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

**SECOND APPEAL NO.542 OF 2017
WITH
CIVIL APPLICATION NO.10617 OF 2017
IN
SECOND APPEAL NO.542 OF 2017**

Paru w/o Devrao Gedam,
Age: 50 years, Occ: Agri.,
R/o. Vazara (Bk), Tq. Kinwat,
Dist. Nanded.

..APPELLANT

VERSUS

1. Pandu s/o Shyamrao Atram,
Age: 60 years, Occ: Agri.,
R/o. Vazara (Bk), Ta. Kinwat,
Dist. Nanded.
2. Ukandabai w/o Namdev Sidam,
Age: 58 years, Occ: Agri.,
R/o. Gaur Ta.Kinwat,
Dist. Nanded.
3. Laxmi w/o Mahadu Kusrange (died)
Through her L.Rs.
- 3/1 Shalik s/o Mahadu Kusrange,
Age: 43 years, Occ: Agri.,
- 3/2 Ramkrishna s/o Mahadu Kusrange,
Age: 38 years, Occ: Agri.,

Both R/o. Vazara (Bk), Ta. Kinwat,
Dist. Nanded.

..RESPONDENTS

Mr N.D. Kendre, Advocate for appellant;
Mr Sushant V. Dixit, Advocate for respondent No.1

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CORAM : NITIN W. SAMBRE, J.**DATE : 12th OCTOBER, 2017****ORAL ORDER :**

The parties to the present appeal are belonging to '*Gond community*' (Scheduled Tribe).

2. The appellant filed Regular Civil Suit No.50 of 2008 for declaration of ownership and recovery of possession of the suit property. While deciding the said suit, trial Court framed the following issues at Exhibit-34.

ISSUES	FINDINGS
1. Does the plaintiff prove that she is the owner of the suit property?	In the affirmative.
2. Does the plaintiff further prove that, the suit property is joint family property of herself and deceased Chandrabhagabai?	In the affirmative.
3. Does the plaintiff prove that mutation entry no.293 dated 09-03-1992 is null and void?	In the affirmative.
4. Whether the plaintiff is entitled for declaration as a owner of the suit property?	In the affirmative.

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5.	Whether the plaintiff is entitled for the possession of the land Gat No.225 area 2H 95R?	In the affirmative.
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6.	What order and decree?	The suit is decreed as per final order.
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3. After answering the issues in favour of the present appellant-original plaintiff, suit came to be decreed on 28th March, 2011, which was questioned in Regular Civil Appeal No.45 of 2011. The lower appellate Court set aside the judgment of the trial Court decreeing the suit and dismissed the suit of the plaintiff. As such, this second appeal.

4. Learned Counsel for the appellant would urge that it is not in dispute that the parties to the appeal are belonging to *Gond community*, Scheduled Tribe. However, trial Court, without framing issue as to whether the parties are governed by their own traditions and customs qua the property in question has evaluated the claim based on Hindu Succession Act, 1956. He would then

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urge that the appellate Court, without considering the fact that in absence of any issue as to applicability of Hindu Succession Act, has set aside the findings on the ground that the parties are not governed by the provisions of Hindu Succession Act but by the provisions of customs and traditions which are practiced by *Gond Community*, Scheduled Tribe. According to him, other issues, as such, are not at all gone into by the Court and in view thereof, matter needs to be remanded back to the Court below for re-framing the issue under Order 20 Rule 5 of the Code of Civil Procedure. According to him, the question of law that is required to be considered is, whether the lower appellate Court was right in upsetting the judgment of trial Court in absence of any findings recorded by the trial Court and issue of parties to be governed by the customs and traditions to be followed by *Gond community*.

5. Per contra, Mr. Dixit, learned Counsel for respondent No.1 would urge that the suit itself

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was barred by limitation.

6. According to him, the proceedings taken out by the original plaintiff in the matter of questioning the mutation entry are already answered against the appellant-plaintiff. He would urge that once it was brought to the notice of the trial Court that the parties are belonging to Gond community, Scheduled Tribe, it was expected of both the Courts below to deal with the same by framing specific issue to that effect. He would then urge that for the said purpose, the matter need not be remanded back, as this Court can appreciate the said aspect of the matter at this stage. As such, he sought dismissal of the second appeal.

7. Considered rival submissions.

8. It is not in dispute that the appellant and respondent i.e. plaintiff and defendant respectively, are related to each other. It is

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also not in dispute that the parties belong to Gond community, Scheduled Tribe. The appellant-plaintiff has based his claim on the basis of provisions of Hindu Succession Act and based on the same, the trial Court framed issue No.2 viz., whether the appellant-plaintiff prove that the suit property is joint family property of herself and deceased Chandrabhagabai.

9. The trial Court, as such, has lost sight of the fact that parties since are tribal by their community/religion are governed by their trades, customs and traditions, which are required to be established independently by each of the party having regard to the practice in their community.

10. It is admitted fact that the trial Court had failed to frame specific issue on the said aspect of the matter, rather proceeded to consider the claim of respective parties pursuant to the provisions of Section 15 of the Hindu Succession Act and has recorded findings in favour of the

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appellant.

11. The present respondent-original defendant in appeal has raised ground to that effect and as such, the appellate Court for the first time, framed point as to whether the plaintiff is entitled for possession being owner of the suit property. While dealing with such issue, the appellate Court, having regard to the admission of the parties that they belong to Gond community, recorded finding that the provisions of Hindu Succession Act are not applicable but for lost sight of the fact that no such issue was framed by learned trial Court.

12. Before learned trial Court, when the issue was not framed, none of the parties got opportunity to adduce evidence and prove that pursuant to trade, customs and traditions as are practised in *Gond community*, Scheduled Tribe, whether the plaintiff is entitled for prayer for possession and declaration of ownership. Rather, the trial Court

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swayed away by considering that the provisions of Hindu Succession Act are applicable to the dispute in question undisputedly.

13. None of the parties to the proceedings including the appellant and respondent have brought to the notice of trial Court that the parties are not governed by the provisions of Hindu Succession Act but are governed by the provisions of trade, customs and traditions of their community. In view of above, specific issue to that effect could be framed by the trial Court. As such, both the Courts below have committed an error apparent on the face of record in denying opportunity to the respective parties, particularly plaintiff of establishing her case that she is entitled for the relief in the aforesaid background.

14. In the backdrop of above referred facts, it was expected of the lower appellate Court to remand the matter to the trial Court for deciding the suit afresh after framing the issue to that

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effect and after giving opportunity to the parties to lead evidence in support thereof. Lower appellate Court, in my opinion, has lost sight of the fact that the trial Court itself has committed an error by non-framing of issue on the basis of entitlement under tribal custom and traditions to the relief claimed by the plaintiff.

15. In the backdrop of aforesaid reasons, the appeal is allowed. The impugned judgment passed by Adhoc District Judge-1, Nanded on 6th July, 2017 delivered in Regular Civil Appeal No. 45 of 2011 to the extent of plaintiff is set aside and decree in question is maintained. However, for the reasons stated herein above, the parties hereto are directed to appear before learned trial Court on 27th November, 2017 and trial Court is directed to frame appropriate issue in the backdrop of having record and decide the suit afresh.

15. With above observations, second appeal stands partly allowed.

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16. Pending civil application stands disposed
of.

(NITIN W. SAMBRE, J.)

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