

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

SECOND APPEAL NO. 659 OF 2016  
WITH  
CIVIL APPLICATION NO. 13003 OF 2016  
WITH  
CIVIL APPLICATION NO. 7769 OF 2018

1. Arunabai Bhausahab Mali,  
Age : 48 years, Occu. : Agri.
2. Dipali Bhausahab Mali,  
Age : 27 years, Occu. : Household
3. Sonali Bhausahab Mali,  
Age : 22 years, Occu. : Household
4. Rupali Bhausahab Mali,  
Age : 21 years, Occu. : Household
5. Sarika Bhausahab Mali,  
Age : 19 years, Occu. : Household  
All r/o Sonewadi, Tq. Kopargaon,  
District Ahmednagar

...Appellants  
(Orig. Defendants)

**Versus**

1. Manubai Kashinath Dhongade,  
Age : 45 years, Occu. : Agri.  
r/o Sonaj, Tq. Malegaon,  
District Nashik.
2. Sahebrao Vishnu Landbale,  
Age : 50 years, occu. : Agri.  
r/o Sonewadi, Tq. Kopargaon,  
Dist. Ahmednagar
3. Kantilal Vishnu Landbale,  
Age : 80 years, occu. : Agri.  
r/o Sonewadi, Tq. Kopargaon,  
Dist. Ahmednagar

4. Janabai Keruji Gadhave,  
Age : 48 years, occu. : Agri.  
r/o Sonewadi, Tq. Kopargaon,  
District Ahmednagar

5. Saraswati Mahadu Raut,  
Age : 42 years, occu. : Agri.  
r/o Sonewadi, Tq. Kopargaon,  
Dist. Ahmednagar

... Respondents  
(No.1 Orig. Pltff)

Mr. Darakh, Advocate holding for  
Mr. A.D. Gakekar, Advocate for Appellants  
Mr. C.V. Korhalkar, Advocate for Respondent Nos. 1, 4 and 5

**CORAM : SMT. VIBHA KANKANWADI, J.**

**RESERVED ON : 19<sup>th</sup> JUNE, 2019**

**PRONOUNCED ON : 30<sup>th</sup> JULY, 2019**

**JUDGMENT :**

1. Present Appeal has been filed by original defendants challenging the concurrent judgment and decree passed in Regular Civil Suit No. 115/2004 by Second Joint Civil Judge, Junior Division, Kopargaon, Dist. Ahmednagar dated 16.12.2008 and the confirmation thereof by learned District Judge – 2, Kopargaon, Dist. Ahmednagar in Regular Civil Appeal No. 76/2011 dated 27.06.2016.

2. Present respondent No. 1 had filed the said suit for partition and separate possession. It will not be out of place to mention here that present respondent Nos. 2 and 3 had filed Regular Civil Suit No. 111/2004 before the same Court for permanent

injunction against present appellant No. 1 and others. The said suit was decreed by the common judgment on the same day by the learned trial Court. However, it appears that nobody had challenged the said judgment and decree before the First Appellate Court, and therefore, Regular Civil Appeal No. 76/2011 was restricted to the challenge to judgment and decree passed in Regular Civil Suit No. 115/2004, and therefore, the subject matter of this Second Appeal is also limited to that extent.

3. The genology that has been given in the judgment of the trial Court was not disputed. Further, it was not in dispute that the suit properties mentioned in the said suit were owned initially by Barku Mali, who was the father of the plaintiff, defendant Nos. 8 and 9 and deceased husband of defendant No. 1. Barku expired on 16.11.1996. His wife Umabai had pre-deceased him on 15.11.1988. The present appellants/original defendants No. 1 to 5 had come with the case that there was a partition between Barku and his son Bhausahab i.e. the predecessor of the present appellants. Half of the agricultural lands were taken by each of them and the said partition had taken place somewhere in 1981. The learned trial Court on the basis of the mutation entry exhibit - 37 had come to the conclusion that the said partition was certified by Tahsildar on 08.07.1981. None of them had ever taken any step to get the said mutation entry i.e. No. 773 cancelled, and therefore, these long standing entries prove

the partition between Barku and his son Bhausahab. Bhausahab expired in 2002. As regards house property is concerned, it was held by the learned trial Court that it is still in the name of Barku and the defendants are residing in the same. There is no evidence of partition in respect of the house property, so also, there is no evidence in respect of the partition of then amount i.e. standing in the name of Barku with Ahmednagar District Central Co-operative Bank to the extent of Rs. 76770.16 ps. Under the same circumstance, the finding has been given that agricultural land ad-measuring 3 hector 46 R from Survey No. 114/295/1, land ad-measuring 0.05 from Survey No. 107 of 40, the amount in the Savings Account with Ahmednagar District Central Co-operative Bank is the Joint Hindu Family property of the plaintiffs and defendants No. 1 to 5. In fact, though there was evidence regarding partition, yet, the oral evidence especially the cross of defendant No. 1 showed that in spite of partition, Barku and Bhausahab were residing jointly, that means, though mutation entry was taken, yet it was not actually implemented, and therefore, the said finding has been arrived at by the learned trial Court. This fact is based on the evidence, which has been appreciated by the learned trial Court as well as the learned First Appellate Court.

4. Bhausahab has been held to be the exclusive owner by virtue of partition only in respect of Survey No. 113/294/1 by virtue of

the said evidence. No fault can be found in respect of the leading of the evidence in the form of documents as well as the oral evidence. Naturally, the half of the property which was then allotted to Barku was partible between his heirs viz. the three daughters and one son, since son was no more on the date of the suit, to the heirs of the son. Therefore, from those properties, which have been held to be joint family properties by carving out equal share to each one of the sharer of Barku, one forth share has been allotted. No fault can be found in the same also. Taking into consideration the undisputed relationship as well as the fact that only two agricultural lands and the money in the account was held to be the joint family property.

5. The learned Advocate appearing for appellants tried to submit that both the Courts below have not considered the oral as well as the documentary evidence properly. The fact that Barku had expired in 1996 and the marriages of the daughters had taken place in the year 1972, 1973 and 1975 would not have given any share in the suit property to them. When already the partition had taken place in the year 1981-1982, the said partition could not have been re-opened by the plaintiff. There is no substance in the above said argument for the simple reason that what has been granted is not the re-opening of the partition, which was effected by Barku, but the plaintiff, defendant Nos. 8 and 9 and the predecessor of defendant Nos. 1 to 5 has been given share in the property, which has been

left by Barku. This in any way does not amount to re-opening. No fault can be found either in respect of the appreciation of evidence or on the point of law in the judgment and decree passed by both the Courts below.

6. One more attempt has been made by the learned Advocate appearing for the appellants that the learned First Appellate Court has not made compliance of Order 41 Rule 31 of CPC, which is a mandatory provision.

7. The points for determination ought to have been clearly set out and answered. In order to buttress his submissions, he has relied on the decision in ***Laliteshwar Prasad Singh and Ors. Vs. S.P. Srivastava (dead) through L.Rs. 2017 (4) Mh.L.J. 663***, wherein it has been held that the judgment of the First Appellate Court must reflect Court's application of mind and record its findings supported by reasons. Further, reliance has been placed on the decision in ***Barnes School and Anr. Vs. Arzoo Allan Baker 2012 (3) Mh.L.J. 310 and Shri Hazrat Ali Mohammad (D) the L.Rs. and Anr. Vs. Shri Prabhakar Dattaram Sirvoicar & Ors. 2015 (5) MR 730***. Both these decisions are of this Court at Principal Seat and at Panji Bench respectively, wherein it has been held that it is mandatory for the First Appellate Court to set the points for determination, the decision thereon and the reasons for the decision. Further where the

decree appealed from is reversed or varied, the relief to which the appellant is entitled. Here in this case, two points have been framed by the learned First Appellate Court. First is regarding whether the learned trial Court has carved out shares of respective parties properly or not, and then the second is whether the said judgment is required interference. Here, it is to be noted that the first point as well as the discussion is covered in respect of what is the joint family property and whether the partition had taken place between Barku and Bhausahab or not. Therefore, it was not necessary to have a specific point for the same. In different words, the only question that was as to whether the shares have been properly carved out or not in respect of the suit land, which has been held to be the joint family property. Under such circumstance, there was sufficient compliance of Order 41 Rule 31 of CPC, in this case.

8. No substantial question of law is arising in this case requiring admission of the second Appeal. Hence, following order :-

**ORDER**

- (A) The Second Appeal is disposed of as '**not admitted**'.
- (B) Pending Civil Applications stand disposed of accordingly.

[ **SMT. VIBHA KANKANWADI** ]  
**JUDGE**

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