

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

**SECOND APPEAL NO.158 OF 2022 WITH
CIVIL APPLICATION NO.14278 OF 2019**

Devidas s/o Zagdu Koli

... APPELLANT

VERSUS

Subhash s/o Sravan Koli

... RESPONDENT

.....

Mr. P.B. Patil, Advocate for appellant

Mr. Girish Rane, Advocate for respondent

.....

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CORAM : R. G. AVACHAT, J.

DATE : 22nd JUNE, 2022.

ORDER :

Both these Second Appeals are being disposed of by this common order since parties thereto are same, and the challenge is also to one and the same judgment and decree dated 17/12/2016, passed in Regular Civil Suit No.129/2013

and confirmed by the District Judge-1, Amalner in Regular Civil Appeal Nos.3/2017 and 14/2018. The appellant in both these appeals is the original defendant in the suit. The respondent and his mother, deceased Laxmibai filed the suit, Regular Civil Suit No.129/2013 for partition and separate possession of agricultural lands and house property as well. A sale deed dated 11/6/2003, executed by the father of the respondent No.1 was also sought to be set aside on the ground of the same having been got executed by practicing fraud etc.

2. The trial Court, vide judgment and decree dated 17/12/2016, partly decreed the suit. Both the plaintiff and defendant in the suit, therefore, preferred two separate appeals. The respondent herein preferred appeal on the ground of having been not granted relief of setting aside the sale deed. While the appellant herein filed the appeal, contending that, though he was served with the suit summons, could not appear before the Court due to untimely death of the original plaintiff Laxmibai.

3. The first appellate Court allowed the appeal preferred by the original plaintiff and granted decree in toto as was asked for in the suit. The appellate Court held the

appeal preferred by the appellant herein to have not been maintainable since remedy for him was to file an application under Order IX Rule 13 of the Code of Civil Procedure. In support of the reasons, the appellate Court relied on the judgment of this Court in case of Shobha wd/o Suresh Kurekar Vs. Mohan s/o Suresh Kurekar [2017(3) Mh.L.J. 334].

4. Heard. The learned counsel for the appellant made submissions consistent with his stand before the appellate Court and in the grounds of this Second Appeal. The learned counsel for the respondent would, on the other hand, submit that, the first appellate Court has rightly observed the appeal to have not been maintainable. He reiterated the reasons given by the first appellate Court for dismissal of the appellant's appeal.

5. Considered the submissions advanced. Perused the impugned judgment. It is a dispute pertaining to agricultural lands and house property as well. A sale deed executed by the plaintiff's father way back in 2003 was sought to be set aside by filing a suit in October 2013. The grounds for setting aside the said sale deed were based on fraud. The plaintiff's father did not file such suit during his lifetime. True, it is a matter of evidence to be considered. Suffice it to say

that the first appellate Court allowed the appeal preferred by the original plaintiff for the reason that the appellant herein neither filed his written statement nor took exception to the evidence let-in on behalf of the plaintiff. The appellate Court also found that the limitation for setting aside the sale deed is of 12 years in view of Article 109 of the Limitation Act. This Court has reservations to concede to this reasoning. Moreover, the appeals have not been argued on merits. This Court is inclined to allow the same as the appellant herein did not have an opportunity to meet the case of the respondent/plaintiff.

6. After having gone through the judgment of the first appellate Court, decreeing the suit in toto, this Court finds it to be a fit case to remand the matter back to the first appellate Court with a view to give the appellant herein an opportunity of hearing.

7. For the reasons given hereinabove, both the appeals are allowed in terms of the following order :-

ORDER

- (i) Both the Second Appeals are allowed.

- (ii) The judgments and decree impugned in both the appeals are set aside.
- (iii) Regular Civil Appeal No.3/2017 is remitted back to the first appellate Court, for deciding it on its own merits within a time-frame of six months from the date of receipt of copy of this order, after giving opportunity of hearing to the parties thereto.
- (iv) The appellant shall pay the respondent a sum of Rs.25,000/- (Rupees twenty five thousand) as costs immediately before the first appellate Court.
- (v) The amount of cost deposited with this Court towards allowing the application for condonation of delay be remitted to the first appellate Court, for being paid to the respondent.

**(R. G. AVACHAT)
JUDGE**

fmp/-