No.69 of 2016 :

Heard the learned counsels appearing for the parties.

For the reasons stated in the application, which remain uncontroverted, I am satisfied that a sufficient cause is made out for condonation of four days' delay caused in filing an appeal.

Hence, the civil application is allowed. The delay causes is condoned.

The civil application stands disposed of.

Second Appeal Stamp No.23108 of 2015 :

Heard the learned counsels for the parties.

The Trial Court dismissed the suit, recording the finding that the plaintiff has failed to establish that the Will dated 16-9-2008 executed by Banabai in favour of the defendants, is false, fabricated and concocted document. It is also the finding recorded that the plaintiff has failed to establish that the suit land has been purchased by the plaintiff's father in the name of Banabai out of the income of the joint family. It further holds that the suit is barred by the principles of *res judicata* in view of the decision in Regular Civil Suit No.52 of 1999.

The lower Appellate Court partly allows the appeal and sets aside the finding of the Trial Court with regard to proof of Will dated 16-9-2008. The lower Appellate Court records the finding that the plaintiff has failed to establish that the suit was the ancestral property and that the Will executed by Banabai in favour of the defendant Nos.1 and 2 is not proved. The lower Appellate Court, however, does not set aside the dismissal of the suit by the Trial Court.

If the plaintiff is coming before the Court with a plea that the Will dated 16-9-2008 is fraudulent, then unless such a burden is discharged, the plaintiff would not succeed. Be that as it may, the Trial Court dismissed the suit and the lower Appellate Court has not set aside the dismissal of the suit. Hence, the question is whether the second appeal is maintainable only against the reversal of the findings by the lower Appellate Court. It is proposed that the finding of the lower Appellate Court that the Will is not proved, can be set aside to maintain the dismissal of appeal by the lower Appellate Court.

The learned counsels to address this Court on the aforesaid question.

Put up this matter on 8-3-2017, by way of last chance. No further adjournment shall be granted.

Judge.

Lanjewar