

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

**SECOND APPEAL NO.61 OF 2017
WITH
CIVIL APPLICATION NO.2895 OF 2017**

Nandu s/o Bhagwan Pardeshi,
Age : 45 years, Occupation : Agriculture,
R/o village Jamdi, Taluka Chalisgaon,
District Jalgaon.

...PETITIONER
(Original Defendant)

-versus-

1 Smt.Hirkanbai wd/o Adhar Patil,
Age : 69 years,
Occupation : Agriculture.

2 Shri Deepak s/o Adhar Patil,
Age : 35 years,
Occupation : Agriculture.

3 Sambhaji s/o Adhar Patil,
Age : 30 years,
Occupation : Agriculture.
All R/o village Talonde Digar,
Taluka Chalisgaon,
District Jalgaon.

...RESPONDENTS
(Original Plaintiffs)

...
Shri G.R.Syed, Advocate h/f Shri M.S.Deshmukh, Advocate for the
Appellant.

Shri P.R.Patil and Shri S.R.Patil, Advocates for the Respondents.

...

CORAM: RAVINDRA V. GHUGE, J.

**Reserved on 08th December, 2017.
Pronounced on 15th December, 2017.**

JUDGMENT:

1 By this Second Appeal, the Appellant/ original Defendant seeks to challenge the judgment and decree dated 07.08.2013 delivered by the Trial Court in Regular Civil Suit No.118/2005, as well as the judgment dated 07.10.2016 delivered by the First Appellate Court, by which Regular Civil Appeal No.272/2013 filed by the Defendant was dismissed.

2 I have considered the strenuous submissions of the learned Advocates for the respective sides.

3 The contention of the Appellant is that the mother of the original Plaintiffs (Yashodabai) had entered into an agreement to sale on 16.12.1968 with the father of the Appellant (Bhagwan) and the Appellant's father was put in possession of the land admeasuring 13 H 87 R (Potkharaba 17 H 87 R) in Gat No.3 and the land admeasuring 8 H 62 R (Potkharaba 1 H 32 R) in Gat No.112. Since then, his father and thereafter, the Appellant is in peaceful possession of the said land.

4 The original Plaintiffs have preferred Regular Civil Suit No.118/2005 on 12.08.2005 alleging that they have been illegally dispossessed after Adhar Dodhu Patil, who had inherited the land from the mother of the Plaintiffs (Yashodabai Nathu Patil), died on 01.02.2002.

5 The Appellant contended that Yashodabai got married to

Dodha Patil. As it became difficult for her to cultivate the land after marriage, she had entered into an agreement to sale on 16.12.1968. She received Rs.6000/- and she prepared the "Sauda Pavati" in favour of the father of the Appellant (Bhagwan Rupchand Pardeshi).

6 It is contended that the issue of limitation was raised by the Appellant/Defendant. The Trial Court has erroneously concluded that the Plaintiffs were dispossessed of the land after 01.02.2002. The suit was barred by limitation and the Plaintiffs could not claim recovery of possession. Twenty two grounds have been set out in the memo of the Second Appeal and it is contended that they are substantial questions of law to be considered in this appeal.

7 The learned counsel for the Appellant has relied upon the judgment delivered by this Court in the matter of Chetan Navnitlal Shah vs. Fizza Navnitlal Shah w/o Navnitlal Ratanji Shah and others, 2017 (3) BOM.C.R. 182.

8 The learned counsel for the Respondents/Plaintiffs along with the learned counsel for the Appellant, have taken me through the impugned judgment delivered by the Trial Court dated 07.08.2013 and the judgment of the First Appellate Court dated 07.10.2016.

9 The learned counsel for the Respondents also points out that the revenue records right upto 2002 indicate that the Respondents/Plaintiffs were in possession. He has placed reliance upon the following

judgments:-

- (a) Gurudev Kaur and others vs. Kaki and others, (2007) 1 SCC 546.
- (b) Bhura Mogiya and others vs. Satish Pagariya and others, (2001) 9 SCC 385.

10 The record suggests that Yashodabai had agreed to sale the suit field to Bhagwan Rupchand Pardeshi, father of the Appellant/original Defendant, for a total consideration of Rs.16,875/-. She received an amount of Rs.6000/- and executed the sale deed, which was registered before the Sub Registrar. The Appellant/ original Defendant claims that the possession of the suit land was handed over to his father, who is the true owner. He developed the land and even sunk a well in the said land. The Defendant also took a plea of adverse possession.

11 While considering the evidence, the Trial Court came to a conclusion, on the basis of the record, that 7/12 extract at Exhibit-19 indicated the names of the Plaintiffs in the occupation column and in the cultivation column for the years 1996 to 2002. The endorsement in the 7/12 extract is "Khudda" meaning that the Plaintiffs cultivate the land. Earlier and later possession of the Plaintiffs is also proved on the basis of the cultivation entries in the 7/12 extracts. There was no explanation forthcoming from the Defendant about these crop cultivation entries

recorded in the names of the Plaintiffs for about seven years.

12 The column of crop cultivation entries for the years 1982 to 1995 indicates "*GU Pramane*" which means as per the earlier entries. The crop cultivation entries from 1996 till 2001 contain the remark "*Khudda*". As such, even if the Appellant/ Defendant claims to have been put in possession on the basis of the agreement to sale, such possession can be termed to be permissive possession and which cannot be converted into a title by way of adverse possession. An adverse possession is only to be used as a shield and not as a sword, is the settled position of law. So also, if the Appellant was said to be dispossessed in 1996, he has not taken any steps either to restore his possession or to correct the entries in the 7/12 extracts.

13 Both the lower Courts have concurrently concluded that the Plaintiffs appear to have been forcefully dispossessed after 01.02.2002 and hence, the suit for recovery of possession, was within limitation under Section 5 and Article 64 of the Limitation Act. Both the Courts have considered the "*Sauda Pavati*" and the notices dated 29.09.1972, 20.11.1972, 01.06.1973 and 09.01.1975, which indicate that the Defendant was not in the peaceful possession of the suit property. The revenue records from 1982 onwards indicate that the Appellant was shown to be the owner of the suit land. Even otherwise, if the agreement to sale was presumed to be fully implemented and a sale deed would have

been registered, the Defendant would have surely moved the appropriate Revenue Authorities for seeking change in the mutation entries so as to indicate that he was in legal possession of the suit property and had acquired ownership of the same. The Sauda Pavati required the Defendant/ Appellant to obtain permission under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, which was not taken.

14 It also cannot be ignored that once the agreement to sale was signed, the contention of adverse possession falls to the ground and the said contention would not survive. On the one hand, the Defendant claims that he was put in possession on the basis of the agreement to sale and on the other hand, he contended that he has acquired the ownership and title over the suit land by adverse possession.

15 Considering the above and the submissions of the learned Advocates for the respective sides, I have gone through the grounds formulated by the Appellant. I do not find that a substantial question of law emerges from the facts and circumstances of the case.

16 The Second Appeal being devoid of merit is, therefore, dismissed. No costs.

17 The pending Civil Application does not survive and stands disposed of.