

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

SECOND APPEAL NO.314 OF 1993

[SECOND APPEAL NO.30 OF 1982 (BOMBAY)]

1. Mahadev Namdeo Gaikwad
since deceased by his heirs:

1-A. Sahebrao Mahadeo Gaikwad,
son, age : 65 years,

1-B. Apparao Mahadeo Gaikwad,
son., age : 50 years,

1-C. Raghunath Mahadeo Gaikwad
(son), Age : 45 years,

1-D. Smt. Sarubai Eknath More,
Age – 75 years, daughter

1-E. Sou. Tolabai Nivrutti Bahir,
daughter, age : 40 years,
at Katadi, Tq. Jamkhed,
Dist. Ahmednagar

1-F. Vijayanta Yuvraj Narke,
daughter, Age 35 years,
Pimpalgao, Alva, Tq. Jamkhed,
Dist. Ahmednagar

Nos.1 A to 1C residing at Rajuri,
Tq. Jamkhed, Dist. Ahmednagar

..Appellants

Vs.

- 1-B. Ramdas s/o. Nivruti Gaikwad,
died through his Lrs.

1-B-1.Kusturbai w/o. Ramdas Gaikwad,

Age : 45 years, Occ. Household,
r/o Rajuri (Kolhyachi),
Tq. Jamkhed, Dist. Ahmednagar

1-B-2.Datta s/o. Ramdas Gaikwad,
Age : 25 years, Occ. Agri.,
r/o. Rajuri (Kolhyachi),
Tq. Jamkhed, Dist. Ahmednagar

1-B-3.Nutan d/o. Ramdas Gaikwad, dismissed vide
Age : 20 years, Occ. Household, R's order
r/o. Rajuri (Kolhyachi), dt.9-3-2016
Tq. Jamkhed, Dist. Ahmednagar

2. Vithal Namdeo Gaikwad,
since deceased by His heirs and
legal representatives

2A. Smt. Lochanabai w/o. Vithal
Namdeo Gaikwad, since deceased
by her only heir and legal
representative

2B. Smt. Sumalbai w/o. Sahebrao
Sapkal, r/o.Rajuri, Tq. Jamkhed,
Dist. Ahmednagar ..Respondents

Mr.S.S.Chaudhari, Advocate for appellants

Mr.R.L.Kute, Advocate i/b. Mr.R.N.Dhorde, Senior
Advocate, for respondents

CORAM : SANGITRAO S. PATIL, JJ.

RESERVED ON : AUGUST 02, 2017
PRONOUNCED ON : AUGUST 23, 2017

JUDGMENT :

The original defendant nos.1 to 3 in Regular Civil Suit No.127 of 1975 have challenged the judgment and decree dated 20.08.1981 passed in Regular Civil Appeal No.244 of 1979 by the learned Assistant Judge, Ahmednagar, dismissing the said appeal and confirming the judgment and decree dated 31.07.1979 passed by the learned Civil Judge, Senior Division, Jamkhed, in the above-numbered Civil Suit.

2. The original plaintiff Nivrutti had two brothers namely, Mahadeo (original defendant no.1) and Vitthal (original defendant no.4). All of them are no more. They are hereinafter referred as the deceased Nivrutti, the deceased Mahadeo and the deceased Vitthal. Defendant nos.2 and 3 namely, Pandurang and Sahebrao are the sons of the deceased Mahadeo. The appellants are the legal heirs of the deceased Mahadeo and the deceased Vitthal, while the respondents are the legal heirs of the deceased

Nivrutti. The common ancestor of the parties was Namdeo Gaikwad.

3. The suit properties as described in paragraph 1 of the plaint comprise of agricultural lands, houses, a flour mill and a grocery shop. According to the deceased Nivrutti, the suit properties belong to the joining family comprising of the deceased Mahadeo, the deceased Vitthal and himself. Some of the agricultural lands and houses are ancestral, while some of the agricultural lands and houses have been purchased from the income of the joint family. The suit properties were not ever partitioned. The deceased Mahadeo being *Karta* of the joint family, purchased some of the agricultural lands and houses from the income of the joint family in the name of defendant no.2. Some of the agricultural lands were taken by the joint family for cultivation on lease in the name of defendant no.2. Since his name was recorded as tenant in the suit

lands, they were purchased in the name of defendant no.2 from the income of the joint family earned from the agricultural lands, flour mill and grocery shop. Due to certain disputes among the female members of the family, the deceased Nivrutti, the deceased Mahadeo and the deceased Vitthal started residing separate in the year 1971. At that time, by way of a family arrangement, the agricultural lands described in paragraph 1(c) of the plaint were given to the deceased Mahadeo, the deceased Nivrutti and the deceased Vitthal for cultivation separately for their livelihood. The deceased Nivrutti asked the deceased Mahadeo to furnish accounts of the income from running the flour mill and grocery shop and further to give his share therein. However, the deceased Mahadeo avoided to do so. Therefore, the deceased Nivrutti asked the deceased Mahadeo to effect equitable partition of all the suit properties and allot his 1/3rd share therein to him. Since the deceased Mahadeo avoided to do so, the deceased

Nivrutti filed the above-numbered suit for partition and recovery of possession of his 1/3rd share therein.

4. The deceased Mahadeo and defendant nos.2 and 3 filed written statement and opposed the suit claims. They denied that the suit lands bearing survey nos.182/1, 184, 170, 226/3/1, 226/9, 227/1/1, 225/1/1, 225/2A/1,225/2c are the ancestral/joint family properties. They specifically stated that these suit lands are the self-acquired properties of defendant no.2. They have further stated that the lands survey nos.226/3/1, 225/2A/1, 227/1/1, 225/1/1, 225/2c and 226/9 were being cultivated by defendant no.2 as a tenant. He has purchased the said lands under the provisions of the Bombay Tenancy and Agricultural Lands Act ("B.T.A.L. Act", for short). The deceased Nivrutti has no right to claim share in the said lands. It is further stated that the Civil Court has no jurisdiction to entertain the claim of the deceased Nivrutti in respect of these lands vide Section 85 of the B.T.A.L. Act. It is stated that the

flour mill is a separate property of defendant no.2 and the grocery shop also is separate property of the deceased Mahadeo. According to these defendants, the ancestral and joint family properties of the parties were partitioned prior to about 15 years (of filing of the written statement) i.e. in or about 1960-61. Since then, the deceased Nivrutti, the deceased Mahadeo and the deceased Vitthal were cultivating the lands of their respective shares separately. The deceased Nivrutti has no concern whatsoever with the lands and houses purchased by defendant no.2 or even with the flour mill and the grocery shop. On these grounds, these defendants prayed for dismissal of the suit.

5. The deceased Vitthal did not file written statement. The suit proceeded without his written statement.

6. The learned trial Judge framed issues at Exh.22. After evaluating the evidence adduced by the

parties, the learned trial Judge accepted the case of the deceased Nivrutti, decreed the suit for partition and allotted $1/3^{\text{rd}}$ share to the deceased Nivrutti in the suit houses and the suit lands excepting the lands survey nos.226/9 and 225/2c since the deceased Nivrutti gave up his claim in respect of those two lands.

7. So far as the accounts of the flour mill and grocery shop are concerned, the learned trial Judge observed that the deceased Nivrutti filed separate application. The learned trial Judge further observed that the deceased Nivrutti filed separate suit for mesne profits under Order XX Rule 12 of the Code of Civil Procedure ("the Code", for short). This part of the judgment and order has not been challenged by either of the parties and has got finality.

8. The deceased Mahadeo and defendant nos.2 and 3 filed Regular Civil Appeal No.224 of 1979 in the District Court against the judgment and decree passed

by the trial Court. After hearing the parties, the District Court dismissed the appeal and confirmed the judgment and decree passed by the trial Court.

9. The learned Counsel for the appellants submits that the deceased Nivrutti claimed the properties, which were standing in the name of defendant no.2, as joint family properties. Therefore, the burden was on the deceased Nivrutti to establish that fact. He ought to have produced sufficient evidence to establish that the joint family had sufficient nucleus at its disposal, when the lands and houses were purchased by defendant no.2 and that the said lands and houses were purchased by defendant no.2 from that nucleus. He submits that the learned trial Judge wrongly placed the burden on defendant no.2 to establish that the said lands and houses are his separate properties. He then submits that the above-referred lands which were being cultivated by defendant no.2 as a tenant have been purchased by him under the provisions of the B.T.A.L.

Act. The issue as to whether he was cultivating the said lands as a representative of the joint family ought have been referred to the tenancy Court since the Civil Court had no jurisdiction to decide that issue in view of the provisions of Section 85 of the B.T.A.L. Act. However, the learned trial Judge wrongly decided that issue. He then submits that the partition of the joint family properties was effected in the year 1960-61 itself. Therefore, the agricultural lands and the house properties purchased by defendant no.2 after 1960-61 cannot be characterised as joint family properties. He submits that the trial Court as well as the first appellate Court did not appreciate the facts of the case properly and correctly and decreed the suit wrongly.

10. As against this, the learned Counsel for the deceased – Nivrutti and his legal heirs, submits that the deceased Mahadeo and defendant nos.2 and 3 totally failed to establish that the partition of the joint family properties was effected in the year

1960-61. On the contrary, there is positive and dependable evidence on record to show that it was for the first time that in the year 1971, family arrangement was effected by the deceased Mahadeo by giving some portion of the lands belonging to the joint family to the deceased Nivrutti for his maintenance. All the agricultural lands and house properties standing in the name of defendant no.2 were purchased from the income of the joint family. There is sufficient evidence on record to show that there was sufficient nucleus available with the joint family from which the said properties were purchased in the name of defendant no.2, who was the elder son of the deceased Mahadeo - *Karta* of the family. He then submits that the lands which were taken on lease and cultivated by the joint family were shown in the name of defendant no.2 as a tenant thereof. Defendant no.2 was representing the joint family. The said lands were purchased from the income of the joint family in the name of respondent no.2. The

said lands also assume the character of joint family property. The learned Counsel submits that the dispute between the tenant and landlord is required to be referred to the tenancy Court vide Section 85 of the B.T.A.L. Act. No such dispute was involved in this suit. Therefore, the Civil Court was quite competent to entertain and try the suit. In support of his contention, he relied on the judgment in the case of **Rajaram Mahadu Dahatonde and others Vs. Babu Mahadu Dahatonde and others, 2016 (2) All.M.R. 326.** The learned Counsel submits that Mutation Entry No.2347 was effected on the application of the deceased Mahadeo in the year 1971. The contents of the said mutation entry also would make it clear that the joint family properties of the parties were not partitioned till 1971. He submits that the learned trial Judge as well as the first appellate Court have rightly considered the case of the deceased Nivrutti and have rightly decreed the suit.

11. In view of the rival contentions raised by the learned Counsel for the parties, the following substantial questions of law arise for my consideration :-

(i) Whether the status of the joint family of the parties was legally severed and partition of the joint family properties of the parties was legally effected in the year 1960-61 ?

(ii) Whether the suit properties are joint family properties of the parties?

(iii) Whether the Civil Court has jurisdiction to entertain and try the present suit?

(iv) Whether the findings of facts recorded by the trial Court and the first appellate Court call for any interference?

12. It is well settled that there is a presumption that every Hindu Family is joint and continues to be joint in the absence of proof of division/severance of the status of joint family. The deceased Nivrutti has come with a positive case that there was joint family comprising of the deceased Mahadeo, the deceased Nivrutti and himself and that they started residing separate by way of family arrangement in 1971. It was, therefore, necessary for the deceased Mahadeo and defendant no.2 to produce positive evidence on record to rebut the presumption of jointness and and establish that there has been division of the family at any particular point of time.

13. Defendant no.2 deposes that there has been partition of the joint family properties before about 18 years of his deposing before the Court i.e. in or about 1961. He has given certain details about the properties which were subject matter of the said

partition. He examined Sakharam (DW 2) to prove the factum of partition, who tried to support the evidence of defendant no.2 in respect of the alleged partition but in cross-examination, he admits that he was not present at the time of the talks about the partition between the deceased Mahadeo, the deceased Vitthal and the deceased Nivrutti. He expressed inability to state the survey numbers of the lands given to the shares of the said persons. He happened to be the servant of the deceased Mahadeo working in the flour mill. The trial Court has rightly characterised this witness as an interested witness and discarded his evidence.

14. Mutation entry no.2347 (Exh.54) dated 01.03.1971 has been effected on the application of the deceased Mahadeo. By that application he informed that eleven agricultural lands mentioned in that mutation entry were under joint cultivation of the deceased Nivrutti, the Nivrutti and himself and they are having $1/3^{\text{rd}}$ share each therein. He requested the

Talathi to record the names of the deceased Nivrutti, the deceased Vitthal and himself jointly to the record of rights of the said lands showing that all of them have $1/3^{\text{rd}}$ share therein. The contents of this mutation entry do not speak of partition of the joint family properties of the parties. Had the partition taken place as alleged by defendant no.2 in the year 1961, the lands subject matter of the Mutation entry no.2347 would have been shown separately in the names of the deceased Mahadeo, the deceased Nivrutti and the deceased Vitthal separately to the extent of their $1/3^{\text{rd}}$ share therein in the year 1961 itself. There was no reason for the deceased Mahadeo to await till 1971 to show the names of the deceased Nivrutti and the deceased Vitthal as the joint holders of the said lands to the extent of their respective $1/3^{\text{rd}}$ shares. This mutation entry nullifies the version of defendant no.2 that the partition of the joint family parties was effected in the year 1961.

15. The deceased Mahadeo was *Karta* of the joint family of the parties. He was very much available for being examined before the Court when the evidence of defendant no.2 was recorded. The deceased Mahadeo being *Karta* of the family, was the best witness to depose about the partition or otherwise of the joint family properties. However, he has not been examined without assigning any reason. Therefore, the trial Court has rightly drawn adverse inference that had the deceased Mahadeo been examined, his evidence would not have supported the case of defendant no.2 about the alleged partition of the joint family properties.

16. In the absence of any positive and dependable evidence from the side of defendant nos.1 to 3 about partition of the joint family properties, the presumption of jointness of the family of the deceased Mahadeo, the deceased Nivrutti and the deceased Vitthal would get attracted and their family would be presumed to be joint.

17. The case of the deceased Nivrutti that because of the domestic disputes among the female members of the family, they started residing separate in the year 1971 under a family arrangement, in the circumstances, is quite natural, probable and acceptable. Defendant nos.1 to 3, thus, failed to establish that the status of joint family of the parties was severed in the year 1960-61 and that the joint family properties were legally partitioned in the said year.

18. Defendant no.2 deposes that the agricultural lands subject matter of the suit, excepting the lands mentioned in mutation entry no.2347, are his self-acquired properties. He deposes that the deceased Nivrutti and the deceased Vitthal were paid Rs.1,000/- each in lieu of their shares in the grocery shop and Rs.1,375/- in lieu of their shares in the oil engines. Thus, according to him, the grocery shop and oil engine no longer remained the

joint family properties. This version is not corroborated by any documentary evidence. Moreover, as held above, the partition of the joint family properties has not been proved to have been effected in the year 1960-61. Therefore, the contention of defendant no.2 that the suit properties, excepting the lands described in Mutation Entry No.2347, were purchased by him after severance of the joint status of the family, cannot be accepted.

19. Though, there is presumption that a Hindu family continues to be joint unless contrary is proved, there is no such presumption that a family, because it is joint, possesses joint family properties or any property at all. When, in a suit for partition, a party claims that any particular item of the properties is a joint family property, the burden of proving it rests on the party asserting it. Where it is established or admitted that the family possesses some joint property, which, from its nature and relative value, may have nucleus from

which, the properties in question, might have been acquired, the presumption arises that it was joint property and the burden shifts to the party alleging self-acquisition, to establish that the property was acquired without the aid of the joint family. In order to give rise to the presumption that the property standing in the name of an individual member of the joint family is co-parcenary/joint family property, the nucleus must be such that with its help, the property claimed to be joint, could have been acquired.

20. The learned Judge of the trial Court seems to have placed the burden on defendant no.2, in whose name, some of the properties are standing, to prove that they are his self-acquired properties. However, while discussing the evidence adduced by the parties, he rightly appreciated it and held that there was sufficient nucleus with the joint family of the parties, from which the properties standing in the name of defendant no.2 could have been purchased. The

learned trial Judge further observed that the deceased Mahadeo and defendant no.2 were not having any independent source of income from which, the suit properties could have been purchased. It may be noted that the learned Judge of the first appellate Court corrected the technical mistake committed by the learned trial Judge in placing burden on defendant no.2 and rightly framed point no.2 placing burden on the deceased Nivrutti, to prove whether the properties described in the plaint were belonging to the joint family. The learned Judge of the first appellate Court also appreciated the evidence of the parties in respect of this point and held that the all the suit properties are belonging to the joint family of the parties.

21. It has come in the evidence of the deceased Nivrutti that his father died before 40 years i.e. in or about 1949. He states that the deceased Mahadeo being the eldest in the family, all the ancestral/joint family properties were mutated in his

name as a *Karta* of the family. He states that his family was holding 40-50 acres of land when his father died, out of which 30 acres of land was irrigated and rest of the land was dry. He states that the deceased Mahadeo and defendant no.2 were looking after the family business. The deceased Vitthal and himself were doing agricultural work only. He states that a flour mill was purchased and a grocery shop also was started from the income of the joint family. He states that the agricultural land subject matter of the plaint, expecting the lands shown in Mutation Entry No.2347 were purchased from the income of the joint family. The deceased Mahadeo and defendant no.2 had no independent source of income of their own. He then states that they were cultivating certain lands as tenants and the same have been purchased in the name of defendant no.2 from the income of the joint family. Thus, according to him all the properties subject-matter of the suit are joint family properties.

22. Defendant No.2 admits in his cross-Examination that the deceased Mahadeo was doing business of agriculture only. He admits that the grocery shops was started from the income of the lands of the family. He further admits that his family was not having any source of income except the shop and the lands. He states that they were getting Rs.12/- (perhaps per day) from the grocery shop. He then states that 10 acres of land out of the ancestral lands was irrigated and they were getting Rs.1500/- per annum from that land. Though it was the claim of defendant No.2 that the deceased Mahadeo was earning by running a sewing machine, there is absolutely no evidence to support this version. Moreover, the said version has been contradicted by defendant No.2 himself by saying that the deceased Mahadeo was doing business of agriculture only.

23. Defendant No.2 claims himself to be the sole tenant of the lands subject-matter of the sale deed (Exh.52) dated 23.05.1974 which have been purchased

for Rs.2,700/- from the landlady namely, Nababai Patil. The price of the said lands was fixed by the Additional Tahasildar and A.L.T., Jamkhed as per the order Exh.102 dated 06.08.1972. The deceased Nivrutti specifically states that the said lands were being cultivated by the joint family of the parties and not by defendant no.2 individually. Defendant No.2 does not state as to when he started cultivating the said lands individually. Thus, the starting point of the alleged tenancy of defendant No.2 itself has not been established by him. The lands subject-matter of the sale deed Exh.52 certainly must have been under cultivation of the joint family on Tiller's day, when admittedly there was joint family of the parties. In the circumstances, the case of defendant no.2 that he was cultivating the said lands as tenant in his individual capacity cannot be accepted.

24. Defendant no.2 has produced sale deeds Exh.44 to 52 in respect of the lands/houses purchased in his name. The dates of execution of the sale deeds, the

nature of the properties subject-matter of the sale deeds and the prices thereof are as under:-

Sr.No.	Date of Sale Deed	Nature of property	Price
44	03.04.1962	House	Rs.400/-
45	18.03.1965	House	Rs.500/-
46	14.03.1968	Land	Rs.2,000/-
47	10.07.1969	House	Rs.1,000/-
48	26.05.1970	Land	Rs.27,000/-
49	20.03.1972	Land	Rs.1,500/-
50	30.05.1973	House	Rs.3,000/-
51	20.10.1973	Land	Rs.1,000/-
52	23.05.1974	Lands	Rs.2,700/-

25. As stated above, defendant No.2 has admitted the income from the joint family properties to the extent of Rs.12/- per day from the grocery shop and Rs.1500/- per annum from the agricultural lands. He has not disclosed the income earned by the running of flour mill. In all probabilities, defendant no.2 must have suppressed the income of the joint family in order to show that there was no sufficient nucleus available to purchase the above-mentioned properties. The deceased Mahadeo, who was the best witness to state about the income and nucleus of the joint

family, has not come forward to depose before the Court. The income of the family, in all probabilities must have gone increasing year after year. Considering the income of joint family and the value of the lands subject matter of the sale deeds Exh.44 to Exh.52, it can easily be inferred that there was sufficient nucleus available with the joint family to purchase the said properties. The trial Court as well as the first appellate Court have rightly appreciated the evidence on record on this point and have rightly held that the said properties have been purchased from the nucleus of the joint family properties. In the circumstances, I have no hesitation to hold that the suit properties are joint family properties of the parties.

26. The learned counsel for defendant nos. 1 to 3 submits that the Civil Court has no jurisdiction to entertain and try the suit in view of section 85 of the B.T.A.L. Act. Section 85 for the B.T.A.L. Act reads as under:-

"85.(1) No Civil Court shall have jurisdiction to settle, decide or deal with any question [(including a question, whether a person is or was at any time in the past a tenant and whether any such tenant is or should be deemed to have purchased from his landlord the land held by him)] which is by or under this Act required to be settled, decided or dealt with by the Mamlatdar or Tribunal, a Manager, the Collector or the [Maharashtra Revenue Tribunal] in appeal or revision or the [State] Government in exercise of their powers of control.

(2) No order of the Mamlatdar, the Tribunal, the Collector or the [Maharashtra Revenue Tribunal] or the [State] Government made under this Act shall be questioned in any Civil or Criminal Court.

Explanation.- For the purposes of this section a Civil Court shall include a Mamlatdars Court constituted under the Mamlatdars Courts Act, 1906."

27. In the present case, it is established that the lands subject-matter of the sale deed Exh.52 have been purchased in the name of defendant No.2 since he was recorded as a tenant of the said lands. The question about the status of defendant No.2 qua the

said lands is not required to be decided in this suit. It is the case of the deceased Nivrutti that defendant no.2 was representing the joint family and as such, he was recorded as a tenant of the said lands. Such dispute is not required to be referred to the tenancy court, since it is a dispute inter-se the family members. Here, reference may be made to the judgment in the case of **Rajaram Mahadu Dahatonde and others** (supra), cited on behalf of the deceased Nivrutti, wherein the question was whether the Civil Court is bound to draw inference on the basis of the certificate of purchase under section 32-M of the B.T.A.L. Act, that the certificate holder is the absolute owner of the property and it is his self-acquired property or whether the members of Joint Hindu Family can be allowed to prove in Civil Court that it was joint family property or whether such dispute needs to be referred to the Tenancy Court. In paragraph no.23 of the judgment, this Court held as under:-

"23. Firstly, the bar of jurisdiction under Bombay Tenancy Act is applicable only with regard to the subject matters mentioned in the Bombay Tenancy Act. Secondly, the bar does not mean that for all purposes the jurisdiction of Civil Court is taken away. Under the Bombay Tenancy Act, the tenant's rights are hereditary. Tenancy rights can be acquired by single person or more persons or even by joint Hindu family. The disputes which are between tenant and the landlord are expected to be considered by the tenancy Court. In the present matter, the question is, whether the three properties mentioned in three certificates given under section 32-M of the Bombay Tenancy Act are joint Hindu family properties. Such dispute can be and needs to be decided by Civil Court. This is partition suit and only on the basis of certificate granted under section 32-M of the Bombay Tenancy Act defendant No.1 cannot contend that it is his self acquired property. No such inference is possible

when there are facts and circumstances of the case like present one. This Court has no hesitation to hold that the dispute of the present nature cannot be dealt with under the Bombay Tenancy Act. Reliance is placed on the case reported as 2006 (2) Mh.L.J. 243 (Savitra Bapu v. Rau Rama)."

28. Considering the above referred judgment and the facts of the present case, I hold that the civil court has jurisdiction to decide the issue involved herein and it was not at all necessary to refer any issue to the tenancy Court.

29. The trial Court as well as the First Appellate Court have rightly considered the evidence on record and have rightly held that the suit properties are joint family properties and that they have not been legally partitioned amongst the members thereof. The trial Court as well as the first appellate Court have rightly held that the deceased Mahadeo, the deceased Nivrutti and the deceased

Vitthal are entitled to have $1/3^{\text{rd}}$ Share each in the excepting the land Survey Nos.226/9 and 225/2c. The concurrent findings of facts recorded by the trial court and the first appellate court, based on correct appreciation of evidence, cannot be interfered with in the second appeal. However, as per Order XX Rule 18 of the Code, where in a suit for partition of property or separate possession of a share therein, the Court passes a decree, then it shall declare the rights of the several parties interested in the agricultural or house properties. In the present case, the trial Court as well as the first appellate Court have not declared shares of all the parties to the suit. This mistake will have to be rectified by modifying the impugned judgment and decree of the trial Court vide Order XLI Rule 33 of the Code.

30. The appellants have failed to substantiate the grounds of objections against the impugned judgments of trial Court and that of the first appellate Court. The Second Appeal is devoid of

substance. It is liable to be dismissed. However, the impugned decree will have to be modified. Hence, the order :-

(i) The appeal is dismissed.

(ii) The impugned decree is modified and it is hereby declared that the deceased Nivrutti, the deceased Mahadeo and the deceased Vitthal and after their demise, their respective legal heirs, have 1/3rd share each in the suit properties excepting the land Survey Nos.226/9 and 225/2c.

(iii) Other directions given by the trial Court in the decree are maintained.

(iv) No costs.

[SANGITRAO S. PATIL]
JUDGE