

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

SECOND APPEAL NO.753 OF 2003

Makbul s/o Dulekhan Pathan
(died, through L.Rs.)

[1-A] Chotibi w/o Makbul Pathan, age 76 years, Occu. Nil, R/o Kanadi (Kh), Taluka Ashti, District Beed	Deleted as per Court's order dated 14.11.2014
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1-B Shaikh Daulatbi w/o Papabhai,
Age 65 years, Occu. Household,
R/o 47/1, Burudgaon road,
Near Hotel Chankya,
Ahmednagar

1-C Shaikh Shahajadi w/o Rahimuddin,
Age 45 years, Occu. Household,
R/o Godli Galli, Near Kamgar
Kalyan Bhavan, Azad road,
Andheri (East), Mumbai

2. Gulab s/o Dulekhan Pathan,
Age 70 years, Occu. Agril.,
R/o Kanadi (Kh), Taluka Ashti,
District Beed

3. Babulal s/o Makbulkhan Pathan,
Age 50 years, Occu. Agril.,
R/o Kanadi (Kh), Taluka Ashti,
District Beed

4. Mohammad s/o Makbulkhan Pathan,
Age 48 years, Occu. Agri.,
R/o Kanadi (Kh), Taluka Ashti,
District Beed

5. Ahmad s/o Makbulkhan Pathan,
Age 45 years, Occu. Agri.,
R/o Kanadi (Kh), Taluka Ashti,
District Beed

6. Mansoor s/o Makbulkhan Pathan,
Age 35 years, Occu. Agri.,
R/o Kanadi (Kh), Taluka Ashti,
District Beed

..Appellants
(Orig.Defts.No.2 to 6)

Versus

1. Shikandar s/o Akbar Pathan,
Age 42 years, Occu. Agri.,
R/o Kanadi (Kh) Taluka Ashti,
District Beed
2. Hashmatbee Shaikh Kareem,
Age 60 years, Occu. Agri.,
R/o Kanadi (Kh) Taluka Ashti,
District Beed
3. Madinabee Shaikh Baban,
Age 35 years, Occu. Household,
R/o Ramzan Chincholi,
Taluka Karjat, Dist. Ahmednagar
4. Imtazbee w/o Syed Taher,
Since deceased through her L.Rs.
- 4A. Rais w/o Shaikh Taher,
Age 35 years, Occu. Agri.,
R/o Tapneshwar Galli, Jamkhed,
Taluka Jamkhed,
District Ahmednagar
- 4B. Shaikh Taher s/o Syed Taher
died
- 4C. Nazmabi w/o Shaikh Babu
Age 30 years, Occu. Agri.,
R/o Tapneshwar Galli,
Jamkhed, Taluka Jamkhed,
District Ahmednagar
5. Saleemabee Shaikh Abbas,
Age 29 years, Occu. Agri.,
R/o Pimpri Bhumri, Taluka Ashti,
District Beed.
6. Taj Mohmad Akbar Pathan,
Age 27 years, Occu. Agri.,
R/o Kanadi (Kh) Taluka Ashti,
District Beed
- [7] Rashidabee Akbar Pathan,
Age 65 years, Occu. Agri.,
R/o Kanadi (Kh) Taluka Ashti,
District Beed | Deleted as per
| Court's order
| dated 4.3.2014
8. Umrao Dulekhan Pathan
(died, through L.Rs.)

- 8A. Sabirkhan Umrao Pathan,
Age 19 years, Occu. Agri.,
R/o Kanadi (Kh) Taluka Ashti,
District Beed
- 8B. Hamidabee w/o Umrao Pathan
Age 50 years, Occu. Household
R/o Kanadi (Kh) Taluka Ashti,
District Beed
- 8C. Aminabee w/o Umrao Pathan,
Age 50 years, Occu. Agri.,
R/o Kanadi (Kh) Taluka Ashti,
District Beed
- 8D. Jubedabee w/o Shaikh Chand,
Age 43 years, Occu. Household
R/o Kasba, Ashti, Dist. Beed
- 8E. Kondabai w/o Shaikh Asbar,
Age 40 years, Occu. Household,
R/o Hangewadi, Taluka Kaij,
District Beed
- [9] Bismillabee w/o Shaikh Kasam,
Age 75 years, Occu. Household,
R/o Patilwada, Taluka Pathardi,
District Ahmednagar
10. Jamrudbee w/o Shaikh Aziz
since deceased, through L.Rs.
- 10-a Shaikh Gafoor Shaikh Ajij,
Age 75 years, Occu. Agri.,
R/o Sarate Wadgaon,
Taluka Ashti, District Beed
- 10-b Shaikh Munwar Gafoor Shaikh Ajij,
Age 70 years, Occu. Agri.,
R/o Sarate Wadgaon,
Taluka Ashti, District Beed
- 10-c Shaikh Kasam Gafoor Shaikh Ajij,
Age 65 years, Occu. Agri.,
R/o Sarate Wadgaon,
Taluka Ashti, District Beed
- 10-d Shaikh Rashid Shaikh Ajij,
Age 50 years, Occu. Agri.,
R/o Sarate Wadgaon,
Taluka Ashti, District Beed

..Respondents
(Orig.Plaintiffs)

(Died)

- 10-e Shaikh Bashir Shaikh Ajj,
Age 45 years, Occu. Agri.,
R/o Sarate Wadgaon,
Taluka Ashti, District Beed
- 10-f Yasinbi w/o Shaikh Isak
Age 85 years, Occu. Household
R/o Sarate Wadgaon,
Taluka Ashti, District Beed
- 10-g Jubedabi w/o Shaikh Bahadur,
Age 40 years, Occu. Agri.,
R/o Bhtodi, Taluka and District
Ahmednagar
- 10-h Jaahadabi w/o Dadamiya Pathan,
Age 35 years, Occu. Agri.,
R/o Dhamangaon
Taluka and District Beed
11. Niyamatbi w/o Shaikh Munsoddin
@ Fakruddin since deceased,
through her L.Rs.
- 11A. Sayyad Kasam Fakruddin,
Age 60 years, Occu. Agri.,
R/o Alma Iqbal Colony,
Near Takiya Masjid,
Shahenshah Nagar, Beed,
Taluka and District Beed
- 11B. Sayyad Shafi Fakruddin,
Age 50 years, Occu. Agri.,
R/o Alma Iqbal Colony,
Near Takiya Masjid,
Shahenshah Nagar, Beed,
Taluka and District Beed
- 11C. Chandbi Shaikh Munawar,
Age 45 years, Occu. Agri.,
R/o Sy.No.27, Adarsh Nagar,
Yerwada, Pune 6

Mr C.R. Deshpande, Advocate for appellants

Mr G.R. Sayed, Advocate for respondents No.1, 2, 3, 4A, 4C, 5, 6, 8A,
8D, 8E

CORAM : N.W. SAMBRE, J.

DATE : 31st July 2015

PER COURT

1. The present Second Appeal is by the original defendant Makbul.
2. The respondents herein filed Regular Civil Suit No.38 of 1986 for partition and separate possession in relation to land Survey No.2-B/1, area 5 acres 35 gunthas and Survey No.3 area 8 acres 16 gunthas at Mauje Kanadi (Kh.) claiming half share in the said property along with inquiry in the mesne profit.
3. The suit of the plaintiffs was registered as Regular Civil Suit No.38 of 1986 which came to be decreed by the judgment and decree passed by the Civil Judge, Junior Division, Ashti on 24th January 1997.
4. The present appellants, feeling aggrieved thereby preferred appeal bearing Regular Civil Appeal No.30 of 1997 in the Court of District Judge, Beed. The appeal preferred at the behest of the present appellants came to be partly allowed and the judgment and decree passed by the trial Court came to be set aside and the same was substituted with a decree granting 2/17th share in the property to the legal representatives of Akbar Dulekhan, plaintiffs No.1 to 7, 2/17th share to the legal representatives of Umrao Dulekhan i.e. plaintiff Nos.8-A to 8-E.
5. Feeling aggrieved by the judgment and modified decree passed by the Additional District Judge, Beed on 31st January 2003, the present appeal.

6. The appeal though is pending since 2003, for want of service/ for bringing legal representatives of the respective parties on record, it remained pending for admission.

7. With the consent of the learned Counsel for the parties, the appeal is taken up for final disposal at admission stage.

8. The facts, as are necessary for deciding the present appeal are as under :

9. The plaintiffs hereto filed Regular Civil Suit No.28 of 1979 for partition of the suit property, however, being left with technical defect, same came to be withdrawn.

10. Thereafter, the plaintiffs have chosen to file Regular Civil Suit No.38 of 1986 for partition and separate possession.

11. It was the case of the original plaintiffs that the suit property was their ancestral property and they were entitled for share in the same. It is claimed that one Bapukhan was having three sons - Banekhan, Dulekhan and Sonekhan. Banekhan had a son by name Dadakhan who had wife by name Hamidabee. Hamidabee was blessed with a son Akbar i.e. plaintiffs No.1 to 7 whereas plaintiff No.8 Umrao was born to Hamidabee and after his death, the legal representatives plaintiff No.8-A to 8-E are brought on record.

12. The appellants-original defendants are the legal representatives of Makbul who was born to Janbee, second wife of Dulekhan. Dulekhan expired in year 1948.

13. It is further claimed by the plaintiffs that apart from the suit property, the other property bearing Survey No.4, 16 were partitioned way back and amongst all the suit property, Survey No.2 belonging to Sonekhan and Dulekhan, who were real brothers. A Civil Suit bearing No.16/14/1958 and Civil Suit No.15/14/1959 in between defendant No.1 and one Kisan and Pirasake came to be decided on 25th April 1959 by the Civil Judge, Junior Division, Ashti in favour of present plaintiffs, however, in view of the dispute in relation to Survey No.2/B, Survey No.3, these properties remained to be partitioned and remained joint amongst the brothers of Dulekhan, i.e. Banekhan and Sonekhan. It is further claimed by the plaintiffs that the 4 acres 36 gunthas land out of Survey No.2 was acquired for Gaothan and canal purpose and the compensation was received by defendants No. 1 and 2. It is also claimed that Dulekhan being a Karta of family, the entry in the government record remained in the name of Dulekhan and also he got entitlement for share in the amount of compensation.

14. It is further claimed by the plaintiffs that the defendants who were born to Janbee and Akbar, their father who was Hamidabee's son who were in need of money in the year 1966, sold the suit property for a consideration of Rs.3,000/- by executing a nominal sale deed in favour of Parvatibai Gavane on 11th March 1966. However, later on Akbar and Makbul repaid the loan amount and again sale deed was executed in favour of defendant No.3 on 26th October 1967. According to them, the said property is a joint family property and they are entitled for share.

15. The plaintiffs No.1 to 6 as such claimed 1/4th share and plaintiff No.8 claimed 1/4th share in the property. It is further claimed that the defendants have one half share in the suit property. In addition to above, half share in the compensation was claimed.

16. The defendants thereafter appeared in the trial Court and resisted the claim of plaintiffs by filing written statement at Exh.31, 116 and 126. They have admitted that Dulekhan had two wives viz. Hamidabee and Janbee and further claimed that after the death of Dulekhan, partition took place in between Akbar, Umrao, Makbul and Gulab i.e. two sons of Hamidabee and two sons of Janbee respectively in the year 1953-54. They have given complete description of the partition in written statement and denied that the plaintiffs are entitled for any share in the said property. It is further claimed by the defendants that there was improvement to the suit property to which the defendants have spent substantial amount.

17. Pursuant to the pleadings of the parties, learned trial Court framed following issues and answered them accordingly.

Sr. No.	ISSUES	FINDINGS
1	Do the plaintiffs prove that suit lands were not partitioned when other properties were partitioned ?	Yes
2	Do they prove that the Civil Suits of 1958	

	were filed by the deft.No.1, on behalf of the parties ?	Yes
3	Do they prove that the amount was paid jointly but the sale deed was obtained only in the name of deft. No.3 on 26.10.1967 and that was the repayment of the loan raised jointly by Akbar and defendant No.1 ?	Yes
3A	Do the plaintiffs prove that deft. No.7 to 9 and their six sisters had relinquished their right of property of their father before 40 or 41 years ?	No
3B	Is the suit bad for non-joinder of necessary parties ?	No
3C	Do the defendants No.1 to 6 prove that they spent Rs.10,000/- for deepening the well and Rs.10,000/- for laying pipe-line in the suit field ?	No
4	Whether the plaintiffs have to pay the court fee for the claim of compensation ?	No
5	Whether the plaintiffs are entitled for the relief sought ?	Yes
5A	Do the defendants No.7 to 9 prove in the alternative that they are entitled to partition and separate possession of their share in the suit property ?	No
5B	Are the defendants No.1 to 6 entitled to claim	No

	compensatory costs ?	
6	What order and decree	As per final order

18. The plaintiffs in support of their claim have examined PW-1 Sikandar Pathan at Exh.79, PW-2 Shaikh Babulal Shaikh Mohd. at Exh.160, PW-3 Nizam Pathan at Exh.162, PW-4 Usman Khan Pathan at Exh.163 and Sahebrao Jagtap at Exh.164 and have placed on record documentary evidence viz. 7/12 extracts vide Exhs.5 and 6, copy of the plaint in Civil Suit No.28/1979 vide Exh.18, copy of award vide Exh.63, the death extract of Umrao vide Exh.107, extracts of *Khasra Patrak* vide Exh.129 to 135, 7/12 extracts at Exhs.136 to 139 and application preferred by Akbar for compensation vide Exh.140. The plaintiffs have also relied upon the extract of 8/A of Rui vide Exh.141. The plaintiffs have also placed reliance upon the 7/12 extracts of the land at Exhs.142 to 145/A, copy of judgment in Civil Suit No.16/1958 vide Exh.146, copy of judgment in Civil Appeal No.74/1982 vide Exh.147, statement of Hayatkhan Sonekhan vide Exh.148, copy of panchnama vide Exh.149, certified copy of *Koshtak* vide Exh.150, copy of panchnama vide Exh.151, 152, copy of award vide Exh.153, copy of written statement vide Exh.154 and copy of sale deeds vide Exhs.155, 156 and 157.

19. The plaintiffs have placed reliance upon the evidence of Mohammadkhan Makbulkhan Pathan vide Exh.167 and Niyamtbee vide Exh.171. The defendants have placed reliance on the mutation

extract No.75 vide Exh.66, copy of *Pahani Patrak* of Rui vide Exh.67, 68, 69 copy of mutation extracts vide Exh.70, 71, copy of sale deed vide Exh.168, copy of quotation form vide Exh.169 and copy of Bank *Khate* extract vide Exh.170.

20. Learned trial Court, upon analysing the evidence of plaintiffs and defendants has given finding that the suit property is an ancestral property and there was no partition. The trial Court then noticed that the sale deed dated 26th October 1967 in favour of defendant No.3 was out of the consideration spent jointly by the plaintiffs and defendants. In addition to above the trial Court then declared that the plaintiffs are entitled for the share and accordingly, decreed the suit mentioned herein above.

21. The appellate Court pursuant to an appeal preferred by the appellants framed the following points for consideration and answered the same accordingly.

Sr. No.	POINTS	FINDINGS
1	Whether the plaintiffs proved that they are entitled to share in the suit properties ?	In the affirmative
2	Whether the defendants proved partition and allotment of Survey Nos.2 and 3 to them since the year 1954 ?	In the negative
3	Whether the plaintiffs are entitled for	Partly in the

	the reliefs as claimed ?	affirmative
4	Whether the impugned judgment and decree is liable to be set aside ?	Partly in the affirmative
5	What order ?	As per final order

22. The learned lower appellate Court has partly allowed the appeal. Learned Counsel for the appellants while questioning the legality and validity of both the concurrent findings would urge that both the Courts below have committed error apparent on the face of record by not framing the issues in the light of pleadings which were raised by the respective parties. Learned Counsel for the appellants has pressed into service the ground (G) raised in the appeal has a colour of question of law. According to him, both the Courts below have committed error apparent on the face of record in holding that no partition had effected in between the legal representatives of Dulekhan in 1954.

23. The next ground that is sought to be placed in to service was that the sale deed in favour of original defendant No.3 was held to be nominal in spite of the fact that there was a separate independent contract of sale in between original defendant No.3 and Parvatibai Gavane. The appellants also urged that the six daughters who have expired, their legal representatives were not joined as party to the suit.

24. The learned Counsel for the respondents has supported the

judgment delivered by both the Courts below. He would urge that there is concurrent finding recorded by both the Courts below and appeal being devoid of merit, is liable to be dismissed.

25. With the above referred background, this Court has proceeded to evaluate the submissions in the light of the findings recorded by both the Courts below, particularly having gone through the record and proceedings of the case with the assistance of the parties.

26. It is required to be noted here that the submissions which are sought to be made by learned Counsel for the appellants appear to be interlinked. The witnesses PW-3, PW-4 and PW-5 who were examined by the plaintiffs in support of their case have deposed in favour of the case of plaintiffs, particularly in the matter of joint ownership of legal representatives of Dulekhan. The said witnesses stand to the scrutiny of cross-examination and nothing could be elicited from their evidence by the defendants. It is required to be noted here that the Survey No.2 was sold to Parvatibai Gavane for a consideration of Rs.3,000/- vide sale deed Exh.155 in the year 1966, however, by sale deed Exh.156, on 26th October 1967, the said property was transferred in the name of defendant No.3. The above referred transaction prima facie appears to be only for the paper purpose as the aspect that is required to be taken note of is the consideration paid to Parvatibai was Rs.3,000/-, whereas the defendant No.3 paid only Rs.2,000/- for the said land apart from the incriminating circumstances.

27. It is also required to be noted here that the jointness of the

property and the common ownership of the plaintiffs and defendants was proved by the parties, particularly since the defendants have come out with a case of partition, they were unable to prove the partition of the suit property. It is also required to be noted that though there is a case of partition claimed in 1954 amongst the legal representatives of Dulekhan, however, property Survey Nos.14 and 4, 75, 76, 77 and 81 were allotted to the plaintiffs and defendants. The defendants were allotted land Survey No.2/B-1, 3, 4/B-3 and 16-A is the case sought to be canvassed by the defendants, however, it is required to be noted here that the earlier suit filed by the defendant Makbul bearing Civil Suit No.16/14/1958 against Kisan and Pirasake vide Exh.146 came to be decreed on 25th April 1959 wherein it was held that Dulekhan was the owner of the suit property. Said Dulekhan left behind four sons and till 1959, his son Makbul has regarded the property Survey No.2 as a joint and unpartitioned.

28. It is required to be noted that if the partition that was taken place in the year 1954 as is claimed by the defendants, then it has to be inferred that name of Gulab along with other assets of Makbul, son of Dulekhan should have appeared in the record, particularly in the matter of payment of compensation. In view thereof, the contention of the present appellants-defendants that the property in question was not subjected to partition and they are entitled for the partition of the suit property was rightly appreciated and granted by the trial Court and the lower appellate Court.

29. It is further required to be noted that the contention of the

plaintiffs that the issues, particularly in the matter of pleadings were not raised and have sought to rely upon ground (G) in the present Second Appeal, in my opinion, cannot be termed as having colour of substantial question of law. It is also required to be noted here that at no point of time, the appellants herein have raised any objection to the said aspect of the matter, particularly when the issues were framed and points for determination were raised by both the Courts below. In my opinion, once the pleadings were completed, the issues framed pursuant to the points which were raised for determination before the trial Court and the points for consideration before the lower appellate Court, in any case the non-framing of an issue cannot be held to be a substantial question of law in the background of the above referred findings recorded by the Courts below. The Courts below have rather dealt with the aspect which was brought before it in the form of pleadings and the ground that is sought to be canvassed here also to be too vague to deal with, as subsequent aspect about the issue was not framed, was canvassed by learned Counsel for the appellants, particularly in the background of the pleadings.

30. In view of above, in my opinion, the present Second Appeal, which is devoid of merit, fails, stands dismissed.

(N.W. SAMBRE, J.)

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