

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 423 OF 2016**

Mr. Rajaram Vithoba Gole ... Appellant

Versus

The Chief Executive Officer,

Satara Zilha Parishad, Satara and Ors. ... Respondents

Mr. Prashant Patil for the Appellant.

Mr. Siddesh Pilankar i/b. Mr. Uday Warunjikar for Respondent No. 1.

Mr. Pradeep Gole for Respondent No. 2.

CORAM : S.J. KATHAWALLA, J.
DATED : 29TH AUGUST, 2017

P.C.:

1. Special Civil Suit No. 189 of 2006 (Regular Civil Suit No. 32 of 2003) was initially instituted in the Court of Civil Judge, Junior Division, Medha. Thereafter, the Plaint was returned for presenting the same in the Court of the Civil Judge, Senior Division, Satara (the 'Trial Court') as it was beyond the pecuniary jurisdiction of the Court at Medha. The subject matter of the Suit is land admeasuring 12R situated at Hategeghar, Taluka Javali in Gauthan, on which properties described in Paragraphs 1A to 1E are situated (the 'Suit Properties'). The said Suit was originally filed by the Appellant No.1 - Rajaram Vithoba Gole (Plaintiff No.1) and thereafter, Plaintiff Nos.2 to 5 were joined (the original Plaintiffs - hereinafter referred to as 'the Plaintiffs') against the Respondents - Chief Executive Officer, Satara Zilla Parishad and

Gramsevak, Sarpanch, Grampanchyat, Hategeghar, Taluka Jawali, District Satara (the original Defendant Nos. 1 and 2 respectively / hereinafter referred to as 'the Defendants') for mandatory injunction against the Defendants to remove all the constructions made on the Suit Properties at their cost and to give vacant possession of the land to the Plaintiff and for perpetual injunction restraining the Defendants and / or anyone else on their behalf in obstructing the possession of Plaintiff No. 1 over the Suit Properties.

2. Plaintiff No. 1 has, in Special Civil Suit No.189 of 2006 stated that he is the son of the brother of one Khandu Mahadu Gole (Khandu); Khandu was the owner of the Suit Properties; Khandu died on 29th July, 1958; although the legally wedded wife of Khandu was not alive, one lady named Anusaya Khandu Gole (Anusaya) alleged that she is the heir of Khandu and got her name recorded in some of the properties; during the life time of Anusaya, there were several proceedings in Court between her and the Plaintiff No.1 in respect of certain properties of Khandu; Anusaya died on 24th April, 1983, during the pendency of the said Court proceedings; Thereafter, Atmaram Sahebrao Mankumare (Atmaram) - son of Anusaya's sister produced the alleged Will of Anusaya and based thereon claimed certain properties, which originally belonged to Khandu; initially, the decision of the Court was in favour of Atmaram; However, on 24th July, 2002 the District Judge, Satara in Appeal No. 603 of 1994 filed by the Plaintiff held that Anusaya was not the legally wedded wife of Khandu, therefore, she is not the heir of Khandu and the properties were owned by the

Plaintiffs.

3. Plaintiff No.1 has further stated in his Suit, that some of the properties/out of the Suit Properties are in Gauthan and some properties are in original Survey No.46 / 10 admeasuring 12 R; Defendant No. 1 - the Chief Executive Officer, Satara Zilla Parishad constructed the primary school building on the property bearing No. 46/10; Defendant No. 1 also constructed a building where offices of Grampanchayat and an agricultural service centre were housed; After perusal of the record, it was revealed that on 15th March, 1964 Anusaya had gifted the property bearing No. 149 in favour of the Defendant for running a health center; on 9th October, 1985, the Grampanchayat Hatgeghar passed a resolution to construct a building to house the health center. After noticing the said fact, the Plaintiff No. 1 through his Advocate, issued notice dated 29th August, 2002 to the Defendants and called upon them to remove the construction standing on City Survey No. 46/10; on 4th September, 2002 on behalf of Defendant No.1, a letter was issued to the Land Development Officer, Panchayat Samiti, informing him not to carry out construction on the Grampanchayat Property bearing City Survey No. 149 and also to give vacant possession of land bearing Survey No. 46/10 to the Plaintiff ; however, the construction was not removed and peaceful possession of the Suit Property was not given to the Plaintiff No.1, who was therefore, constrained to file the Suit. The Plaintiff No.1 thereafter, impleaded Plaintiff Nos. 2 to 5 and has prayed for handing over possession of the Suit Properties in favour of Plaintiff No. 1 on their behalf.

4. Defendant No. 1 resisted the Suit by filing the Written Statement at Exhibit-23, wherein Defendant No.1 denied that Anusaya is not the legally wedded wife of Khandu, as alleged by the Plaintiffs. Defendant No.1 contended that the Suit Properties originally belonged to Khandu. Khandu died on 29th July, 1958 and thereafter the name of his wife Anusaya was recorded in the Record of Rights in respect of the land being Mutation Entry No. 852 dated 1st October, 1958. The said entry was taken as per Waras (heirs) Register No. 147 on local inquiry; the said entry was certified on 23rd January, 1958; accordingly Anusaya was in actual possession and enjoyment of the Suit Properties as its owner on 15th March, 1964. Out of Survey No. 46/10, Anusaya gave the entire property in Gavthan by way of gift to the Grampanchayat and also handed over possession of the entire property to the Grampanchayat; the Plaintiffs have not given details of the Court matters between Anusaya and the Plaintiff No.1. The Defendant was not a party to the said proceedings; since Defendant No.1 was not joined as party to the said Suit/Appeal, the Defendant was not aware of the Suit between Atmaram and the Plaintiff No.1 or Appeal No.603 of 1994; therefore, the decision in any such proceedings is not binding on the Defendant No.1. Between 1970-72 the Grampanchayat constructed a school building on the Suit Property and till date a school is being run in the said building. The Grampanchayat constructed Krushi Seva Kendra in the year 1977-78. The Grampanchayat also constructed its office on the Suit Property in 1998-99; the Plaintiffs were aware of the said constructions since inception; however, they did not

complain about the said constructions and the constructions have been recorded in the Grampanchayat records and the entire village is taking benefit of the school and Grampanchayat office in the Suit Properties; though Khandu passed away as far back as on 29th July, 1958, the Plaintiffs have not made any Complaint/grievance qua the constructions and use of the same by the Defendant for several years; Defendant No. 1 continues to be in peaceful possession of the Suit Properties and has become the owner of the Suit Properties by adverse possession; the Suit is barred by the Law of Limitation and deserves to be dismissed.

5. Defendant No. 2 has also filed the Written Statement (Exhibit-61) and has submitted that Anusaya is the legally wedded wife of deceased Khandu; the Plaintiffs have, in order to grab the Suit Properties made a false contention that Anusaya is not the wife of Khandu; after the death of Khandu the name of Anusaya was recorded in the Record of Rights; on 15th March, 1964 Anusaya gifted plot bearing Survey No. 46/10 in favour of Grampanchayat for public purpose; though the Gift Deed was to be registered, since Anusaya fell ill the document could not be registered; in the year 1970-72 a building for primary school was constructed on the Suit Property; in the year 1977-78 a building to house an agricultural center was constructed; the Grampanchayat office was constructed in the year 1998-99; in the year 2003 Defendant No. 2 has constructed a shopping complex and has leased out shops to Kasheshwari Dudh Sanstha, Bhimrao Sakharam Gole, Sadashiv Tukaram Parte, Devdas Shankar Gole, Kisan Dhondiba Gole, Shivram Mahadev Jadhav, Sanjay

Nandu Gole, Gyandeo Maruti Gole and Nathu Jagannath Visapure; the Plaintiffs have not impleaded the said individuals in whose favour the shops are allotted as party Defendants to the Suit; besides Plaintiffs there are other coparceners who have not been impleaded as party Defendants to the Suit; the Suit is therefore bad for non-joinder of necessary parties; even assuming though denying that the Plaintiffs are the owners of the Suit Property, they have not made any grievance qua the peaceful possession and enjoyment of the Suit Properties by the Defendants for more than 12 years and therefore alternatively the Defendants have become owners of the Suit Properties by adverse possession; the decision given in the litigation between the Plaintiffs and Atmaram is not binding on the Defendants as they were not parties to the proceedings.

6. The Trial Court thereafter framed the following issues :

- "1. *Whether the Plaintiff is the owner and possessor of the Suit properties ?*
2. *Whether the Defendant No. 2 has obtained Suit properties by Gift Deed of Anusaya Khandu Gole ?*
3. *Whether Anusaya Gole had power to dispose of Suit properties ?*
- 3A. *Whether the Defendants prove that they have become owners of the Suit properties by adverse possession ?*
- 3B. *Whether the Defendant No. 2 has legal rights in disputed properties ?*
- 3C. *Whether the Suit is bad for non joinder of necessary parties ?*
- 3D. *Whether the Suit is within limitation ?*
4. *Whether the Plaintiff is entitled to the relief, as sought ?*
5. *What Order and Decree ?"*

7. The Trial Court after appreciating the oral as well as the documentary evidence, recorded that the ownership of the Suit Properties which is the subject matter of the present Suit, was not challenged in RCS No. 272 of 1989 or in Appeal No. 603 of 1994 i.e. the proceeding between the Plaintiff and Atmaram (son of Anusaya's sister), wherein it was held that Anusaya was not married to Khandu and the properties belonged to the Plaintiff No.1; the present Defendants were also not parties to the said proceeding/s; the Plaintiffs have not filed any litigation claiming possession of the present Suit Properties; if as alleged by the Plaintiff in the year 1964 Anusaya gifted the Suit Properties 'illegally' in favour of Defendant No. 2/ Grampanchayat, the question remains as to why the Plaintiff remained silent since 1964 and did not file any litigation claiming possession of the Suit Properties from Defendant No. 2; Extract 8A of the house property shows that the Defendants are owners of the Suit Properties; Letters of Administration were granted in favour of Atmaram in RCS No. 111 of 1983; the Appeal filed against the said Application, has been dismissed and the Letter of Administration granted in favour of Atmaram is still intact; even if it is held that Anusaya is not the legally wedded wife of Khandu, still that itself does not automatically establish the Plaintiffs' title over the Suit Properties and the Plaintiffs have to independently prove their title over the Suit Properties; in RCS No. 272 of 1989 filed by Atmaram, it has been specifically contended on behalf of the 1st Plaintiff in his Written Statement that Venu was the legally wedded wife of Khandu, after her death one lady by name Banubai was residing with Khandu as a

keep and thereafter Anusaya was residing with Khandu as a keep; It is further contended that Khandu married one Shevantabai who died issue-less; thus, if the contention of the Plaintiff No.1 in RCS No. 272 of 1989 is accepted as true, then it can be said that there are other legal heirs of Khandu; the fact whether Venu, wife of Khandu died without giving birth to any children or not is also not brought on record in support of the claim of the Plaintiffs that they are the owners of the Suit Properties. The Plaintiffs have to establish that they are the only legal heirs of Khandu and besides them, there are no other legal heirs; The name of Anusaya was mutated in the Record of Rights on 1st October, 1958 vide Mutation Entry No. 852, which is certified on 23rd January, 1958; even at that time the Plaintiff has not challenged the title of Anusaya over the Suit Properties by filing appropriate proceedings; the Plaintiff was born on 1st August, 1940 and in the year 1958 he was fully capable of understanding; the Plaintiff has admitted in cross-examination that Khandu died in the year 1958 and his father (brother of Khandu) died in the year 1972, but the evidence shows that even the father of the Plaintiff during his lifetime never challenged the mutation entry of Anusaya. This clearly shows that the father of the Plaintiff has not challenged the right of Anusaya over the Suit Properties, but the Plaintiff in the capacity of his son made a grievance qua the right of Anusaya over the Suit Properties only in the year 1989; the Plaintiff has admitted in cross-examination that he does not have any documentary evidence to show that he is the legal heir of Khandu; the Plaintiff has admitted that he did not file any civil litigation against

Anusaya disputing her title over the Suit Properties; he also admitted that he has not impleaded his brother as a necessary party to the proceedings; therefore, a mere allegation that Anusaya is not the legally wedded wife of Khandu is not sufficient to declare the Plaintiff No.1 as an owner of the Suit properties; the Plaintiff has therefore failed to prove that he is the owner of the Suit Properties.

8. The Trial Court has also held that though the gift deed in favour of Defendant No.2 was not registered and therefore, it cannot be held that the Defendant No.2 has obtained the Suit Properties by gift deed, Anusaya had the power to dispose of the Suit Properties. The Trial Court has in this regard pointed out, that Khandu died on 29th July, 1958, whereas the Plaintiff's father who was the brother of Khandu died in the year 1972; Anusaya died on 24th April, 1983. After the death of Khandu the name of Anusaya was immediately mutated in the Record of Rights as his legal heir. Since the year 1958 until 1972, when the father of the Plaintiff died, neither the Plaintiff nor his father made any grievance about the relevant entries made in favour of Anusaya. If according to the Plaintiff No.1, he is the legal heir of the deceased Khandu then certainly after the death of Khandu, the father of the Plaintiff being the real brother of Khandu would have made a grievance about the entries made in favour of Anusaya. Infact he has not raised any objection qua the subject entries. However, after his death, the Plaintiff No.1 being his son for the first time made a grievance in the year 1989 ; the concerned entries in favour of Anusaya were never challenged and therefore, those entries in favour of Anusaya are still intact. On the basis of the said

entries, Anusaya transferred the property in favour of Defendant No.2. Therefore, the fact remains that those entires are not challenged and are still intact. As already discussed Anusaya transferred the properties on the basis of the relevant entries in favour of the Defendant. This clearly shows that she was having a right and interest over the Suit Properties and therefore she has disposed of the Suit Properties. Again, another material aspect is that in RCS No. 272 of 1989 filed by Atmaram against the 1st Plaintiff as well as in the Civil Appeal bearing No. 603 of 1994 filed by the 1st Plaintiff against the order in RCS No.272 of 1989, the present property was not the subject matter. In both the litigations, the present Defendants were not parties, so also in the present litigation Atmaram is not a party. If at all the Suit Properties would have been the subject matter in both the litigations in that case the facts would have been otherwise. It is also pertinent to note that earlier to the execution of the alleged Will dated 29th January, 1977, Anusaya has disposed off the Suit Property and therefore the Suit Property has not been included in the alleged Will; thus the relevant entries clearly shows that Anusaya had the power to dispose off the properties.

9. The Trial Court has in paragraphs 25, 26 and 27 of its Judgment pointed out that the Plaintiff has not impleaded necessary parties to the Suit and therefore, the Suit is bad for non-joinder of necessary parties. The Trial Court also held that the Plaintiff has not exercised his right within the period of limitation and Defendant No.2 has acquired legal rights over the disputed properties.

10. The Trial Court did not accept the Defendant's alternate plea of adverse

possession on the ground that before taking the plea of adverse possession it is necessary to admit on behalf of the Defendant that the present Plaintiff is the real owner of the land, but according to the Defendants the present Plaintiff is not concerned with the Suit Properties. Again in the present case, it cannot be said that possession of the Suit Properties by the Defendants is hostile since according to the Defendants, Anusayabai herself transferred the Suit Property in favour of the Grampanchayat.

11. The Trial Court by its Judgment dated 28th July 2010 dismissed the Suit.

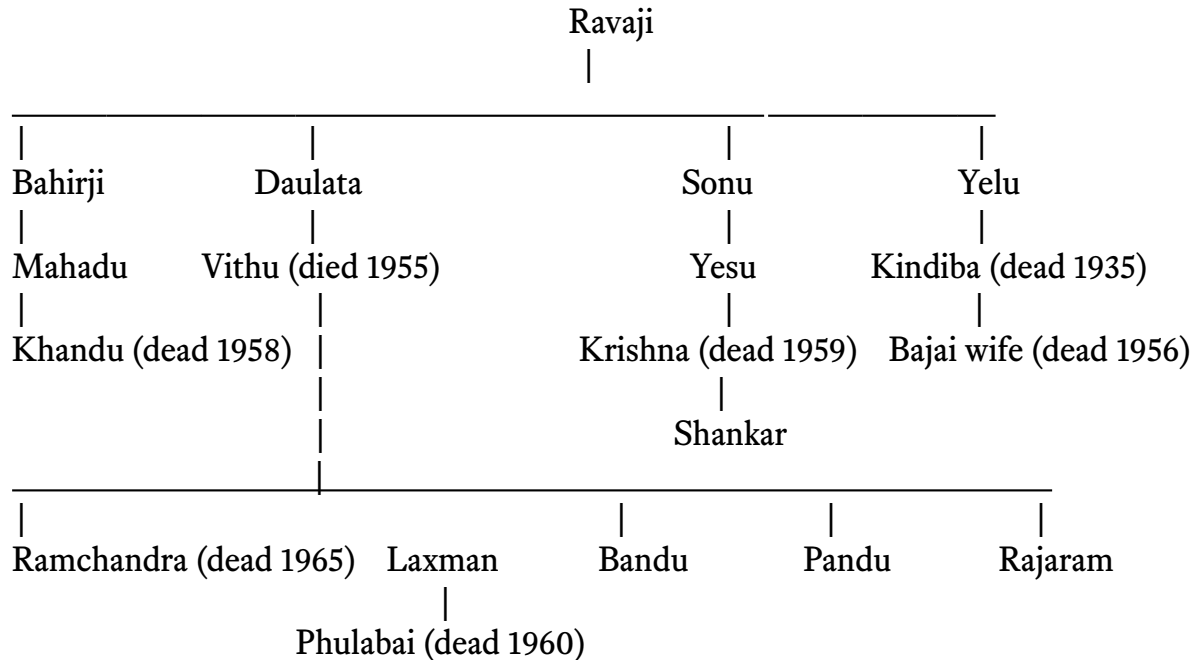
12. Being aggrieved by the Judgment of the Trial Court dated 28th July, 2010, the Plaintiffs filed Regular Civil Appeal No. 225 of 2010 before the Court of Principal District Judge, Satara. The Appeal Court has recorded in its Judgment and Order dated 14th October, 2015 that the Appellants have submitted that they are not claiming any reliefs in respect of the constructed properties as set out in Paragraph 1B, 1D, and 1E (i.e. School Building, agricultural office and Grampanchayat Office) and the Plaintiff No. 1 has also amended the Plaint and joined Plaintiff Nos. 2 to 5 as party Plaintiffs in the Suit. The Appeal Court after setting out the facts in the matter, raised the following points for its determination :

"1. Whether it is proved that the Plaintiffs are owners and possessor of the Suit properties and more particularly of the Suit properties 1A and 1C ?

2. Whether it is proved that Anusaya Khandu Gole was legally wedded wife of Khandu Mahadu Gole ?

3. *Whether it is proved that Anusaya Khandu Gole had power to dispose off the Suit properties ?*
 4. *Whether it is proved that Anusaya Khandu Gole had gifted the Suit properties to the Defendant No. 2 and said Defendant has acquired title to Suit properties ?*
 5. *Whether it is proved that the Defendants have become owners of the Suit properties by adverse possession ?*
 6. *Whether the Suit is bad for non joinder of necessary parties ?*
 7. *Whether the Suit is in limitation ?*
 8. *Whether the Plaintiffs are entitled to mandatory injunction to direct the Defendants to remove constructions in the Suit properties as prayed in Plaint para 10A?*
 9. *Whether the Plaintiffs are entitled to possession of land from the Defendants after removing all the buildings in the Suit properties as claimed in Plaint para 10A-1 or possession of the Suit properties 1A and 1C ?*
 10. *Whether the Plaintiffs are entitled to perpetual injunction to restrain the Defendants or anybody else on their behalf from disturbing their lawful possession and enjoyment of the Suit properties as claimed in Plaint para 10B ?*
 11. *Whether the impugned Decree needs to be confirm, reversed or modified ?*
 12. *What Order ?"*
13. As regards the issue of non-joinder of necessary parties, the Appellate Court

has in its Judgment dated 14th October, 2015, set out the family tree of the deceased Khandu as submitted by Defendant No. 2, which is reproduced hereunder for ready reference :



The Appellate Court has thereafter noted the contention of Defendant No. 2 that all the persons, who are alive as per the above family tree, are not joined as Plaintiffs or Defendants in the Suit and though Defendant No. 2 has since the year 2003 constructed certain shops / galas in the Suit Properties and have handed them over on rent since the year 2003 to Kaleshwari Dudh Sanstha, Bhimrao Sakharam Gole, Sadashiv Tukaram Parte, Devdas Shankar Gole, Kisan Dhondiba Gole, Shivram Mahadeo Jadhav, Sanjay Nandu Gole, Dnyandeo Maruti Gole and Nathu Jagannath Visapure after accepting deposits from them, they are not made parties to the Suit although they are necessary parties.

The Appellate Court after appreciating/considering the evidence of Rajendra Tukaram Gole (DW 1) and Haribhau Bala Gole (DW 2) and the cross-examination of the Plaintiff No.1, held in paragraph 28 of the Judgment dated 14th October, 2015 that the Milk Sanstha and six other persons are necessary parties to the Suit. Similarly, the Appellate Court has after appreciating / considering the family tree submitted by Defendant No. 2 and the evidence of Rajendra Tukaram Gole (DW 1), who was the Sarpanch of Grampanchayat, Hatgeghar and the cross-examination of the Plaintiffs, in paragraph 29 of the Judgment dated 14th October, 2015, held that several members of the family who ought to have been joined as parties to the Suit are not so joined and the Suit is therefore, bad for non-joinder of the necessary parties.

14. For the reasons set out in paragraph 30 of the Judgment dated 14th October, 2015, the Appellate Court has held that the decision in RCA No. 603 of 1994 dated 24th July, 2002, relied on by the Plaintiffs to show that Anusaya was not the legally wedded wife of Khandu Gole, cannot be said to operate as res-judicata in the Appeal under consideration and after considering the facts as well as the law as discussed in paragraphs 31 and 32 of the Judgment dated 14th October, 2015, the Appellate Court has in paragraph 33 of its Judgment held that the Judgment in the said Appeal i.e. RCA No. 603 of 1994 is not a Judgment as per Sections 40, 41 and 42 of the Evidence Act, 1872. The Appellate Court proceeded to hold that therefore applying the ratio relied on in the case of Payappar Sree Dharamsastha Temple

A.Com v/s. A.K. Joseph and others¹ and Gulabrao Maruti Bhagat v/s. Bhagwan Nana. Bhagat and others², the Judgment in RCA No. 603 of 1994 cannot be said to be binding on the Defendants to say that Anusaya is not the legally wedded wife of Khandu Gole as alleged by the Plaintiffs and therefore the aspect whether she is the legally wedded wife of Khandu, can be independently considered in the Appeal before it, in the light of the evidence adduced by the parties.

15. The Appellate Court has after extensively considering, appreciating and analysing the evidence of Haribhau Gole (DW 2), who was 82 years old at the time when he gave evidence, and who in his evidence deposed that between 1948 to 1952 he and Khandu were cultivating each other's lands and were residing two to three houses away from each other, and that in 1948 he had visited the house of Khandu, where he was residing with his wife Anusaya, and after considering the cross-examination of the Plaintiff, for the reasons set out in paragraphs 34 to 39 of the Judgment dated 14th October, 2015, held that Anusaya was the legally wedded wife of Khandu and being his heir, she had power to dispose off the Suit Properties as per the mode of law.

16. The Appellate Court has also given detailed reasons in paragraphs 45 and 46 of its Judgment in support of its findings that the Plaintiffs are not entitled to mandatory injunction/s as claimed. For the reasons set out in paragraphs 47 and 48 of the Judgment dated 14th October, 2015, the Appellate Court also held that the Plaintiffs are not entitled to possession of the properties including the Suit Property

¹ 2009 (2) SCCR 383

² 2001 (2) Mah. L.R. 754

1A and 1C as claimed in paragraph 10A. The Appellate Court has also explained in paragraph 43 of its Judgment that the letter dated 04-09-2002 (Exhibit 3/2 of the Defendant No.1) to the Block Development Officer is not sufficient to say that the Plaintiffs are owners and in possession of all the Suit Properties or Suit Properties 1A and 1C. Though the Appellate Court has agreed with the findings of the Trial Court that the Defendants' cannot claim to be in adverse possession of the Suit Property and the Gift Deed not being registered, the Defendants cannot contend that the properties were gifted to them, the Appellate Court has held that the Suit filed by the Plaintiffs cannot be said to be barred by the Law of Limitation. The Appellate Court has therefore, by its Judgment dated 14th October, 2015, dismissed the Appeal.

17. As set out earlier, being aggrieved by the Judgment of the Appellate Court dated 14th October, 2015, the Plaintiffs have filed the above Second Appeal under Section 100 of the Code of Civil Procedure, 1908. In the above Second Appeal, the learned Advocate appearing for the Appellants has once again raised the same contention namely Anusaya was not entitled to the properties of Khandu and therefore, she had no right to transfer the Suit Properties and /or handover possession of the same to the Defendants and that in RCS No.272 of 1989 and Appeal No.603 of 1994 i.e. proceedings between the Plaintiffs and Atmaram, wherein it is held that the Plaintiff is the owner of the Suit Properties and since it was not established that Anusaya was married to Khandu, she cannot be said to be the legal heir of Khandu.

18. In my view, the Trial Court as well as the Appeal Court after appreciating

the oral as well as documentary evidence led/placed before the Courts by the parties, and after considering the law on the subject, have by their detailed reasoned Judgments given concurrent findings that the Suit is bad for non-joinder of necessary parties; that Anusaya was entitled to transfer the Suit Properties in favour of the Defendants and the findings of the Court in the proceedings between the Plaintiffs and Atmaram Mankumare, wherein the title of the Suit Properties was not challenged and the Defendants were not party to the said proceeding, is not binding in the present Suit and the Plaintiffs are not entitled to the relief/s as claimed. Therefore, I am of the view that no substantial question of law is raised by the Appellant in the above Second Appeal. The Second Appeal is therefore, dismissed.

(S.J.KATHAWALLA, J.)