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

**SECOND APPEAL NO.67 OF 2015
WITH
CIVIL APPLICATION NO.2333 OF 2015**

1. Shriram Namdeo Bagal,
Deceased, thr. Legal Heirs
- 1A. Anusayabai Shriram Bagal,
Age: 85 years, Occu: Housewife
- 1B. Shakuntalabai Ashok Patil,
Age: 50 years, Occu: Housewife
- 1C. Amrut Shriram Bagal,
Age: 65 years, Occu: Service
- 1D. Prakash Shriram Bagal,
Age: 45 years, Occu: Service
- 1E. Dnyaneshwar Shriram Bagal,
Age: 42 years, Occu: Service

Nos.1A, 1C,1D, 1E R/o. Nimgul,
Tq. Shindkheda, Dist. Dhule

No.1B R/o. Plot No.18, Datta Colony,
Swaminarayan Road, Datta Mandir
Chowk, Deopur, Dhule

2. Vedu Shripad Bagal,
Age: 63 years, Occu: Agril.,
R/o: At post. Nimgul,
Tal. Shindkheda, Dist. Dhule
3. Vithal Shripad Bagal,
Since deceased, thr. Heirs
- 3A. Indubai w/o Vithal Bagal,
Age: 50 years, Occu: Household
- 3B. Sandip Gulabrao Bagal,
Age: 25 years, Occu: Education,
Both R/o: At post Nimgul,
Tal. Shindkheda, Dist. Dhule

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4. Dungal Shripad Bagal,
since deceased, thr. Heirs
- 4A. Anjanabai Dungal Bagal,
Age: 65 years, Occu: Household
- 4B. Jijabrao Dungal Bagal,
Age: 35 years, Occu: Service

Both R/o At post Nimgul,
Tq. Shindkheda, Dist. Dhule
- 4C. Manglabai d/o Dungal Bagal,
Age: 40 years, Occu: Household,
R/o Gowardhan, Tal. Amalner,
Dist. Jalgaon
- 4D. Sangitabai d/o Dungal Bagal,
Age: 32 years, Occu: Household,
R/o. At post Shingave, Tq. Shirpur,
Dist. Dhule
5. Vinayak Shankar Bagal,
since deceased, thr. Heirs,
Dilip Vinayak Bagal,
Age: 28 years, Occu: Agril.,
R/o: At post Nimgul,
Tq. Shindkheda, Dist. Dhule
6. Pushpabai w/o Sahebrao Bagal,
Age: 45 years, Occu: Household,
R/o : At post Nimgul, Tq. Shindkheda,
Dist. Dhule

..APPELLANTS
(Orig.defts.)

VERSUS

1. Dagubai w/o Rupchand Patil,
Age: 58 years, Occu: Household
2. Pandurang Rupchand Patil,
Age: 33 years, Occu: Labour
3. Suresh Rupchand Patil,
Age: 27 years, Occu: Labour

All R/o : At post Malapur Road,
Dondaicha, Tq. Shindkheda,
Dist. Dhule

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4. Chandrakalabai w/o Dagaji Patil,
Age: 29 years, Occu: Household,
R/o : At post Sulwade,
Tq. Shindkheda, Dist. Dhule
5. Grampanchayat Nimgul,
At post Nimgul, Tq. Shindkheda,
Dist. Dhule
6. Sayaji Rupchand Patil,
Age: 38 years, Occu: Labour,
R/o: Nimgul, Tq. Shindkheda,
Dist. Dhule
(Deleted as per Court's order
dtd. 29/09/17)

..RESPONDENTS
(orig.pltffs. & R-5 & 6
orig.deft.)

Mr S. P. Brahme, Advocate for appellants;
Ms A. S. Mantri, Advocate (appointed) for respondent No.1

CORAM : NITIN W. SAMBRE, J.

DATE : 7th November, 2017

ORAL ORDER:

The present appeal is by original defendants. Respondents no.1 to 4-original plaintiffs filed Regular Civil Suit No.139 of 2003 (Old No.115 of 2002) for declaration of ownership and possession, as described in para 1 of the plaint, being land survey no.48/1/2, ad measuring 2 Acres 9 Gunthas, located at Mouja Nimgul, Taluka Shindkheda, District Dhule. The suit is based on the cause of action as narrated therein, claiming that in 1994-95 the plaintiffs were dispossessed by the present appellants-defendants.

2. The suit claim was resisted by the present appellants by filing written statement at Exh.25. According to them, the property Gat No.48/2

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was gifted by Rupchand and Yashwant, Rupchand being husband of plaintiff no.1 Dagubai and father of plaintiffs no.2 to 4. According to him, mutation entry no.1454 to that effect was carried, which remains till today in favour of the appellants. They tried to bring to the notice of the Court that survey no.48/2, which was gifted to them, was having area ad-measuring 2 Acres, in which three houses were constructed after plotting was done. Based on the aforesaid submissions, the defendants sought dismissal of the suit.

3. Learned Trial Court, based on the respective pleadings of the parties, framed issues a Exh.34, which read thus :-

Sr. No.	ISSUES	FINDINGS
1	Whether plaintiffs proves that the agricultural field bearing Survey No.48/1/2 known as Akharey, area 2 acre 9 Gunthe, Land Revenue Rs.3.90 ps. and Grampanchayat House No.1089 to 1091 situated within Nimgul Shivar, are the ancestral properties ?	In the Affirmative
2	Whether plaintiffs further proves that defendant No.1 to 6 taken the forcible possession of the suit houses bearing Grampanchayat House No.1089 to 1091 and suit field No.48/1/2 in the year 1994-95 after death of Rupchand Parasharam Patil ?	In the Negative
3	Whether plaintiffs further proves that on 21.10.2002, when he demanded possession of suit properties, defendant No.1 to 6 refused to give the possession ?	In the Negative
4	Whether plaintiffs are entitled for relief of possession as prayed ?	In the Negative
5	Whether defendants proves that there is no cause of action to file the present suit ?	There is cause of action, but not as alleged in plaint.
6	Whether defendants further proves that deceased Rupchand Parasharam Patil his	In the Negative

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	brother Yashwant Parasharam Patil given agricultural land, out of Survey No.48 to Shriram Namdeo, Shripad Natthu & Shankar Natthu as a gift ?	
7	Whether defendants further proves that they are using the said field as a Khalwad since the year 1950 ?	In the Affirmative
8	Whether defendants proves that plaintiff or her deceased husband Rupchand Parasharam, was having no concern with Survey No.48/1-2 ?	In the Negative
9	Whether defendants further proves that the sanctioned lay-out map, pertaining to field Gat No.48/1-2, is not binding upon his rights ?	Does not survive
10	Whether defendants are entitled for the compensatory costs of Rs.5000/- ?	In the Negative
11	Whether plaintiffs are entitled for the mesne profit ?	In the Negative
12	What order, decree & costs ?	Suit is dismissed
13	Whether plaintiffs are entitled for the declaration of above said property as prayed in prayer Column No.10 (B) against defendant No.7 Grampanchayat Nimgul ?	In the Negative

4. The aforesaid issues were answered against the present respondents no.1 to 4-original plaintiffs and the suit of the plaintiffs came to be dismissed by judgment and decree dated 31st August, 2006.

5. The original plaintiffs, feeling aggrieved by aforesaid judgment and decree, preferred Civil Appeal No.87 of 2006, which came to be allowed by judgment and decree dated 1st January, 2015, passed by Ad hoc District Judge-2, Dhule, whereby the appellate court set aside the judgment and decree rendered by the Trial Court dismissing the suit, granted declaration of ownership of the suit properties and further directed appellants-defendants no.1 to 6 to hand over possession of the suit properties described in plaint para 1 to respondents no.1 to 4-original plaintiffs.

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6. While questioning the judgment and decree rendered by the first appellate court, Mr Brahme, learned Counsel appearing on behalf of appellants-original defendants would urge that the appellants have no grievance *qua* ownership of the plaintiffs over land Survey No.48/1/2, ad measuring 2 Acres and 9 Gunthas. According to him, out of aforesaid property land ad measuring 2 acres and 9 gunthas was given survey no.48/2, area around 2200 Sq.ft. is in possession of the appellants by virtue of the gift executed in 1950. He would then urge that as the appellants remained in continuous and uninterrupted possession of the property survey no.48/2, to the extent of 2 Gunthas as reflected in mutation entry no.1454 till date, the suit ought not to have been decreed against them. He reiterates that the appellants have no grievance *qua* title of respondents no.1 to 4-original plaintiffs to land survey no.48/1/2.

7. Mr Brahme then would urge that the issue of adverse possession should have been taken into consideration by the learned first appellate court and as such the appeal warrants remand on the said issue.

8. By drawing support from the judgment of the Apex Court, in the matter of **Anathula Sudhakar vs. P. Buchi Reddy (dead) by L.Rs. & ors.**, reported in **(2008) 4 Supreme Court Cases 594**, he would submit that the title of respondents no.1 to 4-plaintiffs was under cloud in view of mutation entry as is existing since 1950 and as such, the first appellate court should not have decreed the suit of the plaintiffs.

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9. Per contra, Ms Mantri, learned Counsel (appointed) on behalf of respondent no.1 would urge that the first appellate court has appreciated the evidence, having regard to the title of Rupchand to the suit property. The appellate court has proceeded to analyze the claim of the plaintiffs based on their status as legal heirs of Rupchand, whose title was not disputed by appellants-defendants. According to her, the suit is decreed to the extent of properties mentioned in para 1 of the plaint. She would then urge that the present appellants have failed to demonstrate their title to the suit property, particularly in absence of the fact that the gift deed was neither produced nor proved. She submits that the suit has been rightly decreed by the first appellate court and the present second appeal being devoid of merit be dismissed.

10. At the outset, it is required to be noted that the Trial Court dismissed the suit of the present respondents no.1 to 4-plaintiffs, by recording finding that they have proved that the suit properties are ancestral, however, noted that appellants-defendants have not taken forceful possession of the suit properties. The Trial Court, in the wake of above, dismissed the plea for possession. The Trial Court though recorded finding against the present appellants-defendants that they have failed to prove the gift deed, still held that the suit field was used by the appellants since 1950.

11. While doing so, the Trial Court appreciated evidence of P.W.1 Dagubai (plaintiff no.1) examined at Exh.33 and other documentary

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evidence viz. 7/12 extracts of survey no.48/1/2 at Exh.40, extract of form No.VI at Exh.41, extract of Grampanchayat in respect of house property bearing house Nos.1089 to 1091 at Exhs.42 to 44 and other documents.

12. The evidence of the defendants was appreciated as one Amrutrao, their power of attorney was examined as D.W.1 at Exh.54, D.W.2 Sahebrao Patil at Exh.66, D.W.3 Anandrao at Exh.67 and D.W.4 Yashwant Patil at Exh.68. The present appellants produced documentary evidence viz. power of attorney at Exh.55, extract of land Gat No.48 at Exh.56, 7/12 extract of Gat No.48/2 at Exh.57, extract of mutation entry no.1454 at Exh.58 and extracts of Grampanchayat house Nos.1091 and 1090 at Exhs.59 and 60, respectively.

13. The first appellate court, while re-appreciating the entire evidence in the background of the pleadings of the parties, framed following points for its consideration :-

Sr. No.	POINTS	FINDINGS
1	Do defendants no.1 to 6 prove that deceased Rupchand Parsharam Patil and his brother Yashwant Parsharam Patil bequeathed the suit property in favour of Shriram Namdev, Shripad Natthu and Shankar Natthu through gift deed executed long back in 1950 ?	No
2	Do the defendants no.1 to 6 prove that they are in possession of the suit property since 1950 onwards in pursuance to the gift deed ?	No
3	Do plaintiffs prove that defendants no.1 to 6 took the possession of suit property forcibly in the year 1994-95 after death of Rupchand Patil ?	Yes
4	Are the plaintiffs entitled for declaration and possession of the suit properties ?	Yes

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5	Are the defendants no.1 to 7 entitled for compensatory costs ?	No
6	Whether the judgment and decree passed by trial court is legal and proper ?	No
7	What order and decree ?	As per final order

14. The appellate court then permitted present respondents no.1 to 4-original plaintiffs to produce public documents in the form of additional evidence, by taking recourse to the provisions of Order XLI, Rule 27 of the Code of Civil Procedure. The said evidence was in the form of revenue entries recorded in respect of residential plots which were alienated by Rupchand during his life time and demarcation of plots in the lay-out.

15. The appellate court then proceeded to analyze the evidence and recorded finding based on the evidence of the party that the appellants have proved title to the land survey no.48/1/2. The appellate court noticed that mutation entry no.1454 is not sufficient to believe that the present appellants are in possession of the suit property as they have failed to prove the gift deed claimed to have been executed in their favour. The appellate court proceeded to record finding of fact that the present respondents no.1 to 4-original plaintiffs, being legal representatives of Rupchand have inherited the property.

16. If we appreciate the submissions made by Mr Brahme, in the backdrop of aforesaid findings recorded by the first appellate court, the fact remains that the respondents no.1 to 4-original plaintiffs have established their title, which was already admitted by appellants-defendants to land

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Survey No.48/1/2, being legal representatives of deceased Rupchand. The fact remains that appellants-defendants have failed to establish that the property was gifted in their favour by virtue of the gift deed, resulting into mutation entry No.1454, in absence of production of alleged gift deed or by adducing cogent evidence in support of such defence.

17. In the backdrop of above, in my opinion, the judgment and decree rendered by the first appellate Court in favour of respondent Nos.1 to 4-plaintiffs *qua* the properties mentioned in para 1 of the plaint, is based on the title of the plaintiffs, which was not at all under cloud, or rather no such inference can be drawn.

18. Apart from above, it is required to be noted that though the present appellants have tried to raise a plea of adverse possession, such plea is required to be established by them by leading appropriate evidence, after having raised a specific plea to that effect in the pleadings.

19. Upon appreciation of pleadings and evidence of the respective parties, it is noticed that neither such plea is raised nor any evidence is produced by appellants-defendants to establish that they remained in adverse possession of the suit property. The burden on the present appellants-defendants to prove that their possession was adverse to that of plaintiffs was not at all discharged.

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20. In the aforesaid backdrop, in my opinion, no case for interference is made out. The appeal does not involve any substantial question of law. The appeal, therefore, lacks merit and stands dismissed.

In view of dismissal of appeal, Civil Application No.2333 of 2015 does not survive and stands disposed of accordingly.

As learned Counsel Ms. Mantri is appointed on behalf of respondent No.1, fees payable to her is quantified at Rs.5,000/-. In addition to Rs.5,000/-, she be paid Rs.2,000/- towards expenses.

(NITIN W. SAMBRE, J.)

amj