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

**SECOND APPEAL NO.108 OF 2017
WITH
CIVIL APPLICATION NO.2051 OF 2017**

1. Smt. Bibi wd/o Sk. Sadek,
Age: 36 years, Occu: Household
2. Sk. Rajek s/o Sk. Sadek,
Age: 14 years, Occu: Education
3. Sk. Tarek s/o Sk. Sadek,
Age: 8 years, Occu: Education,
Nos. 2 & 3 all minors u/g.
of appellant No.1
All R/o Jamalshah Colony,
Sillod, Tq. Sillod,
Dist. Aurangabad

..APPELLANTS
(Orig.pltffs.)

VERSUS

1. Bashirkha Gulabkha Pathan,
Age: 50 years, Occu: Agril.,
R/o. Borgaon Bazar, Tq. Sillod,
Dist. Aurangabad
2. Sandip Ashokchand Patni,
Age: 38 years, Occu: Business,
R/o Shastri Colony, Sillod,
Tq. Sillod, Dist. Aurangabad
3. Vijaykumar Badrinarayan Rathi,
Age: 52 years, Occu: Business,
R/o Sambhaji Nagar, Jalna,
Tq. & Dist. Jalna
4. Jaykisan Ramkishan Jindal,
Age: 57 years, Occu: Agril.,
R/o Sadan Bazar, Jalna,
Tq. & Dist. Jalna
5. Abedkha s/o Sharifkha,
Age: 19 years, Occu: Agril.,
R/o Rahemaniya Colony,
Aurangabad, Dist. Aurangabad

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6. Sanjay s/o Shenphad Dange,
Age: 33 years, Occu: Agril.,
R/o Pimpalgaon Petha,
Tq. Sillod, Dist. Aurangabad

..RESPONDENTS

Mr P. G. Godhamgaonkar, Advocate for appellants;
Mr V. I. Thole, Advocate for respondent Nos.1 to 4

CORAM : NITIN W. SAMBRE, J.**DATE : 23rd November, 2017****ORAL ORDER**

The appellants are plaintiffs in Special Civil suit No.30 of 2010, which was filed for declaration of sale deed as null and void and perpetual injunction.

2. The Trial Court, by judgment and decree dated 5th September, 2011, decreed the suit declaring the sale deed dated 10th September, 2008, in relation to the land mentioned therein at Exh.41, as null and void and also passed an order of injunction. The said judgment and decree was upset in Regular Civil Appeal No.22 of 2013, by the judgment and order dated 22nd September, 2016, passed by the learned District Judge. Thus, the present Second Appeal.

3. Heard Mr Godhamgaonkar, learned Counsel appearing on behalf of the appellants-plaintiffs. According to him, the suit was rightly decreed by the Trial Court, which decree was upset by the first appellate court without appreciating the very factual matrix and evidence. He would urge that

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respondents-defendants never appeared before the Trial Court, the fact as regards execution of the sale deed in question for want of legal necessity and transfer of the property of the original owner by virtue of a power of attorney by a dead person, are the issues which are not considered by the first appellate court. He would try to impress upon the Court to frame substantial question of law on the said issue.

4. It is not in dispute that one Sanjay Wankhede was appointed as power of attorney holder on behalf of the appellants to conduct the suit in question.

5. So far as the suit property is concerned, same was owned by the husband of appellant no.1 Sk. Sadeq, who died on 4th April, 2009 i.e. prior to execution of sale deed dated 10th September, 2008, which is at Exh.41.

6. Under the Muslim Law, if an issue of succession is to be tested, the same opens on the death of a party who was owner of the suit property. The fact remains that the sale deed in question was executed by Sk. Sadeq through his real brother Rabbani for a consideration of Rs.2,40,000/-.

7. Though a plea of want of legal necessity is sought to be raised by the appellants, still they have failed to demonstrate that the suit property is ancestral property.

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8. Apart from above, it is to be noted that the power of attorney holder of the appellants, to what extent is entitled to depose, particularly whether the suit property was rightly transferred during the life time of its original owner Sk. Sadeq could be inferred from the date of death and the date of sale deed.

9. In the aforesaid background, I hardly notice any infirmity or illegality in the findings recorded by the first appellate court while dismissing the suit.

10. Second Appeal lacks merit and as such stands dismissed.

11. In view of dismissal of Second Appeal, Civil Application No.2051 of 2017 does not survive and accordingly stands disposed of.

(NITIN W. SAMBRE, J.)

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