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

**SECOND APPEAL NO. 353 OF 1998
WITH
CIVIL APPLICATION NO. 5686 OF 1998
IN
SECOND APPEAL NO.353 OF 1998**

1. Sow. Mangalbai w/o Ramchandra
Bhandarge, Age: 35 years,
Occ: Household,
2. Sow. Sushilabai w/o Kishanrao
Suryawal, Age: 47 years,
Occ: Household,
3. Sharyu Mohanrao Kulkarni,
Age: 37 years, Occ: Household,
4. Arjun s/o Bhanudasrao Kajale,
Age: 47 years, Occ: Agri.,

Above all R/o. Jalna,
Tq. and Dist. Jalna.
Through their General Power of
Attorney holder -

Shri. Sopanrao s/o Limbaji
Bhandarge, Age: 59 years,
Occ: Agri., R/o. Kacheri Road,
Old Jalna, Tq. and Dist. Jalna. ..APPELLANTS

VERSUS

1. Sow. Durgabai w/o Babulal
Madare, Age: 47 years,
Occ: Household,
R/o. Barwar Galli, old Jalna,
Tq. and Dist. Jalna.
2. Ratan s/o Babulal Madare,
Age: 26 years, Occ: Business,

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R/o. Barwar Galli, old Jalna,
Tq. and Dist. Jalna.

..RESPONDENTS

Mr M.M. Patil Beedkar, Advocate for appellants;
Mr R.L. Kute, Advocate for respondents

CORAM : NITIN W. SAMBRE, J.

DATE : 15th JUNE, 2017

ORAL JUDGMENT :

The present appeal is by original plaintiffs, who filed Regular Civil Suit No. 517 of 1993 for perpetual injunction and declaration. The said suit came to be dismissed on 29th December, 1997 vide judgment and decree passed by learned Joint Civil Judge, Junior Division, Jalna and the appeal being Regular Civil Appeal No.13 of 1998 preferred by the appellants against the said judgment came to be dismissed on 18th May, 1998 by learned Additional District Judge, Jalna. As such, second appeal.

2. It is the case of plaintiffs that they are owner and possessor of Survey No.477/2-B to the extent of 3 Acres 1 Guntha land, which was

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converted in to non-agricultural use with 38 plots on them. Declaration is sought that the decree in Regular Civil Suit No.82 of 1983 is null and void initio.

3. It is the case of plaintiffs that on 5th October, 1981 under two sale deeds, the suit property was purchased by them. The mutation entries being M.E. Nos. 2996 and 2997 were granted. Non-agricultural permission of the suit property was ordered in favour of the plaintiffs on 5th March, 1987 and after carving out 38 plots in accordance with Town Planning Rules, some plots were sold. Plot Nos. 35 and 36 were sold to Sunil, Plot No.28 to Nilkanth, who are in possession of the said plots as purchasers. On 23rd June, 1991 notice was issued by Collector, Jalna calling upon the appellants to provide all documents in support thereof.

4. It is claimed that original owner Fakirchand Laxman Madare and Fakirchand Laxman

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Madare got mutated the names of appellants vide M.E. Nos.4233 and 1249. It is claimed that false suit was filed by defendants-respondents in collusion with Fakirchand Laxman Madare bearing Regular Civil Suit No. 82 of 1983 against original owner Fakirchand Laxman Madare and same was got decreed exparte. It is claimed that since decree was obtained behind back of the appellants – plaintiffs, said be set aside.

5. The trial Court framed following issues at Exhibit-25 and answered the same accordingly.

ISSUES	FINDINGS
(1) Do plaintiffs prove that they are owner and possessor of suit land survey No.477/2-B area, 3 acres 1 guntha?	No
(2) Do plaintiffs prove that defendants have got decreed the suit R.C.S. No.8/83 (exparte & without w.s. hearing) against the original owner of suit land Fakirchand and others in collusion with original owner?	No

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- (3) Do plaintiffs prove that the sale deed executed by Fakirchand is valid and legal? No
- (4) Do plaintiffs prove that the decree in R.C.S. No.82/83 (exparte) against Fakirchand in favour of this defendants is null void and not binding on plaintiffs? No
- (5) Do plaintiffs prove that during the year in which decree in R.C.S. No.82/83 passed in favour of defendants no.1 and 2 against Fakirchand, plaintiffs were in possession of suit land on the basis of sale deed? No
- (6) Are plaintiffs entitled for relief of perpetual injunction, declaration of ownership and declaration that the decree in R.C.S. No.82/83 is null and void and not binding on plaintiffs? No
- (7) What order and decree? As per order.

6. The trial Court held that the present appellants are not owner of the suit property as they failed to prove the sale deed executed by Fakirchand is valid and legal document.

7. The trial Court then held that the

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judgment in Regular Civil Suit No. 82 of 1983 was not obtained by collusion with original land owner Fakirchand and also noted that the said decree was not exparte decree. As such, the suit came to be dismissed.

8. In appeal, learned lower appellate Court appreciated the claim of the appellants – plaintiffs afresh by framing appropriate points for determination and further held that the claim of the appellants-plaintiffs can be adjudicated under Order 21 of the Code of Civil Procedure. As such, present second appeal.

9. Mr. Patil, learned Counsel for the appellants would urge that the question of law which needs to be framed is, whether the decree passed in earlier suit being Regular Civil Suit No. 82 of 1983 could be held to be binding on the appellants since it was exparte decree. According to him, title of present appellants by virtue of sale deed was ignored. He claimed that the issues

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of grant of non-agricultural permission, collusive decree obtained in Regular Civil Suit No. 82 of 1983 are required to be considered to be legal nature and as such, question of law be framed.

10. Learned Counsel for the respondents opposed the claim and would urge that the appeal against concurrent findings needs to be dismissed. According to him, both the Courts below have rightly appreciated the claim of the appellants – plaintiffs and it is always open for them to take such recourse as is permissible in law, particularly under Order 21 of the Code of Civil Procedure and he sought dismissal of the appeal.

11. Mutation Entries are at Exhibits-33 and 34 produced by the plaintiff, 7/12 extracts at Exhibits-35 and 36, non-agricultural permission at Exhibits-37 and 38, record of rights card at Exhibits-39 and 40.

12. It is the case of appellants – plaintiffs

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that the suit property was purchased on 5th October, 1991 from Fakirchand and all the rituals of mutation and P.R. card were valid. Fakirchand sold part of land to one Pradeep and upon measurement, it was noticed that the plaintiffs are in possession of part of land. Both the Courts below reappreciated the entire documentary and oral evidence and held that it cannot be inferred from the material evidence that the plaintiffs might have to be held in possession of the suit property, as the they have not proved sale deed to establish ownership over the suit. Both the Courts below have taken into account the documentary evidence viz., mutation entries, 7/12 extracts for consideration.

13. So far as the issue of Regular Civil Suit No. 82 of 1983 and judgment delivered therein against Fakirchand in favour of defendants – respondents is concerned, it is noticed that the suit proceeded exparte against the defendants to the said suit. In the said suit, certain documents

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were produced by the plaintiffs. Summons to the defendant Nos. 4 to 8 of the said suit, was very much served but they have chosen to remain absent. It is also observed that there is hardly any material to infer that the suit was collusive suit in between Fakirchand and plaintiffs to the said suit i.e. Regular Civil Suit No. 82 of 1983. As such, learned Courts below, after analyzing the evidence and pleadings, have rightly held that that the judgment in the said suit cannot be set aside or declaration cannot be granted that the same is not binding on the present appellants.

14. It is then to be noted that the lower appellate Court has taken note of the fact that the judgment delivered in Regular Civil Suit No. 82 of 1983 was questioned by Fakirchand up to this Court. The lower appellate Court then took recourse to the provisions of Order 21 of the Code of Civil Procedure and noted that the remedy is available to the appellants in execution proceedings.

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15. In the wake of above, the claim put forth by the appellants that the decree obtained in Regular Civil Suit No. 82 of 1983 is collusive decree and not binding on the appellants is at all not proved so as to warrant indulgence.

16. The appeal against concurrent findings, in my opinion, lacks merit, as no substantial question of law could be noticed. The appeal, as such, must fail and accordingly is dismissed.

17. Consequently, civil application stands disposed of.

(NITIN W. SAMBRE, J.)

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