

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

Second Appeal No.110 of 2017
(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 Appellants.
Shri Nitin Bhishikar, Advocate for Respondent.

Coram : R.K. Deshpande, J.
Date : 8th March, 2017

On 1-3-2017, this Court passed an order in this second appeal on merits after condoning the delay caused in filing an appeal. The said order is reproduced below :

“ *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.”

The learned counsels appearing for the parties submit that the second appeal can be dismissed with the observation that the finding recorded by the lower Appellate Court in respect of the Will shall not come in the way of any of the parties in any subsequent proceeding, which can be decided in accordance with law.

Hence, with this clarification, the second appeal is dismissed.

Judge.