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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO.660 OF 2013  
WITH  
CIVIL APPLICATION NO.2138 OF 2013**

Devendra Ramchandra Palsamkar .. Appellant

**Versus**

Gajanan Raghunath Patkar .. Respondent

**Mr. Pradeep Thorat a/w Ms.Aditi Naikare a/w Mr.Aniesh Jadhav,  
*Advocate for the Appellant***

**Mr.Ashutosh Kaushik a/w Ms.Namrata Parmar, Ms.Laxmi Mishra i/b  
*M/s.Kaushik and Co., Advocate for the Respondent Nos.1 to 3.***

**CORAM: FIRDOSH P. POONIWALLA, J.**

**RESERVED ON: 5<sup>th</sup> DECEMBER, 2024**

**PRONOUNCED ON: 13<sup>th</sup> FEBRUARY, 2025**

**Judgement:**

1. This First Appeal is filed by the Original Defendant No.1 challenging the Judgement dated 1<sup>st</sup> October 2012, passed by the Bombay City Civil Court at Dindoshi, decreeing Suit No.1341 of 2010.

2. In the present Judgement, the parties are described in the same manner as they were described in the Suit.

3. Suit No.1341 of 2010 was filed seeking the following relief:

*“a) That this Hon'ble Court be pleased to restrain the defendant No.1 his servants, agents, contractor/s or any person or persons claiming through under or by him permanently by an order and injunction of this Hon'ble Court from entering into, remaining upon, dispossessing the Plaintiffs and/or disturbing the peaceful possession of the plaintiffs on the suit property and/or constructing unauthorised sheds/structures/chawl's and/or from carrying out any unauthorised construction activities of whatsoever nature of otherwise from encroaching upon the suit property i.e. the land admeasuring m24 Gunthas equivalent to 2458.5sq. meters or thereabouts bearing survey No.178, Hissa No.1, Corresponding C.R.S.NO.171, 171/1 to 6 of Village Malad (East) Taluka Borivli, District Mumbai suburban together with three structures assessed for the property taxes under Ward Nos. PN6438-299A, PN 6438-2-299 AB, P-6438(3) 299-AC standing thereon known as Patkar Wadi, Manchhubhai R Road, Malad (East) Mumbai 400097 and as more Particularly delineated by red colour on the plan annexed and marked Exhibit -A to the Plaint or any part or portion thereof.*

4. The Plaintiffs' case in the Plaint is as under:
- a. The Plaintiffs and Defendant Nos.2 to 7 are the co-owners of the property admeasuring 24 Gunthas, equivalent to 2458.5 sq.meters or thereabouts, bearing survey No.178, Hissa No.1, corresponding to C.T.S.No.171, 171/1 to 6 of Village Malad (East) Taluka Borivli, District Mumbai Suburban, together with three structures, assessed for property taxes, standing thereon known as Patkar Wadi, Manchhubhai Road, Malad (East), Mumbai 400 097 ("the suit property").
- b. By a Deed of Conveyance dated 18<sup>th</sup> October 1897, one Purshottam Atmaram Patkar, the grand father of the Plaintiffs and Defendant Nos.2 to 7, purchased the suit property from Haridas Narayandas for the consideration and on the terms and conditions mentioned therein. The said Purshottam Atmaram Patkar died in the year 1920 leaving behind him three sons namely (i) Raghunath Purshottam Patkar (ii) Krishnarao Purshottam Patkar and (iii) Pandharinath Purshottam Patkar. The said Pandharinath Purshottam Patkar died intestate as a bachelor on 28<sup>th</sup> October

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1940. The said Raghunath Purshottam Patkar died on 6<sup>th</sup> March 1968 leaving behind him his widow Sumati Raghunath Patkar, his three sons, namely the Plaintiffs, and his six married daughters, namely Defendant Nos.2 to 7, as his only heirs and legal representatives. The mother of the Plaintiffs, Sumati Raghunath Patkar, died on 23<sup>rd</sup> December 1982. Further, the said Krishnarao Purshottam Patkar died intestate as a bachelor on 9<sup>th</sup> October 1973. Accordingly, the Plaintiffs and Defendant Nos.2 to 7 became the co-owners of the suit property by virtue of operation of law.

c. The name of Krishnarao Purshottam Patkar is shown as Kabjedar in Village Form Nos.7, 7A and 12 in respect of the suit property. The names of the Plaintiffs, their mother and sisters (Defendant Nos.2 to 7) are shown as holders in the extract of Property Register Cards in respect of the suit property. The Government of Maharashtra has issued Sanads and map in respect of the suit property under the provisions of the Maharashtra Land Revenue Code, 1966, in the joint names of the said Raghunath Purshottam Patkar and Krishnarao Purshottam Patkar, the father and uncle respectively of the Plaintiffs.

d. The suit property is assessed for non-agricultural taxes. The Assistant District Deputy Collector, Mumbai Suburban District, Andheri, vide his Order dated 28<sup>th</sup> June 1968 has regularised the unauthorised N.A. use of the suit property in the name of the uncle of the Plaintiffs. The Plaintiffs have paid the non-agricultural taxes in respect of the suit property. The predecessor in title of the Plaintiffs had constructed three sheds, one well and W.C. blocks on the suit land. The said sheds are assessed for property taxes by the P/North Ward of the Brihan Mumbai Municipal Corporation (“BMC”) in the name of Krishnarao Purshottam Patkar, the uncle of the Plaintiffs. The Plaintiffs are paying the property taxes to the BMC regularly. The rooms in the said structures are let out on monthly tenancy basis to various tenants by the Plaintiffs. The Plaintiffs have filed two suits for eviction against the tenants on the suit property. In one of the said suits, a decree has been passed by the Court of Small Causes at Bandra, Mumbai, in favour of the Plaintiffs.

e. The land adjoining the suit property, bearing C.T.S.No.170, belongs to one Mukhtar Mistry and others. The said land has access through its North side. As the said access was blocked by the Union

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of India, through COD Mumbai, the said Mukhtar Mistry and others filed a Suit, being S.C. Suit No.417 of 1978, before the Hon'ble City Civil Court at Mumbai, against Union of India and Military Estate Officer for clearing the said access to the said land bearing C.T.S.No.170. The said suit was decreed but the Union of India has preferred a First Appeal and same is pending before this High Court.

f. Since the said access to the said land bearing C.T.S.No.170 through its North side was blocked by the Union of India, the said Mukhtar Mistry and others were trying for access through the suit property. The Plaintiffs filed a suit, being S.C.Suit No.5326 of 2000, before the City Civil Court at Mumbai, against the said Mukhtar Mistry and others, for restraining them from using the suit property as ingress and egress to the said land and for others reliefs. In the said suit, it was held by the Court that the Plaintiffs are the owners of the suit property. However, the said suit was dismissed and the Plaintiffs have filed a First Appeal against the said order of dismissal of the Suit, which is pending before this Court.

g. During the pendency of the said First Appeal, the said Mukhtar Mistry and others have sold and transferred their interest in their said land in favour of M/s.Dheeraj Developers. The said M/s.Dheeraj Developers put pressure upon the Plaintiffs to sell the suit property to them, however, the Plaintiffs refused to sell the suit property as it was an ancestral property of the Plaintiffs and they did not want to dispose of the same. The said M/s.Dheeraj Developers had addressed a letter dated 17th July 2009 to the Plaintiffs requesting them for temporary access through the suit property, for twenty four months, in order to remove the debris of the already demolished existing ground plus three storey building and to bring building materials for constructing a new building on the said adjoining plot of land. The said letters had two annexures, being letters dated 23<sup>rd</sup> January 2009 and 5<sup>th</sup> February 2009, purported to be issued by the Central Ordinance Depot in favour of the Executive Engineer, Building Proposal, Kandivali. The Plaintiffs made an enquiry about the genuineness of the annexures to the said letter dated 17th July 2009. The Plaintiffs received a letter dated 8th March, 2010 from the Public Information Officer informing them that the said annexures are fake and a preliminary enquiry in the matter was in progress. The Plaintiffs also received a

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letter dated 5th May 2010 from the Sr. Inspector of Police, Dindoshi Police Station, stating that the said two letters were not genuine. The Plaintiffs filed a complaint dated 28<sup>th</sup> July 2009 with the Additional Commissioner of Police (Crime) to take action in respect of the said fake annexures. However, no action was taken.

h. Even thereafter, M/s.Dheeraj Developers were unlawfully, illegally and high handedly trying to get access from the suit property but the Plaintiffs objected to the same.

i. The said M/s.Dheeraj Developers, in order to harass the Plaintiffs, instigated Defendant No.1 to put up unauthorised construction on the open portion of the suit property, though Defendant No.1 is in no way concerned with the suit property or any part thereof. On 24th April 2010, Defendant No.1 unauthorisedly and illegally constructed a shed on the east side of the suit property. The Plaintiffs immediately addressed a letter dated 24th April 2010 to the Senior Inspector of Police, Dindoshi Police Station, against Defendant No.1. A copy of the said letter was forwarded to the Assistant Engineer, Building and Factory Department, and other officers of the BMC. By the said letter, the



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Plaintiffs requested the removal of the said unauthorised construction and registration of a case of criminal trespass against Defendant No.1. On 28th April 2010, Defendant No.1 again unauthorisedly and illegally constructed a shed on a part of the suit property. The Plaintiffs addressed a letter dated 24<sup>th</sup> April 2010 to the Officers of the BMC and lodged a complaint for removal of the said unauthorised sheds. The Plaintiffs lodged another complaint dated 28th April, 2010 with the Deputy Commissioner of Police, Zone XII, against Defendant No.1. Further, the Plaintiffs addressed another letter dated 4th May 2010 to the said Deputy Commissioner of Police Zone-XII regarding their complaint. The Senior Inspector of Police addressed a letter dated 11th May 2010 to the Assistant Municipal Commissioner, P/North Ward, of the B.M.C. and requested him for removal of the said unauthorised construction put up by Defendant No.1 on the suit property.

j. The said unauthorised sheds constructed by Defendant No.1 on the suit property were demolished on 20th May 2010 by the Officers of the P/North Ward of the BMC with the help of Police of Dindoshi Police Station. The Defendant No.1 again illegally and unauthorisedly re-erected the said unauthorised sheds on the suit

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property. The Plaintiffs again addressed a letter dated 21st May 2010 to the Municipal Offices as well as to the Sr. Inspector of Police, Dindoshi Police Station, for removal of the said unauthorised sheds re-erected by the Defendant No.1 on the suit property and also requested to register a criminal case against him. The Plaintiffs further addressed a letter dated 24th May 2010 to the Deputy Municipal Commissioner, Zone-IV, Andheri, for removal of the said unauthorised sheds put up by Defendant No.1 on the suit property.

k. Plaintiff Nos.1 and 3 filed a Caveat No.412 of 2000 before the City Civil Court at Dindoshi against Defendant No.1 on 25th May 2010 in respect of the said unauthorised sheds. The said Caveat was sent for service upon Defendant No.1 by courier and came back with the remark 'person not there'.

l. On 26th May 2010, the BMC, with the help of officers of the Dindoshi Police Station, again demolished the unauthorised sheds re-erected by Defendant No.1 on the suit property. The Plaintiffs received a Demolition Report from the office of P/North Ward of the BMC confirming the demolition of the said premises.

m. Thereafter, the Plaintiffs approached the Sub-Engineer P/North Ward of the BMC on 5th June 2010 and requested him to initiate action under Section 52 of the MRTP Act, 1966 against Defendant No.1. The Plaintiffs came to know that the Defendant No.1 had filed a suit, being L.C. Suit No.1282 of 2010, against the BMC, in respect of the unauthorised sheds constructed by him on the suit property but no reliefs were granted in his favour. The Plaintiffs, through their Advocates, took search of the papers and proceedings of the said suit by filing a search praecipe on 7th June 2010. After going through the papers and proceedings of the said suit, the Plaintiffs came to know that Defendant No.1 had filed the said Suit on 25th May 2010 against the BMC only to protect the said unauthorised shed on the suit property. Defendant No.1 had moved for ad-interim relief before the City Civil Court on 26th May 2010 without any notice or intimation to the Plaintiffs. However, taking cognizance of the Caveat filed by Plaintiff Nos.1 and 3, the City Civil Court at Dindoshi was pleased to direct Defendant No.1 to serve notice upon the Caveators, i.e. Plaintiff Nos.1 and 3, and then to press for ad-interim relief of injunction. The notice was made returnable on 28th May, 2010. On 28th May 2010, neither

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Defendant No.1 nor his Advocate appeared before this Hon'ble Court nor did Defendant No.1 comply with the directions given by the Court on 26th May 2010. It is the submission of the Plaintiffs that it was obvious as to why Defendant No.1 or his Advocate did not remain present on 26<sup>th</sup> May 2010 - as the unauthorised sheds constructed by Defendant No.1 on the suit property had been demolished.

n. It is the submission of the Plaintiffs that Defendant No.1, in the said Suit filed by him, had relied upon forged and fabricated documents, being Agreement for Sale dated 20th February 1974 purported to be executed by one Krishanao Pandurang Patkar in favour of Narayan Vithal Mhambale and Agreement for Sale dated 1st November, 1996 purported to be executed by Narayan Vithal Mhambale in favour of Defendant No.1. The Plaintiffs further submitted that the alleged Krishnarao Pandurang Patkar was not the owner of the suit property at any point of time. Moreover, Krishnarao Purshottam Patkar, the uncle of the Plaintiffs, had passed away on 9<sup>th</sup> October 1973 i.e. even before the Agreement for Sale dated 20<sup>th</sup> February 1974 was purported to be executed. The Plaintiffs further submitted that Defendant No.1 had forged and

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fabricated the signatures of Krishnarao Purshottam Patkar on the said Agreement for Sale. The Plaintiffs further submitted that Defendant No.1 not only forged and fabricated the documents annexed to the said Plaint but has gone one step ahead and has used the same by filing the said suit and tried to snatch an injunction order behind the back of the Plaintiffs. It is also the case of the Plaintiffs that Defendant No.1 is not in possession of any part or portion of the suit property nor, at any point of time, was he in possession of the suit property or any part or portion of the suit property.

o. The Plaintiffs visited the suit property on 7th June 2010, at about 4.30 p.m., and saw construction material like G.I. Sheets A.C sheets, bamboos and wooden posts lying near the suit property on C.T.S.No.170. The Plaintiffs made enquiry from their tenants on the suit property who informed them that Defendant No.1 had brought the said construction material. Defendant No.1, alongwith his hirelings, also came to the suit property. The Plaintiffs asked Defendant No.1 as to why he had brought the said building materials and warned him not to put up any unauthorised construction on the suit property. Defendant No.1 and his hirelings

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started abusing the Plaintiffs and tried to exercise force upon them. Defendant No.1 and his hirelings threatened the Plaintiffs to leave the suit property and stated that, otherwise, they would assault the Plaintiffs. Defendant No.1 threatened the Plaintiffs that he would again put up construction on the suit property. It is the submission of the Plaintiffs that Defendant No.1 is a notorious person involved in land grabbing activities by constructing unauthorised structures/sheds on lands belonging to various innocent persons of the locality. It is also the submission of the Plaintiffs that the officers of the BMC as well as the police of the Dindoshi Police Station are hand in glove with Defendant No.1, at the instance of the said M/s.Dheeraj Developers. It is also the submission of the Plaintiffs that Defendant no.1 gets muscle and money power from the said M/s.Dheeraj Developers.

p. In these circumstances, the Plaintiffs approached the Duty Officer of Dindoshi Police Station on 7<sup>th</sup> June 2010, at about 7.00 p.m., in order to lodge a complaint against Defendant No.1. But the Duty Officer, instead of taking the complaint of the Plaintiffs, advised the Plaintiffs to approach the Civil Court and obtain a

prohibitory order against Defendant No.1 in order to avoid day to day disputes.

q. It is in these circumstances that the Plaintiffs filed the present Suit.

5. In the Suit, the Defendant No.1 chose not to file any written statement.

6. The Plaintiffs led oral evidence by filing an Affidavit in lieu of Examination in Chief dated 28<sup>th</sup> September 2011 of Plaintiff No.3, namely, Vinayak Raghunath Patkar, by which Plaintiff No.3 gave evidence of the facts stated in the Plaint. Further, the Plaintiffs produced the following documents in evidence:

*“Exh. 8 City Survey map of Tika No.35 & 36*

*Exh.9 Certified copy of Deed of Conveyance*

*Exh.10 Death Certificate of Pandharinath P. Patkar*

*Exh.11 Death Certificate of Raghunath P. Patkar.*

*Exh.12 Death Certificate of Suman R.Patkar*

*Exh.13 Death Certificate of Krishnarao P. Patkar*

*Exh.14 Certified copy of Extract of Village form No.7,*

7A & 12

- Exh.15 Certified copy of Extract of Property Register Cards.*
- Exh.16 Sanad and Map issued by Special District Inspector Land Record-I, M.S.D.*
- Exh.17 True copy of N.A. Order dt. 28/6/1968*
- Exh.18 Receipt for payment of N.A. Tax*
- Exh.19 Municipal Assessment Bills and payment receipts of Municipal Taxes.*
- Exh. 20 Certified copy of Decree dated 7.5.2009 in R.A.E. & R Suit No.237/1995.*
- Exh.21 Certified copy of Judgement dt. 20/4/2006 in Suit No.5326/2000*
- Exh.22 Roznama Dt. 7.10.2010 in Suit No.1282/10*
- Exh.23 Letter dt. 17.10.2009 with two annexures*
- Exh. 24 Letter dt. 8.3.2010*
- Exh.25 Letter dt. 5.5.2010*
- Exh. 26 Complaint dtd. 28.7.2009*
- Exh.27 Letter dtd. 24.4.2010*
- Exh. 28 Complaint dtd. 28.4.2010*
- Exh. 29 Letter dt. 4.5.2010 to Home Minister*
- Exh.30 Letter dt. 4.5.2010 to Dy. Commissioner of Police Sone*
- Exh. 31 Letter dt. 7.5.2010 to Minister Urban Development Dept. & Asstt. Mun.Commissioner P/North Ward*
- Exh. 32 Letter dt. 11.5.2010*
- Exh.33 Letter dt. 21.5.2010*



*Exh.34 Letter dt. 24.5.2010*

*Exh.35 Demolition report*

*Exh.36 Letter dt. 12.7.10.*

7. On the other hand, Defendant No.1 chose not to cross-examine Plaintiff Nos.3 and only made oral arguments. By Judgement dated 1<sup>st</sup> October 2012, the City Civil Court at Dindoshi decreed the Suit of the Plaintiffs.

8. Mr.Thorat, the learned Advocate appearing on behalf of the Appellant (Defendant No.1), made submissions impugning the said Judgement dated 1<sup>st</sup> October 2012. Mr.Thorat referred to the Judgement of the Hon'ble Supreme Court in ***C.N.Ramappa Gowda vs. C.C.Chandregowda (Dead) by Lrs. And Another*** and submitted that, as per the said Judgement, even if the Defendant has not filed a Written Statement, the Plaintiff has to prove his case and the Court has to record satisfaction that the case is proved.

9. Next, Mr.Thorat submitted that there was no averment in the Plaint stating that the Plaintiffs are in possession of the suit property. He further submitted that the impugned Judgement does not record any finding

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*1 (2012) 5 SCC 265*

that the Plaintiffs are in possession of the suit property, which is essential for granting a permanent injunction, and relied upon the Judgement of the Hon'ble Supreme Court in *Thimmaiah vs. Shabira and Others*<sup>2</sup> in support of this submission.

10. Further, Mr.Thorat submitted that, in view of the averments in paragraph 13 of the Plaint, there was a cloud on the title of the Plaintiffs. Considering the same, and in view of the Plaintiffs' own pleadings that the Agreements for Sale dated 20<sup>th</sup> July 1974 and 1<sup>st</sup> November 1996, relied upon by Defendant No.1, were forged and fabricated, the Plaintiffs should have sought a declaration of title and also a declaration to the effect that the said Agreements are forged and fabricated.

11. Mr.Thorat further referred to the Roznama dated 26<sup>th</sup> May 2010 in L.C.Suit No.1282 of 2010 filed by Defendant No.1 and submitted that the said Roznama showed that Defendant No.1 was claiming ownership in respect of the suit property. Further, Mr.Thorat also referred to the Order dated 22<sup>nd</sup> December 2011 passed by the Deputy Collector (Appeals) Mumbai Suburban District, in an Appeal under Section 247 of the Maharashtra Land Revenue Code, 1966. Mr.Thorat submitted that the submissions of Defendant No.1, as recorded in the said Order, also showed that Defendant

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2 (2008) 4 SCC 182

No.1 was claiming ownership in respect of the suit property. Mr.Thorat submitted that the said Roznama and the said Order passed by the Deputy Collector (Appeals) were on record before the Trial Court. The pleadings in the Plaint were also on record. This showed that Defendant No.1 was claiming ownership in respect of the suit property and, therefore, there was a cloud on the title of the Plaintiffs in respect of the suit property. However, despite the same, the Plaintiffs did not seek a declaration of title in respect of the suit property and the Trial Court has passed a decree of permanent injunction without considering the said fact.

**12.** Mr.Thorat submitted that, for all the aforesaid reasons, the present First Appeal should be allowed and the impugned Judgement dated 1<sup>st</sup> October 2012 be set aside by this Court.

**13.** On the other hand, Mr.Ashutosh Kaushik, the learned Advocate appearing on behalf of Respondent Nos.1 to 3 (Plaintiff Nos.1 to 3), supported the impugned Judgement. Mr.Kaushik referred to the Deed of Conveyance dated 18<sup>th</sup> October 1897 and submitted that it had never been the case of Defendant No.1 that the Plaintiffs are not the owners of the suit property. Mr.Kaushik submitted that, in the Suit, there was no challenge to this Deed of

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Conveyance from which the Plaintiffs and Defendant Nos.2 to 7 derived title to the suit property.

**14.** Mr.Kaushik further submitted that the submission of Defendant No.1 that the impugned Judgement does not record that the Plaintiffs were in possession of the suit property is incorrect and, in this context, referred to paragraph nos.33 and 34 of the impugned Judgement. Mr.Kaushik submitted that the said paragraphs clearly record a finding regarding Plaintiffs' possession of the suit property.

**15.** As far as the submission of Defendant No.1 that the Plaintiffs should have sought a declaration that the Agreements for Sale dated 20<sup>th</sup> July 1974 and 1<sup>st</sup> November 1996 are forged and fabricated is concerned, Mr.Kaushik submitted that the said Agreements have not been produced by Defendant No.1 before the Trial Court, and, therefore, the question, of the Plaintiffs challenging them or seeking any declaration in respect of the same, did not arise at all.

**16.** As far as Defendant No.1's reliance on the Roznama dated 26<sup>th</sup> May 2010 in Suit No.1282 of 2010 is concerned, Mr.Kaushik submitted that Defendant No.1 could not rely on the same to show that he was claiming

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ownership in respect of the suit property as Defendant No.1 had withdrawn the said Suit on 7<sup>th</sup> October 2010.

**17.** Mr.Kaushik further submitted that the facts pertaining to the said Conveyance, City Survey Maps, 7/12 extracts, property cards, N.A. orders etc. had been referred to in the Plaint and in the Affidavit in lieu of Examination in Chief of Plaintiff Nos.3. In addition, Municipal Assessment Bills and Suits filed by the Plaintiffs against their tenants have also been mentioned. The Plaintiffs have produced and proved these documents in evidence. Mr.Kaushik submitted that these documents also clearly showed that the Plaintiffs are in possession of the suit property.

**18.** Mr.Kaushik also referred to a letter dated 17<sup>th</sup> July 2009 addressed by the said M/s.Dheeraj Developers to the Plaintiffs whereby they requested the Plaintiffs to grant them permission for utilising the road through the suit property for a period of 24 months, and submitted that this clearly showed that even the said M/s.Dheeraj Developers accepted that the Plaintiffs are the owners of the suit property.

**19.** Mr.Kaushik further submitted that the grounds raised by Defendant No.1 for challenging the Judgment dated 1<sup>st</sup> October 2012 were

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without any merit, and, therefore, the present First Appeal ought to be dismissed and decree passed by the City Civil Court at Dindoshi be confirmed.

20. I have heard the learned Advocates for the parties and perused the documents on record.

21. Before dealing with the submissions of Defendant No.1 to the effect that the Plaintiffs had not established that they were in possession of the property in order to get a decree for permanent injunction, it would be appropriate to refer to the Judgement of the Hon'ble Supreme Court in ***Thimmaiah vs. Shabira and Others*** (Supra) in this regard. Paragraph 10 of the said Judgement is relevant and reads as under:

*“10. Undisputedly, the suit was one for permanent injunction and in such a suit the plaintiff has to establish that he is in possession in order to be entitled to a decree for permanent injunction. The general proposition is well settled that a plaintiff not in possession is not entitled to the relief without claiming recovery of possession. Before an injunction can be granted it has to be shown that the plaintiff was in possession.”*

**22.** In my view, there cannot be any dispute with the proposition that, in a suit for permanent injunction, the Plaintiff must establish that he/she is in possession in order to get a decree for permanent injunction. However, in my view, the case of Defendant No.1, that the Plaintiffs have not pleaded in the Plaint that they were in possession of the suit property, cannot be accepted. In paragraph 4 of the Plaint, the Plaintiffs have pleaded that their names, along with the names of their mother and sisters, are shown as holders in the extract of the Property Register Cards in respect of the suit property. Further, in paragraph 5 of the Plaint, the Plaintiffs have pleaded that they are paying property taxes to the BMC regularly. The Plaintiffs have also pleaded that the rooms in the said structures on the suit property are let out on monthly tenancy basis to various tenants and that the Plaintiffs have filed Suits for eviction against tenants on the suit property, and in one of the Suits a decree has been passed by the Court in favour of the Plaintiffs. In paragraph 8 of the Plaint, the Plaintiffs have referred to the said letter dated 17<sup>th</sup> July 2009 addressed to them by M/s.Dheeraj Developers requesting them for access through the suit property. The Plaintiffs have also proved the documents referred to by them in paragraphs 4, 5 and 8 in evidence in the Suit. In paragraph 9 of the Plaint, the Plaintiffs have referred to various actions taken by them in order to protect the possession of the suit property when Defendant No.1 had unauthorisedly and illegally constructed a shed on

the suit property. Similar pleadings have also been made in paragraph 10 of the Plaint. Further, the documents relied upon in these paragraphs have also been proved by the Plaintiffs in evidence in the Suit. Further, in paragraph 16 of the Plaint, the Plaintiffs have categorically averred that they seriously apprehended that Defendant No.1 would dispossess the Plaintiffs, disturb the peaceful possession of the Plaintiffs in respect of the suit property and re-erect unauthorized sheds on the suit property. In prayer (a) of the Plaint, the Plaintiffs have sought a permanent injunction restraining Defendant No.1 from *inter alia* dispossessing the Plaintiffs and/or from disturbing the peaceful possession of the Plaintiffs in respect of the suit property. In my view, the said averments made in the Plaint, and the documents produced and proved by the Plaintiffs in evidence in support thereof, clearly show that the Plaintiffs have pleaded in the Plaint that they are in possession of the suit property and have even proved the same.

**23.** Further, in my view, the case of Defendant No.1, that the impugned Judgement dated 1<sup>st</sup> October 2012 does not record any findings that the Plaintiffs are in possession of the suit property, also cannot be accepted. In paragraph nos.11 and 12 of the Judgement, the Trial Court has noted that, after the death of the predecessor in title of the Plaintiffs, the names of the Plaintiffs, their mother and sisters have been recorded as



holders in the extract of the Property Register Cards of the suit property. In paragraph 12 of the Judgement, the Trial Court has noted that the Property Register Cards have been placed on record and have been admitted in evidence. Further, in paragraph nos.33 and 34 of the Judgement, the Trial Court has arrived at a finding that the Plaintiffs are the owners of the suit property and in possession of the suit property. Paragraph nos.33 and 34 of the said Judgement read as under:

*“33. From the evidence produced on record admittedly the plaintiffs are the owner of CTS N.171, 171/1 to 6. The Plaintiffs, have produced the 7/12 extract of survey No.178, Hissa No.1 CTS N.171 and 171/1 to 1781/6. Considering the documentary evidence on record defendant No.1 in my view has no right to obstruct and interfere the peaceful possession of the plaintiff. The Defendants have claimed right of way by writing letter to the plaintiff and the said permission so sought also does not seem to be valid permission for any of the authority as stated by the defendants in their letter to the Plaintiff. In fact a formal complaint has been lodged to check the veracity of the letters, which is sufficient to hold at this stage that the same cannot be relied upon. There is nothing on record brought by the defendant to show that the said permission was sought from any authority.*

*34. Admittedly the Plaintiffs are paying N.A. Assessment and assessment to B.M.C. Defendant is not having any right title and interest in the suit property. According to me if the defendants are allowed to enter/encroach the property*

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*irreparable loss will be caused to the Plaintiff, The oral arguments advanced by the Ld. Advocate for the defendant No.1 according to me are not sufficient to brush aside the voluminous document tendered by the Plaintiff specially in the circumstances where the defendants No.1 has nowhere filed his written statement nor conducted cross examination It is settled principle of law that challenge to oral evidence must be reflected on the course of cross-examination, If the defendants decline to put the essential material setting out their case in cross-examination, it would have to be regarded virtually as an admission and that such an uncontroverted evidence must be acted upon by the Court. The position in law is crystal clear.”*

**24.** Further, it is the case of the Defendant No.1 that there is a cloud on the title of the Plaintiffs i) in light of the averments made in paragraph 13 of the Plaint ii) in light of the documents on record of the proceedings which, according to the Defendant No.1, show that Defendant No.1 was claiming title in respect of the suit property and iii) in light of the Agreements dated 20<sup>th</sup> July 1974 and 1<sup>st</sup> November 1996 referred to by the Plaintiffs. It is further the case of Defendant No.1 that, in light of the same, the Plaintiffs should have sought a declaration of title to the suit property and a declaration that the said Agreements for Sale dated 20<sup>th</sup> July 1974 and 1<sup>st</sup> November 1996 are forged and fabricated. Since the Plaintiffs did not do so, the Trial Court ought to have dismissed the Suit.

25. The law in this regard is laid down by the Hon'ble Supreme Court in the case of ***Anathula Sudhakar vs. P.Buchi Reddy (Dead) By LRS. And Others***<sup>3</sup>, which has been referred to by the parties. Paragraph 21 of the said Judgement is relevant and reads as under:

*“21. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :*

*(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue for possession with a consequential injunction. Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.*

*(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.*

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<sup>3</sup> (2008) 4 SCC 594

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*(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.*

*(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”*

**26.** In the case of *Anathula Sudhakar* (Supra), the Hon'ble Supreme Court clearly laid down that where a cloud is raised over the Plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. However, in the same Judgement, the Hon'ble Supreme Court has also held that persons having clear title and possession suing for injunction should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongful makes a claim or tries to encroach upon his property. The Hon'ble Supreme Court has held that the Court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer the Plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case. Therefore, it has to be considered carefully whether there is any cloud on the title of the Plaintiffs for any of the reasons given by Defendant No.1.

**27.** I am unable to accept the submission of Defendant No.1 that the contents of paragraph 13 of the Plaint show that there is a cloud on the title of the Plaintiffs. In paragraph 13 of the Plaint, the Plaintiffs have mainly referred to the conduct of the Defendant No.1 of filing L.C.Suit No.1282 of 2010 without making the Plaintiffs a party to the said Suit and trying to obtain an ad-interim order in his favour despite a caveat having been filed by

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the Plaintiffs. The said paragraph further states that, in the said Suit filed by him, Defendant No.1 relied upon certain forged and fabricated documents. In my view, none of the averments made in paragraph 13 of the Plaint show that there is any cloud on the title of the Plaintiffs.

**28.** As far as L.C.Suit No.1282 of 2010 filed by Defendant No.1 is concerned, the same also does not raise any cloud on the title of the Plaintiffs. In the said Suit, no ad-interim relief was granted to Defendant No.1. Further, on 7<sup>th</sup> October 2010, Defendant No.1 has withdrawn the said Suit. In these circumstances, in my view, the said Suit also does not raise any cloud on the title of the Plaintiffs.

**29.** The Order dated 22<sup>nd</sup> December 2011 passed by the Deputy Collector (Appeals), Mumbai Suburban District, also does not raise any cloud on the title of the Plaintiffs. In fact the findings and operative part of the said Order are entirely in favour of the Plaintiffs and, therefore, the question, of the said Order raising any cloud on the title of the Plaintiffs, does not arise at all.

**30.** Further, the Agreements for Sale date dated 20<sup>th</sup> July 1974 and 1<sup>st</sup> November 1996 referred to by the Plaintiffs as forged and fabricated, in

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the narration of facts in the Plaintiff, have not been brought on record of the Suit by Defendant No.1. In the absence of Defendant No.1 bringing these documents on record in the Suit and proving the same, the question, of the Plaintiffs seeking a declaration that the said documents are forged and fabricated, does not arise at all. Only if Defendant No.1 had produced the said Agreements on record and had proved the same in evidence, would there arise a question of the Plaintiffs seeking a declaration that the said documents are forged and fabricated.

**31.** Further, in my view, if Defendant No.1 wanted to set up an adverse title in himself, he ought to have filed a Written Statement in the Suit and led evidence to that effect. Not only has Defendant No.1 failed to do so, Defendant No.1 has not even cross-examined the Plaintiffs' witness.

**32.** In these circumstances, in my view, there is no cloud on the title of the Plaintiffs requiring them to file a Suit for declaration of their title, as alleged by Defendant No.1.

**33.** In my view, if the Plaintiffs are driven to file a suit for title, it would amount to persons, having clear title and possession, suing for injunction, being driven to the costlier and more cumbersome remedy of a

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suit for declaration, merely because some meddler like Defendant No.1 vexatiously or wrongfully makes a claim or tries to encroach upon their property, which the Hon'ble Supreme Court has expressly said should not be done. As rightly held by the Hon'ble Supreme Court in *Anathula Sudhakar* (Supra), the Court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case. In my view, in the facts of the present case, the question, of driving the Plaintiffs to file a suit for declaration of their title, does not arise at all.

34. Further, in my view, the Trial Court has correctly appreciated the facts and the law and has rightly decreed the Suit.

35. In the light of the aforesaid discussion, and for the aforesaid reasons, the following order is passed:

- a. The First Appeal is dismissed.
- b. In view thereof, Civil Application does not survive. The same is also dismissed as infructuous.
- b. The decree passed by the Bombay City Civil Court at Dindoshi in Suit No.1341 of 2010 is confirmed.



c. In the facts and circumstances of the case, there will be no order as to costs.

**[FIRDOSH P. POONIWALLA, J.]**