

**IN THE HIGH COURT AT BOMBAY  
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 319 OF 2005

1. Rangnath s/o. Asaram Patil,  
Age 54 years, Occu. Agril.,  
R/o. Gangapur, T. Gangapur,  
District : Aurangabad.
2. Asaram s/o. Shamrao Patil,  
(Died through his L.Rs.)
- 2A. Vishwanath s/o. Asaram Patil,  
Died through L.Rs.
- 2A-1. Kamal w/o. Vishwanath Patil,  
Age 70 years, Occu. Household,  
R/o. 10, Shriniketan Colony,  
Jalna Road, Aurangabad.
- 2A-2. Narendra s/o. Vishwanath Patil,  
Age 40 years, Occu. Business,  
R/o. 10, Shriniketan Colony,  
Jalna Road, aurangabad.
- 2A-3. Yogesh s/o. Vishwanath Patil,  
Age 35 years, Occu. Business,  
R/o. 10, Shriniketan Colony,  
Jalna Road, aurangabad.
- 2B. Dwarkadas s/o. Asaram Patil,  
Age 71 years, Occu. Agril.,  
R/o. Krushnapur, At Post Bidkin,  
Tq. Paithan, Dist. Aurangabad.
- 2C. Jagganath s/o. Asaram Patil,  
Age 65 years, Occu. Agril.,  
Plot No. 9, Seva Nagari Society,  
N-8, CIDCO, Aurangabad.
- 2D. Rangnath s/o. Asaram Patil  
(Applicant No. 1), Age 61 years,  
Occu. Agri., R/o. Gangapur,  
Tq. Gangapur, Dist. Aurangabad.

- 2E. Eknath s/o. Asaram Patil,  
Age 55 years, Occu. Business,  
Plot No. 9, Seva Nagari Society,  
N-8, CIDCO, Aurangabad.

**....Appellants.**

**Versus**

1. Kalabai w/o. Laxman Patil,  
Age 59 years, Occu. Agril.,  
and household, R/o. Patil Galli,  
Gangapur, Tq. Gangapur,  
District : Aurangabad.
2. Kailash s/o. Laxman Patil,  
Age 32 years, Occu. Agril.,  
R/o. Patil Galli, Gangapur,  
Tq. Gangapur, Dist. Aurangabad.
3. Latabai w/o. Apparao Nage,  
Age 34 years, Occu. Household,  
R/o. Block No. 271, Flated  
Building No. 1, Second Floor,  
Eknathnagar, Aurangabad.  
At present Alankar Housing Soci.,  
Near Gajanan Maharaj Mandir,  
Pundliknagar Road, Garkheda,  
Aurangabad.
4. Deorao s/o. Haibati Shaikh,  
Age 59 years, Occu. Agril.,  
R/o. Ganeshwadi, Tq. Gangapur,  
District Aurangabad.
- 4A. Sonabai Deorao Shelke,  
Age 65 years, Occu. Household,  
R/o. Ganeshwadi, Tq. Gangapur,  
Dist. Aurangabad.  
(Died - Order dt. 17.7.2008)
- 4B. Vithal Deorao Shelke,  
Age 45 years, Occu. Agril.,  
R/o. Ganeshwadi, Tq. Gangapur,  
District Aurangabad.

5. Uttam s/o. Laxman Nirphal,  
Age 39 years, Occu. Agril.,  
R/o. Ganishwadi, Tq. Gangapur,  
District : Aurangabad.

**....Respondents.**

Mr. A.S. Bajaj, Advocate for appellants.

Mr. A.V. Hon, Advocate h/f. Mr. V.D. Hon, Sr. Counsel, for  
respondent No. 2.

**CORAM : T.V. NALAWADE, J.**

**DATED : 4th August, 2016.**

**JUDGMENT :**

1) The appeal is filed against judgment and decree of Regular Civil Appeal No. 112/2005, which was pending in the Court of 5th Ad-hoc Additional District Judge, Aurangabad. This appeal was filed by the defendants of Special Civil Suit No. 41/1977, which was pending in the Court of Civil Judge, Senior Division, Aurangabad. In the suit filed by present appellants, plaintiffs, the decree of possession and mesne profit was given to them by Trial Court on the basis of gift document executed by owner of the suit property in favour of plaintiff No. 1. This decision is set aside by the First Appellate Court. Heard both the sides.

2) In short, the facts leading to the institution of the appeal, can be stated as follows :-

The suit was filed in respect of agricultural land

Survey No. 177 situated at Gangapur, District Aurangabad. It is contended that Shamrao was the owner of this land and few other lands and Shamrao had died issueless. It is contended that after the death of Shamrao, his widow Drupadabai adopted plaintiff No. 2 - Asaram.

3) It is the case of plaintiffs that defendant No. 1, a relative of Drupadabai, was against this adoption. Other defendants are relatives of defendant No. 1. It is the case of plaintiffs that there was dispute between Asaram and Drupadabai and then Asaram had filed the suit against Drupadabai in respect of the present suit property and all other properties left behind by Shamrao. It is contended that in the said suit, which was numbered as 30/1 of 1355 Fasli, compromise took place between Drupadabai and plaintiff No. 2 - Asaram and under the compromise, Drupadabai admitted that Asaram was adopted by Drupadabai. It is contended that as per the compromise, land Survey Nos. 153, 304 and 89 were given in possession of plaintiff No. 2 as owner besides some other properties and the suit land Survey No. 177 was given to Drupadabai and she was to enjoy the property during her lifetime. It is the case of plaintiffs that Drupadabai was not given any right to alienate the property and she was to enjoy the

income of the property for her maintenance. It is the case of plaintiffs that after the death of Drupadabai, property was to revert back to Asaram.

4) Drupadabai expired on 9.5.1974. It is the case of plaintiffs that Drupadabai was having love and affection towards plaintiff No. 1, who is son of plaintiff No. 2 and so, she gave the suit property by way of gift to plaintiff No. 1 under gift deed dated 16.2.1974. It is contended that the said gift was accepted by plaintiff No. 1 and under the gift, plaintiff No. 1 had taken the possession of the property.

5) It is the case of plaintiffs that on 19.1.1976 defendants illegally entered the suit land and they gave threat of dispossession. It is contended that initially suit bearing R.C.S. No. 7/1976 was filed for relief of injunction and during pendency of the suit, plaintiffs lost the possession to defendants as no temporary injunction was granted in their favour. It is contended that due to this circumstance, they were required to file present suit for relief of possession. They contended that in suit filed for injunction, defendant No. 1 had falsely contended that under oral contract the suit land was given for cultivation to defendants by Drupadabai on Batai ( बटाई ) basis in 1968. It is

contended that some record is created by defendants to show that they are in possession, but that false record is created by joining hands with Talathi. It is contended that Shamrao, adoptive father of plaintiff No. 2 and Yeshwant, father of defendant No. 1 - Laxman were real brothers and so, they want to grab the suit property. Thus, relief of possession was claimed by the two plaintiffs under their different rights like right of plaintiff No. 1 under gift document and right of plaintiff No. 2 as successor of Drupadabai.

6) The defendants contested the matter by filing written statement. They denied everything. They denied that Drupadabai had made gift of suit property in favour of plaintiff No. 1 and possession was given by Drupadabai to plaintiff No. 1.

7) It is the case of defendants that in the year 1968, in presence of witnesses, who include some defendants, the possession was given by Drupadabai to defendant No. 1 and he was expected to cultivate the land as tenant of Drupadabai. It is contended that during lifetime of Drupadabai, defendant No. 1 cultivated the land as her tenant and plaintiffs were never taking care of Drupadabai. It is contended that right from the beginning, from 1968, defendant No. 1 was in possession, but

false suit was filed for relief of injunction by plaintiff No. 1 bearing R.C.S. No. 7/1976. Thus, the defendants tried to protect the possession by contending that they are tenants in possession.

8) Issues were framed on the basis of aforesaid pleadings. Both the sides gave evidence. The Trial Court held that the plaintiffs have proved that property was gifted by Drupadabai in favour of plaintiff No. 1. The Trial Court held that defendants are not tenants as the said point is already decided by competent authority against the defendants. By giving such finding, the suit was decreed in favour of plaintiff No. 1. The First Appellate Court has held that Asaram was duly adopted by Drupadabai, but plaintiff No. 1 failed to prove that he had accepted the gift. The First Appellate Court has further held that as cross-objection or cross-appeal was not filed against decision of Trial Court by which relief was refused to plaintiff No. 2, it was not possible to decree the suit in favour of plaintiff No. 2, the adoptive son of Drupadabai.

9) This Court admitted the appeal on 1.8.2008 on following substantial questions of law :-

(A) When gift-deed is not held to be proved, whether appellants can claim right to the suit property by inheritance ?

(B) Whether omission to challenge decree in the District Court would disentitle the appellants from getting relief of possession ?

Additional Substantial question of law :-

(C) Whether, the District Court has committed error in holding that 'gift' is not proved by plaintiff No. 1 ?

10) The nature of pleadings in written statement show that defendants cannot retain the possession of the suit property and the owner of the suit property is entitled to get possession from the defendants. In view of this circumstance, it was sufficient for either plaintiff No. 2 or plaintiff No. 1 to prove that plaintiff No. 2 was adoptive son of Drupadabai or property was gifted to plaintiff No. 1 by Drupadabai. Plaintiff Nos. 1 and 2 are sons and father and their interests are not conflicting with each other. The Trial Court had held that the decree of suit No. 30/1 of 1355 Fasli is not binding on defendants. However, it was held that the gift in favour of plaintiff No. 1 was proved and so, the suit was decreed in favour of plaintiff No. 1. It is not disputed by defendants that there was a suit between Drupadabai and

plaintiff No. 2 in which adoption of plaintiff No. 2 by Drupadabai was in question. It is also not disputed that in the said suit, compromise had taken place between Drupadabai and plaintiff No. 2. Copy of the decision given in the said suit is produced on record. Though this Court could not find translation either in English or in Marathi of the said document, in the evidence, son of defendant No. 1 has stated that Drupadabai used to tell them that adoption was false. He has given evasive answers in respect of the effect of decision of the previous suit like the some properties which were standing in the name of Drupadabai were transferred in the name of plaintiff No. 2.

11) On the other hand, there is specific evidence of plaintiff No. 2 - Asaram on aforesaid points in addition to copy of decision given by Civil Court on the basis of compromise. The said copy of compromise was produced on the record and is given Exh. 79. The Trial Court had accepted that under this compromise, suit property was left with Drupadabai, but only because the defendants were not party to the suit, it was held that the decision of the previous suit was not binding on the defendants. Under Hindu Law, Drupadabai was competent to take plaintiff No. 2 in adoption and she had accepted the fact of adoption in previous suit. This adoption was accepted by

Drupadabai in 1355 Fasli, but that decision was never challenged by the defendants, if they were entitled to succeed to the property after Drupadabai. Steps were taken on the basis of said compromise and most of the properties which were standing in the name of Drupadabai were given to the share of plaintiff No. 2. In view of these circumstances, it cannot be said that the said decision is not binding on defendants. Thus, the Trial Court ought to have held that plaintiff No. 2 was validly adopted by Drupadabai. The First Appellate Court has given such finding, but the First Appellate Court has not protected the decree on that ground. Further, the provision of section 14 (2) of Hindu Succession Act, 1956 would have helped plaintiff No. 2 if under compromise decree rights of Drupadabai were restricted.

12) The defendants have not disputed that Drupadabai had executed registered gift document in favour of plaintiff No. 2. There is evidence of plaintiff No. 1 on the gift and on acceptance of gift and plaintiffs have examined one Sheshrao Bhagwat, attesting witness, on the gift document. The gift document is proved as Exh. 82.

13) The First Appellate Court has held that plaintiff No. 1 has failed to prove that he had accepted the gift. The reasoning

given by the First Appellate Court are not convincing. The First Appellate Court has discarded the evidence on gift on following grounds :-

(i) There was a condition that in old age of Drupadabai, Rangnath, plaintiff No. 1 was to maintain her.

(ii) She has admitted that there was some misunderstanding between her and Asaram in the past, but that dispute was settled by her. The First Appellate Court has held that there is nothing on the record to show that the relations between plaintiff No. 2 and Drupadabai had improved and this is observed in view of the circumstance that in the suit of 1967, Asaram had challenged the transfer of one house property by Drupadabai. In view of these circumstances, the District Court has held that it is not possible that Drupadabai had inclination to give the property to son of Asaram.

(iii) The circumstance that in the gift document, the property already transferred by Drupadabai is also shown to be given to plaintiff No. 1.

14) If the provisions of Transfer of Property Act like

sections 122 and 123 are kept in mind, it can be said that there is record like registered gift document which is duly proved and there is the evidence of donee to the effect that he had accepted the gift. Before Sub-Registrar, Drupadabai admitted that she had given the property by way of gift to donee mentioned in the document and she had mentioned in the document itself that plaintiff No. 1 had accepted the gift. The 7/12 extracts show that the name of Rangnath was entered in the revenue record as owner, though the 7/12 extracts also show that name of defendant No. 1 was there in the crop cultivation column from 1968-69. This evidence is sufficient to infer that the gift was accepted by Rangnath. In any case, the property would have come to Asaram, if plaintiff No. 1 was not able to prove that there was valid gift in his favour and he had accepted it. The so called admission given before Tenancy Court by Asaram about the possession of defendants over the suit property cannot make much difference when Civil Court is considering the suit for possession on the basis of title.

15) When the decree was challenged by original defendants in District Court, it was open to Asaram to argue against the finding given by the Trial Court that the decision of the previous suit of 1355 Fasli is not binding on the defendants

i.e. the adoption was admitted by Drupadabai. Surprisingly, the First Appellate Court has held that it was necessary for Asaram to file cross-objection or cross-appeal to challenge that finding. It can be said that there was alternate relief claimed on the aforesaid two grounds by father and son and in any case, they were bound to succeed. In the appeal, Asaram was respondent and this point was argued for Asaram and so, it was not proper on the part of First Appellate Court to hold that Asaram ought to have challenged the decree by filing cross-appeal or cross-objection. Asaram and his sons were together and they had no conflicting interests.

16) On the aforesaid points, the learned counsel for appellants, original plaintiffs placed reliance on the cases like **(1999) 4 Supreme Court Cases 423 [Superintending Engineer and ors. Vs. B. Subba Reddy], (1999) 7 SCC 435 [Ravinder Kumar Sharma Vs. State of Assam and ors.] and AIR 2002 SUPREME COURT 2562 [Nalakath Sainuddin Vs. Koorikadan Sulaiman]**. In the first case, the Apex Court has discussed the entire law developed on the provision of Order 41, Rule 22 of Civil Procedure Code and the principles which emerge are quoted in para No. 23. It is made clear that if the respondents do not want modification of the decree and they

want only to support the decree, they can argue against the finding given by the Trial Court which could have also been base for giving decree and for that, it is not necessary for them to file cross-objection or cross-appeal. In the present case also, the present appellants did not want modification of the decree, though in strict sense, it can be said that the claim of plaintiff No. 2 of possession on the basis of his title as successor of Drupadabai was not accepted. That was clear error on the part of Trial Court and that is already discussed. Similar observations are made in the remaining two cases by the Apex Court. The learned counsel for appellants argued on provisions of Order 41, Rule 33 of Civil Procedure Code also, but there is no need of consideration of that provision in view of the aforesaid rights of appellants.

17) The discussion made above shows that in any case, plaintiffs were bound to succeed. This Court holds that, due to absence of objection of plaintiff No. 2, Drupadabai was competent to give the property by way of gift to plaintiff No. 1 and as the valid gift is proved in favour of plaintiff No. 1, the decree which was given by the Trial Court needs to be restored. In the result, following order.

**ORDER**

Appeal is allowed. Judgment and decree delivered by the District Court in Regular Civil Appeal No. 112/2000 is hereby set aside. The decision of the Trial Court given in Special Civil Suit No. 41/1977 is restored.

**[ T.V. NALAWADE, J. ]**

ssc/