

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

Second Appeal No. 0366 of 2016

District : Jalgaon

1. Smt. Sonabai Pundalik Suralkar,
Age 83 years,
Occupation : Household,
R/o. Sheri, Taluka Jamner,
Dist. Jalgaon.
 2. Smt. Dhanabai Keshav Hadap,
Age 81 years,
Occupation : Agriculture,
R/o. Palaskhede (Mirache),
Taluka Jamner,
Dist. Jalgaon.
 3. Smt. Sarubai Mahipat Khadse,
Age 77 years,
Occupation : Agriculture,
R/o. Umale,
Taluka & Dist. Jalgaon.
Through General Power of
Attorney Holder,
Mahipat Ukha Khadse,
Age 81 years,
Occupation : Agriculture,
R/o. Umale,
Taluka & Dist. Jalgaon.
- .. Appellants
(Original
plaintiffs)

versus

1. Smt. Savitribai Shivilal Chikate,
Age 71 years,
Occupation : Household,
R/o. Loni, Taluka Jamner,
Dist. Jalgaon.
2. Smt. Chandrabhagabai Namdeo Pawar,
Age 65 years,
Occupation : Household,
R/o. Paldhi, Taluka Jamner,
Dist. Jalgaon.

3. Narayan Jagannath Patil,
Age 40 years,
Occupation : Agriculture,
R/o. Nandra Pra.Lo.,
Taluka Jamner,
Dist. Jalgaon.

4. Sau. Ushabai Narayan Patil,
Age 35 years,
Occupation : Agriculture,
R/o. Nandra Pra.Lo.,
Taluka Jamner,
Dist. Jalgaon.

5. Premraj Bhagwat Shevage,
Age 48 years,
Occupation : Agriculture,
R/o. Bambrud Raniche,
Taluka Pachora,
Dist. Jalgaon.

.. Respondents
(Original
defendants)

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Mr. Vijay B. Patil, Advocate, for the appellants.

*Mr. Girish A. Nagori, Advocate, for respondents
no.01 to 05.*

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving the
judgment : 01st August 2019**

**Date of pronouncing the
judgment : 20th August 2019**

JUDGMENT :

01. Present appeal has been filed by the original plaintiffs who had filed Regular Civil Suit No. 89 of 2006 before Civil Judge (Junior Division), Jamner, District Jalgaon, for declaration, partition

of immoveable property and permanent injunction. The said suit came to be dismissed on 17-07-2009 and the appeal filed by the plaintiffs i.e. Regular Civil Appeal No. 150 of 2009 filed by them before learned Principal District Judge, Jalgaon, came to be dismissed on 27-07-2015. *[Parties are referred hereinafter as per their nomenclature before trial Court.]*

02. The original plaintiffs had come with a case that they and the defendants are the daughters of one deceased Bhika Mahipat Dike. The plaintiffs are the real sisters *inter se*, whereas the defendants are real sisters *inter se* and they are step-sisters of each other. Agricultural land bearing Gut no.82/1 admeasuring 04 hectares 96 R situated at village Sheri, Taluka Jamner, District Jalgaon, and house property no.122, 123 and 125 of the same village are the ancestral properties of Bhika. According to them, after death of Bhika, they have become owner of the said properties. Gut no.82/1 was allotted to the mother of the defendants i.e. Bajabai, who was second wife of Bhika; but the said land was never put in possession of Bajabai. It was, in fact, in possession of Bhika and after his death, plaintiffs cultivated the same jointly. Plaintiff no.01 is residing in house no.123 and using house no.122 as cattle shed. She is also using house no.123 for keeping agricultural produce and implements.

According to the plaintiffs, after death of Bajabai, they have become absolute owner. It was stated that the marriage between Bhika and Bajabai was null and void and therefore, the defendants, who are legitimate daughters, have no right in the ancestral property of Bhika. Plaintiffs had filed Regular Civil Suit No. 70 of 1994 against the defendants for partition and separate possession. After interim injunction was granted in that matter, there was an attempt to have compromise and accordingly in the meeting held on 26-04-2004, the defendants relinquished their share in favour of plaintiffs, as a result of which, the plaintiffs had withdrawn the said suit by filing *Pursis* on 27-04-2002. It is stated that the plaintiffs are illiterate and their thumb impression was taken without verifying the contents of the *Pursis*. The defendants by taking disadvantage of the withdrawal of the suit, got their names mutated in the revenue record and therefore, appeal was filed by the plaintiffs. According to the plaintiffs, at the most, the defendants might be having share in the suit properties; but since the defendants intend to claim absolute ownership, they have filed the suit. Declaration has been sought, that the decree in R.C.S. No.70 of 1994, dated 27-04-2004 is not binding on them as it was obtained by misleading them.

03. The defendants filed written statement and

it is stated that after death of mother of the plaintiffs, Bhika had performed marriage with their mother i.e. Bajabai and therefore, marriage between Bhika and Bajabai is legal. Bhika had given suit land Gut no.82/1 to their mother in lieu of maintenance and therefore, Bajabai had become absolute owner of the said property. She was cultivating the same. After she became old, she used to get it cultivated through defendants. After her death, they have become owner of the property. It is also stated that Bhika had allotted house property no.123 and 125 to them during his lifetime. However, their names could not be mutated in the Grampanchayat record. They are in possession of the house property since last 35 to 40 years, with the knowledge of the plaintiffs and the plaintiffs themselves had withdrawn the said suit voluntarily and therefore, the decree is binding on the plaintiffs. The plaintiffs never sought permission to file fresh suit and therefore, present suit is not maintainable.

04. After the issues were framed, parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned trial Court had come to the conclusion that the suit is barred in respect of land Gut no.82/1. Further, it has been held that the suit regarding declaration, partition of house property and injunction is within limitation. It is stated that

the house property was not properly valued. It was also held that Bajabai had become absolute owner of the house property described in para 02 of the plaint. Only house properties are joint family properties; however, the plaintiffs are not entitled to get partition of the said suit properties. Thus, the suit was dismissed and the appeal filed by the original plaintiffs has also been dismissed, as aforesaid. Hence, this second appeal.

05. Heard learned Advocate Mr. V.B. Patil for the appellants. Heard learned Advocate Mr. G.A. Nagori for the respondents.

06. It has been vehemently submitted on behalf of the appellants, that the factual aspects and the evidence led by both the parties has not been considered at all by the learned first appellate Court. The first appellate Court has given a very cryptic judgment. There is no compliance of Order XLI Rule 31 of the Code of Civil Procedure, 1908 by framing appropriate points for determination. By relying on the decision of this Court in Second Appeal No. 0282 of 2015 [*Subabai Shivram Patil, deceased through L.R. Chandrakant & others Vs. Dharamsing Julalsing Patil, deceased through L.Rs. Jijabai & others*], decided on 09th January 2019, wherein this Court had come to the conclusion that since there is no compliance of Order XLI Rule 31 of C.P.C., the matter deserves remand. He

accordingly prayed for remand of the matter for proper determination of points and discussion by the last fact finding Court.

07. It has been further submitted on behalf of the appellants, that the learned trial Court failed to consider that there was merely an entry of Bajabai's name in the revenue record of the land and it cannot be stated that the land was given in lieu of maintenance by Bhika to her. Only on the basis of that revenue entry, it cannot be stated that Bajabai had become owner of the land under Section 14 of the Hindu Succession Act. Further, the learned trial Court had held that the house properties were the joint family properties of the plaintiffs and defendants, yet, partition has not been effected. The learned trial Court had held that the suit regarding partition of Gut no.82/1 is only barred under Order XXI Rule 1(4) of the C.P.C. and therefore, there was no hurdle for the trial Court to partition the house properties which were held to be joint family properties. The suit has been dismissed only on the ground that the house properties have not been valued properly but no proper reasons have been assigned as to how the properties have not been properly valued. Only for the valuation, the suit ought not to have been dismissed.

08. Per contra, the learned Advocate appearing

for the respondents, after relying on the decision in *Tulasabai w/o. Narayanrao Deshpande (Died through L.R.) Vs. Sakharam Babu Chavan & others* [2006(1) Mah.L.R. 25], submitted that when the property was given by Bhika to Bajabai in lieu of maintenance and that fact is admitted in the pleadings as well as admission has been given by the plaintiffs' witness, the said land became property of absolute ownership of Bajabai. Further, when the suit property i.e. house property was not valued properly, though a specific issue to that effect was framed, the learned trial Court was justified in dismissing the suit. When the law points were very clear, it was not necessary to deal with each and every aspect in the first appeal and therefore, the first appellate Court has also rightly dismissed the appeal. No substantial questions of law are arising in this case.

09. At the outset, it can be said that in order to take cognizance of second appeal, formulation of substantial question of law, as contemplated under Section 100 of C.P.C., is *sine qua non*. Here, in this case, after perusal of the judgment of the learned first appellate Court, it can be seen that only law points have been considered. The points those are formulated by the learned first appellate Court and findings recorded thereon are as under :-

	Points	Findings
01.	Whether the present suit for partition is maintainable ?	No.
02.	Whether plaintiffs are entitled to partition ?	No.
03.	Whether the impugned judgment warrants interference in appeal ?	No.
04.	What order ?	As per final order.

There is absolutely no discussion in respect of the oral evidence or documentary evidence led by the parties. In *Subabai Shivram Patil, deceased through L.R. (supra)*, this Court after placing reliance on the decision in *Khatunbi & others Vs. Aminabai* [2006(6) Mh.L.J. 759], held that there is no compliance of Order XLI Rule 31 of C.P.C. In *Khatunbi's case (supra)*, the Division Bench of this Court had relied on the decision of Hon'ble Apex Court in *Santosh Hazari Vs. Purushottam Tiwari deceased by L.Rs.* [2001(2) Mh.L.J. 786], wherein it was held that "Compliance of Order XLI Rule 31 of the C.P.C. is not an empty formality. The necessity of formulation of points for determination by the appellate Court cannot be considered lightly and brushed aside as benefit of technical plea cannot be granted. In fact, formulation of points for determination has to be such that it should cover all important issues in dispute." Here, in this case, when the learned trial Court had held that the

suit was maintainable in respect of house properties and the suit was dismissed only on the ground that the house properties are not properly valued, in appeal, that point ought to have also been dealt with and under such circumstance, it can be said that there is no proper compliance of Order XLI Rule 31 of the C.P.C., in this case. Therefore, the matter deserves remand.

10. Since the matter deserves remand, it is not necessary to have discussion on other points, as to whether the suit was maintainable; whether Bajabai had become absolute owner of the property under Section 14 of the Hindu Succession Act, as it has to be left to be decided by the learned first appellate Court.

11. Hence, the following order :-

(a) The second appeal is partly allowed.

(b) The judgment and decree in Regular Civil Appeal No. 150 of 2009 passed by the Principal District Judge, Jalgaon, dated 27-07-2015, is hereby set aside and the matter is remanded to the first appellate Court. The said appeal is restored to the file of learned Principal District Judge, Jalgaon. The first appellate Court is directed to formulate appropriate points for determination and to decide the appeal

afresh as per the provisions of law, within a period of six months, as far as possible, after the receipt of record & proceedings and copy of this judgment.

(c) There shall be no order as to costs.

(d) Record & proceedings be remitted to the first appellate Court without any delay.

(Smt. Vibha Kankanwadi)
JUDGE

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