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

**11. SECOND APPEAL NO. 238 OF 2001
(OLD SECOND APPEAL NO. 129 OF 1991)**

Shaikh Isaq Shaikh Kadar Musalman
age 38 years residing at Dhule District Dhule(DIED)
Through legal representatives:

- A) Shaikh Aminabee W/o Shaikh Esak,
age 62 yrsrs occupation household
- B) Firajabee W/o Gulabkhan Pathan,
age 37 years occupation household
- C) Vahidabee W/o Shaikh Ajmal,
age 32 years occupation household

All R/o Moglai Lane No. 5, near Dr. Sunita Patil's
Dispensary, Dhule

..APPELLANTS

VERSUS

Shaikh Ibrahim Shaikh Bhilekha Musalman
age 45 years occupation service
residing at Moglai, Bhatyachi Chawl, Dhule.

...RESPONDENT

Mr R.C. Patil, Advocate, for appellants.

CORAM : N.W. SAMBRE, J.

DATE : 22nd June, 2017

ORAL ORDER

One Shaikh Piran was blessed with five children, of which

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Shaikh Kalu and Shaikh Amir are two brothers.

2. Present appellant/original plaintiff claiming to be successor of Shaikh Kalu through his father Shaikh Kadar, sought title to the property in question being house No. C.T.S. No.3797/D situated at Mogali-Dhule.

3. Based on said pleadings, the appellant/plaintiff initiated civil suit claiming possession of the said premises.

4. Defendant claims to be son of brother of Daganbai, wife of Shaikh Amir, who was real brother of father of plaintiff.

5. It is contended by plaintiff in the suit that since Shaikh Amir, who was given the premises during his life time by the grand father of the plaintiff, being permissive occupier, died in the year 1961-1962, and his wife Daganbai died in the year 1971-1972. According to him, for a period from 1961 to 1972 since Daganbai was staying alone, it is the defendant, who was son of brother of Daganbai, entered the suit premises as a caretaker and remained in possession without any title. As such, suit for possession.

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6. The learned Trial Court after considering the written statement filed by the present respondent/defendant at Exh. 11, framed issues, particularly about title of present appellant and status of defendant as that of trespasser and answered the same in favour of present appellant/plaintiff, vide judgment and decree dated September 20, 1985.

7. The defendant, feeling aggrieved thereby, preferred an appeal before the learned District Judge, Dhule, being Regular Civil Appeal No. 268/1985, which came to be allowed by judgment and order dated July 10, 1990. As such, this second appeal. The ground No. 6, which is found to be a basis of admission of appeal, reads thus:

“6. The learned District Judge failed to appreciate that the Respondent-Defendant has not raised the plea of adverse possession in the Trial Court and the same being question of fact, and the Appellate Court ought not to have allowed the Defendant to raise said plea in the District Court.”

8. The Appellate Court while dealing with the claim of the rival parties, has noticed that the appellant/plaintiff has failed to prove his title to the suit property and has further observed that the possession of the respondent/defendant is adverse to that of plaintiff. As such,

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this second appeal.

9. The learned Counsel for the appellant, Shri C.R. Patil, would urge that the Appellate Court without any evidence on record, particularly in absence of issue to the effect of adverse possession, has recorded findings, which are required to be upset and the matter needs to be remanded for recording fresh evidence on the issue of adverse possession. Shri Patil then would urge that the substantial question of law, that requires consideration at this stage is, whether possession of present appellant/plaintiff could be termed as adverse to that of plaintiff, particularly, when under the Mohammedan Law it is plaintiff/appellant, who is successor to the property of his grandfather being elder son. He would then urge that the issue of title is wrongly answered against the plaintiff. As such, according to him, the substantial question of law is required to be considered.

10. None present for the respondent.

11. With the assistance of appellant, perused judgment and decree passed by the learned Trial Judge, wherein Trial Judge has framed following issues and answered them accordingly.

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<u>"Issues</u>	<u>Findings.</u>
1. <i>Whether plaintiff proves that he is having perfect title as a full owner of the suit property And he is entitled for possession of it ?</i>	Yes proved
2. <i>Whether he further proves that deft. is a trespasser in the suit premises ?</i>	Yes proved
3. <i>Whether plaintiff is entitled for the enquiry of mesne profits under Order 20 Rule 12(1)(c) of C.P.Code ?</i>	Yes, he is entitled for enquiry under Order 20 Rule 12(1) (c) C.P.C.
4. <i>Whether defendant proves that he is residing as an adopted son in the suit property and he is the full owner of it by way of inheritance from Sk. Amir Sk. Piran ?</i>	No, not proved at all.
5. <i>What order and decree ?</i>	As per final order."

12. While answering issue No.1 in regard to the title to the suit property of the present appellant, the learned Trial Court considered the pedigree. The Trial Court then considered the common ancestor

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Shaikh Piraj, who has purchased the suit property. It is then to be noted that the Trial Court considered the year of death of Shaikh Amir as 1961-1962 and that of Daganbai as 1970-1971 and expressed that the property fell to the share of present appellant/plaintiff.

13. So far as the said issue of title to the suit premises by the first Appellate Court is concerned, the Appellate Court has first dealt with the judgment of the Trial Court by mechanically observing that though the other brothers of father of the plaintiff were necessary parties, were not added. The said issue No.1 is dealt with keeping in mind the factum of title to be decided amongst the legal heirs of deceased Piraj. In addition, the Appellate Court then proceeded to consider Exh. 13, a revenue document of partition executed in 1943 in relation to the suit property. Considering the evidentiary value of such public document, the Appellate Court answered the issue of title against the present appellant.

14. The Appellate Court has in detail considered the respective submissions of the parties in the backdrop of evidence brought on record and then inferred that the appellant had failed to establish his

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title to the suit property. As discussed here-in-above, the finding of fact recorded by the First Appellate Court on the issue of title, in my opinion, is based on cogent documentary and oral evidence, which does not call for any interference. As such, contention of Shri Patil that the issue of title should have been answered in favour of appellant, is liable to be rejected and is rightly answered against present appellant by the lower Appellate Court.

15. So far as the issue of adverse possession is concerned, it is case of plaintiff/appellant himself that after death of Shaikh Amir in 1961-1962, defendant entered the suit property so as to take care of Daganbai and he continued in possession of said property till the date of filing of the suit. The fact remains that Daganbai expired in 1970-1971. That being so, the Appellate Court rightly appreciated the provisions of the Limitation Act and, particularly Article 65, and further inferred that possession of the defendant is adverse to that of the plaintiff.

16. So far as finding as regards adverse possession is concerned, the lower Appellate Court has relied upon the plea of possession of the defendant as is narrated by the plaintiff himself.

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17. In the wake thereof, issue of adverse possession answered against present appellant/plaintiff, also appears to be just and proper. Appeal lacks merit and it is liable to be dismissed. Appeal is dismissed.

(N.W. SAMBRE, J.)

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