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

**CIVIL APPLICATION NO.16731 OF 2016
IN/WITH
REJECTED CASE NO. 1062 OF 2013
IN/WITH
SECOND APPEAL (ST.) NO.15835 OF 2013**

Sadashiv s/o Laxman Mehkarikar,
Age: 68 years, Occu: Agril.,
R/o. Mehkari,
Tq. & Dist. Ahmednagar

..APPLICANT
(Orig.Deft.No.1)

VERSUS

1. Pandurang s/o Govind Funde,
Age: 70 years, Occu: Agril.,
R/o. Mehkari, Tq. & Dist. Ahmednagar
2. Namdeo s/o Govind Funde,
Age: Deceased through his L.Rs.
- 2A Smt. Laxmibai Namdeo Funde,
Age: 80 years, Occu: Household,
R/o. Funde Wasti, Baradari,
Tq. & Dist. Ahmednagar
- 2B Hausabai Sonyabapu Sanap,
Age: 60 years, Occu: Household,
R/o. Mehkari, Ahmednagar
- 2C Kausabai Bharti Bhatane,
Age: 57 years, Occu: Household,
R/o. Rajni, Tq. Pathardi,
Dist. Ahmednagar
- 2D Anjanabai Narayan Khedkar,
Age: 54 years, Occu: Household,
R/o. Mehkari, Ahmednagar
- 2E Maruti Namdeo Funde,
Deceased Through L.Rs.
- 2E1 Dwarkabai Maruti Funde,
Age: 58 years, Occu: Household,

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- 2E2 Govind Maruti Funde,
Age: 38 years, Occu: Agril.
- 2E3 Ishwar Maruti Funde,
Age: 33 years, Occu: Agril.,
All R/o. Funde Wasti, Baradari,
Tq. & Dist. Ahmednagar
- 2E4 Kavita Santosh Jaibhayi,
Age: 42 years, Occu: Household,
R/o. Parodi, Tq. Paithan,
Dist. Aurangabad
- 2E5 Usha Govind Garje,
Age: 40 years, Occu: Household,
R/o. Narayan Doha,
Tq. & Dist. Ahmednagar
- 2E6 Surekha Ashok Khedkar,
Age: 35 years, Occu: Household,
r/o. Mehkari, Ahmednagar
3. Manjula Rambhau Wagh,
Age: 60 years, Occu: Household,
R/o. Ranegaon-Shinghoni,
Tq. Shegaon, Dist. Ahmednagar
4. Bhanudas Sitaram Chemate,
Age: 60 years, Occu: Agril.
5. Eknath Sitaram Chemate,
Age: 55 years, Occu: Agril.,
Both R/o. Shingoti, Tq. Kopargaon,
Dist. Ahmednagar
6. Ranibai Bhaurao Mahajan,
Age: 50 years, Occu: Household,
R/o. Ranjanwadi, Tq. Kopargaon,
Dist. Ahmednagar
7. Samindrabai Bajirao Jaibhai,
Age: 50 years, Occu: Household,
R/o. Narayanpur, Tq. & Dist. Ahmednagar
8. Barku Govind Funde,
Age: 45 years, Occu: Agri.,
R/o. Mehkari, Tq. & Dist. Ahmednagar
9. Rambhau Govind Funde,
Deceased, through his L.Rs.

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- 9A Smt. Hausabai Rambhau Funde,
Age: 75 years, Occu: Agril.
- 9B Tukaram Rambhau Funde,
Age: 55 years, Occu: Agril.
- 9C Devram Rambhau Funde,
Age: 32 years, Occu: Agril.
- 9D Nivturi Rambhau Funde,
Age: 38 years, Occu: Agril.,
All R/o. Funde Wasti, Baradari,
Dist. Ahmednagar
- 9E Balasaheb Rambhau Funde,
Age: 35 years, Occu: Agril.,
R/o. Baijabai Society, Near Shriram Chowk,
Pipeline Road, Savedi, Ahmednagar
- 9F Mahadev Rambhau Funde,
Age: 29 years, Occu: Agril.,
R/o. Berad Lane, Bhingar,
Ahmednagar
- 9G Chabubai Ashok Jaibhai,
Age: 44 years, Occu: Household,
R/o. Mehkari, Ahmednagar
- 9H Sakuntala Ashok Jaibhai,
Age: 41 years, Occu: Household,
R/o. Narayan Doha,
Dist. Ahmednagar

..RESPONDENTS

(Orig. Plaintiff Nos. 1 to 7
& Deft.Nos. 2 & 3)

Mr V. S. Bedre, Advocate for applicants;
Mr D. R. Markad, Advocate for respondent Nos. 2A, 2E1 to 2E3

CORAM : N.W. SAMBRE, J.**DATE : 16th June, 2017****ORAL ORDER**

By Civil Application No.16731 of 2016, the applicant seeks condonation of delay caused in preferring the application for restoration of Second Appeal and restoration of the appeal by setting aside the order of

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refusal of registration passed by Registrar (Judicial) on 4th September, 2013 for non-removal of office objections.

2. For the reasons disclosed in the application, learned Counsel appearing on behalf of respondents extends consent for allowing the Civil Application. Thus, the Civil Application stands allowed in terms of prayer clause (B) and (C).

3. With the consent of the respective Counsel, the appeal itself is taken up for final disposal at this stage.

4. With consensus, both the respective Counsel tender copy of memo of Second Appeal along with true copies of documents, as the record of the Second Appeal is not available with the application.

5. With the assistance of respective Counsel, I have heard the matter at length.

6. The present respondents no.1 to 3 – original plaintiffs filed Special Civil Suit No.198 of 1983 for recovery of possession of the property and grant of mesne profits.

7. The suit property is located at village Mehkari, Taluka Nagar, Dist. Ahmednagar. It is the case of the plaintiffs that plaintiffs no.1 and 2 and defendants no.2 and 3 are the real brothers who had common ancestor

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Govind. Plaintiffs no.3 to 5 are the legal heirs of one Sonabai, daughter of Govind. Plaintiffs no.6 and 7 are the daughters of deceased Govind and as such, plaintiffs no.1 to 5 and defendants no.2 and 3 are the legal heirs of deceased Govind. Govind was in possession of the suit property as a tenant, pursuant to the provisions of Tenancy Act, which was allotted to him. It is then claimed that Regular Civil Suit No.326 of 1969 was filed by defendant no.1 on 11th August, 1969, wherein an *ex parte decree* for injunction was passed against the plaintiffs, which was executed on 18th August, 1969 due to which the plaintiffs could not enter the suit land. As such, defendant no.1 took possession of the suit property. The said suit was later on decided on merits on 11th January, 1972 against defendant No.1 aggrieved by which he preferred and Regular Civil Appeal No.119 of 1972, which came to be withdrawn on 23rd July, 1974 with liberty to file a fresh suit.

8. Defendant No.1 thereafter filed a Special Civil Suit No.115 of 1974 on 28th August, 1974 against the plaintiffs for partition and injunction, wherein he got an injunction against them. A plea that the sale deed in favour of defendant No.1 was sham and bogus was raised.

9. Subsequently, in a proceedings before this Court, the sale deed executed in favour of appellant-defendant No.1 was declared to be illegal and as such, Special Civil Suit No.115 of 1974 for partition and injunction was dismissed vide judgment and decree dated 11th March, 1982.

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10. Misc. Application No.67 of 1982, based on the said suit was pending in the Court at Ahmednagar.

11. Since on the basis of injunction order the plaintiffs were dispossessed from the suit land, they filed Special Civil Suit No.198 of 1983.

12. It is in these background, learned Civil Judge Senior Division, Ahmednagar framed issues at Exh.33 and answered them accordingly, which read thus:-

Sr. No.	Issues	Findings
1.	Whether the plaintiffs are entitled for possession of the suit property from the defendant No.1?	Yes.
2.	Whether the deft. No. 1 proves that he has become owner of the suit property in view of the provisions of Consolidation Act?	No.
3.	Whether the deft. No. 1 proves his lawful title and possession of the suit land?	No.
4.	Whether the plaintiffs are entitled to claim mesne profits at the rate of Rs.5000/- per year?	At the rate of Rs.2000/- p.a. only
5.	What is found due to the plaintiffs?	Rs.6000/- towards past mesne profits
6.	What order and decree?	See the final order

13. Thereafter, the suit of the plaintiffs i.e. present respondents came to be decreed vide judgment and order dated 30th June, 1986 by the Civil Judge Senior Division, Ahmednagar, which was subject matter of challenge in Regular Civil Appeal No.519 of 2001 before the learned District Judge, Ahmednagar. Regular Civil Appeal No.519 of 2001

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preferred by the present appellant came to be dismissed by learned Principal District Judge, Ahmednagar vide judgment and decree dated 6th March, 2013. Thus, the present second appeal.

14. Mr Bedre, learned Counsel appearing on behalf of the appellant would strenuously urge to rely upon the ground of the appeal viz. Illegal shifting of burden on the present appellant-defendant to prove that he remained in adverse possession of the suit property and by virtue of sale deed there was a title vested in favour of the appellant. Apart from above, Mr Bedre would invite my attention to the findings recorded by both the Courts below, particularly in a civil suit between the defendants *inter se* as regards the non-partition of the suit property, to which the present appellant was not a party. According to him, both the Courts below as such have committed an error of law which is required to be considered by this Court and the matter deserves to be remanded to the Trial Court for deciding the suit afresh.

15. Per contra, Mr Markad, the learned Counsel appearing on behalf of the respondents would urge that this Court should be slow in interfering with the concurrent findings recorded by both the Courts below. According to him, pursuant to the provisions of Section 101 of the Evidence Act the burden was rightly shifted on the present appellant-defendant. So as to substantiate his contention, he would take me through the defence raised by the present appellant in the written statement. Apart from above, he has invited my attention to the findings recorded by the civil courts in

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Regular Civil Suit No.326 of 1969 and thereafter in Special Civil Suit No.115 of 1974 so as to claim that all the attempts on the part of the appellant so as to get benefit of the property illegally were declared unsuccessful. He would the urge that it is the appellant who somehow wanted to continue with the illegal possession of the property.

16. Having considered the rival submissions, it is required to be noted that the present appellant has resisted his case in the suit based on two defences, firstly, that by virtue of sale deed executed in his favour he became owner and lawful possessor of the suit property and secondly, that he is in adverse possession of the suit property as his possession over the same though was within the knowledge of the plaintiffs and defendants, same was never objected to for more than twelve years.

17. In the aforesaid background, in my opinion, having regard to the defence as was raised by the present appellant-defendant the Trial Court rightly shifted the burden on the present appellant to prove that his possession is adverse to that of the plaintiffs and his brothers i.e. other legal heirs of deceased Govind, who are defendants. While doing so, it is required to be appreciated that by a judicial verdict the sale deed in favour of the present appellant in relation to the suit property, was declared as illegal, being a tenanted property of deceased Govind. Once the appellant having lost title to the suit property, the question that he becomes lawful owner of the suit property no more survives.

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18. The occasion for giving such finding was an issue to that effect as to whether the sale deed of the tenanted land in favour of the appellant is legal or not was contested before the Civil Court. The Civil Court rightly referred the said issue, pursuant to the legal position for adjudication before the competent authority, who in turn answered the same against the appellant and it is the said finding which has disturbed lawful ownership of the appellant over the suit property.

19. The second contention of Mr Bedre that possession of the appellant is adverse to that of owner is concerned, the earlier litigation, particularly Regular Civil Suit No.326 of 1969 and Special Civil Suit No.115 of 1974 speaks voluminous about the steps taken by the plaintiffs and his other co-owners who are defendants qua getting the possession of the suit property being their ancestral property. In the wake of the same, both the Courts below, upon appreciation of the evidence, have rightly inferred that the possession of the appellant cannot be considered or termed to be adverse to that of possession of the plaintiffs. As such, these contentions of the appellant are liable to be rejected and accordingly stand rejected.

20. In the wake of above referred observations, I do not find that any substantial question of law is involved in the present second appeal. Present appeal being devoid of merit stands dismissed.

(N.W. SAMBRE, J.)

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