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

SECOND APPEAL NO. 349 OF 2009

1. Sandeep s/o Dinkarrao Deshmukh,
Age: 27 years, Occ: Agri.,
2. Suresh s/o Kishanrao Deshmukh,
Age: 40 years, Occ: Advocate,
Both R/o. Vrundavan Colony,
Jalna, Tq. & Dist. Jalna.

Through their G.P.A.

Dinkarrao s/o Marotrao Deshmukh
Age: 64 years, Occ: Agri. & Business,
R/o. Vrundavan Colony, Jalna,
Tq. & Dist. Jalna.

..APPELANTS

VERSUS

1. Laluram s/o Tukaram Bhurewal (died)
Through L.Rs.
 - i) Dhannabai Laluram Bhurewal,
Age: 63 years, Occ: Household,
R/o. Kalikurti, Old Jalna,
Tq. and Dist. Jalna.
 - ii) Ramesh s/o Laluram Bhurewal,
Age: 40 years, Occ: Agri.,
R/o. Kalikurti, Old Jalna,
Tq. and Dist. Jalna.
 - iii) Santosh s/o Laluram Bhurewal,
Age: 45 years, Occ: Agri.,
R/o. Kalikurti, Old Jalna,
Tq. and Dist. Jalna.
2. Dhannubai w/o Kaluram Bhurewal,
Age: 60 years, Occ: Household,
R/o. Kalidurti Road, Jalna.
Tq. & Dist. Jalna.

..RESPONDENTS

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Mr P.R. Katneshwarkar, Advocate for appellants;
Mr L.B. Palod, Advocate for respondents

CORAM : NITIN W. SAMBRE, J.

DATE : 13th JULY, 2017

ORAL ORDER :

This second appeal is the by original plaintiffs. The appellants filed Regular Civil Suit No. 309 of 2002 for perpetual injunction claiming to be owner and possessor of land Survey No.151/4 to the extent of 3 Hectare 42 Are i.e. suit property. It is claimed by appellants that they purchased the suit property vide registered sale deed dated 7th April, 1999 for consideration of Rs.2,15,000/- and claimed to in possession of the same since then.

2. It is further claimed that the defendants are adjoining land owners to the extent of 7 Acres 31 Gunthas and are not concerned with the suit property. However, the defendants-respondents have made encroachment on the suit property and had

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tried to disturb the peaceful possession of the appellants-plaintiffs. As such, the suit in question.

3. The suit came to be dismissed on 13th December, 2005 by the order of Joint Civil Judge, Junior Division, Jalna, which was confirmed in First Appeal No. 44 of 2006 by District Judge-2, Jalna. As such, this second appeal.

4. The respondents have questioned the title of the appellants, as according to them, Deokabai, predecessor in title of the appellants, has no title to the suit property. It is claimed that the suit property was joint family property of respondents-defendants and claimed to be in cultivating possession for last 25 to 30 years.

5. It is also claimed by the respondents – defendants that Deokabai, predecessor in title of the appellants and her daughters filed Regular Civil Suit No. 407 of 1993 against defendant –

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respondent No.2, which came to be partly decreed on 31st March, 1994. It is claimed that amongst other claim made in the suit were partition, declaration and perpetual injunction, however, only relief of partition was granted, and the judgment in the said suit dated 31st March, 1994 was not questioned and as such, said will act as *resjudicata* against the appellants. It is also claimed that civil suit being Regular Civil Suit No. 228 of 1998 filed by the respondents against Deokabai and other sisters for injunction from alienating the suit property, however, present appellants have purchased the suit property during pendency of the said suit, as such, Section 52 of the Transfer of Property Act will hold the field.

6. The trial Court framed the issues as to whether the appellants-plaintiffs prove the ownership and possession over the suit property and also cause of action. The issue of *resjudicata* was also framed qua Regular Civil Suit No. 407 of 1993 and answered against the appellants.

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7. In appeal also, the issue of possession and lawful ownership based on the sale deed dated 7th April, 1999 was answered against the appellants. The issue of *resjudicata* qua judgment in Regular Civil Suit No. 407 of 1993 was also answered against the appellants.

8. In the aforesaid background, learned Counsel for the appellants would urge that both the Courts below have committed an error of law in recording finding that the appellants are not lawful owner of the suit property. According to him, since the appellants were not parties to the earlier suit being Regular Civil Suit No.407 of 1993, same would not act as *resjudicata* against the appellants. According to him, the documents produced at Exhibits-33 and 39 are not properly appreciated by both the Courts below and as such, would urge to frame question of law.

9. Per contra, learned Counsel for the

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respondents would urge that the appeal against concurrent findings deserves to be dismissed. According to him, perusal of the judgment in Regular Civil Suit No. 407 of 1993 would make it clear that the issues as are sought to be raised in the present appeal were already decided by the Court in the judgment delivered on 31st March, 1994 in Regular Civil Suit No. 407 of 1993. He sought dismissal of the present second appeal.

10. From the record, it depicts that one Chandulal was original owner of the property, who sold land to the extent of 7 Acre 31 guntha in favour of defendant No. 2. Deokabai, predecessor in title of the appellants filed suit for partition being Regular Civil Suit No. 407 of 1993, whereby 6/7 share was granted to Deokabai, her daughter which was never questioned. As such, the said judgment has attained finality on 31st March, 1994. The defendants filed Regular Civil Suit No.228 of 1998 against Deokabai and her sisters who were directed not to create third party interest in the

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suit property. However, Deokabai sold the suit property to the appellants-plaintiffs on 7th April, 1999 contrary to the order.

11. From the perusal of the judgment of Regular Civil Suit No. 407 of 1993, it could be inferred that defendant No. 2 Dhannabai was defendant No.1 in the said suit, which was initiated by Deokabai, who in the present appeal, appears to be predecessor in title of the plaintiffs-appellants. The said suit was for declaration and perpetual injunction. In the said suit, there are findings recorded based on the evidence of witness Ashabai that the present respondents are in possession of the suit property since 15th August, 1993. There are categorical findings as regards possession of the defendants – respondents over the suit property.

12. Once it is not in dispute that the present appellants have purchased the suit property from Deokabai, who was plaintiff in Regular Civil Suit

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No. 407 of 1993, the claim of the appellants that the said judgment will not operate as *resjudicata* against them is rightly rejected by the Courts below and it was held that the claim of the appellants is barred by *resjudicata*.

13. It is then to be considered that the present appellants have filed suit through power of attorney holder and power of attorney was not proved by the appellants by entering into witness box.

14. As such, to what extent, the appeal of the appellants and also suit which was initiated at the behest of power of attorney holder, who was only witness examined to depose in support of the appellants is required to be appreciated. Both the Courts below, in the wake of above, have rightly held that the appellants have failed to prove their title and also possession over the suit property.

15. In the aforesaid background, I hardly

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notice any material for interference. The appeal,
as such, must fail and is dismissed accordingly.

(NITIN W. SAMBRE, J.)

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