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

**SECOND APPEAL NO.222 OF 2017
WITH
CIVIL APPLICATION NO.3794 OF 2017**

Dattatraya s/o Dagadu Mali,
Age: 58 years, Occu: Agri.,
R/o Datta Mandir, Vairag Road,
Osmanabad, Tq.Dist. Osmanabad ..APPELLANT
(Ori. Defendant No.1)

VERSUS

1. Chandrakala w/o Sadhu Gawali,
Age: 55 years, Occu: Agri. & Household,
R/o Karajgaon, Tq. Ausa,
Dist. Latur
2. Rahibai w/o Shivaji Mali,
Age: 57 years, Occu: Agri. & Household,
R/o. Nitali, Tq. Dist. Osmanabad
3. Somnath s/o Nivruti Mali,
Age: 39 years, Occu: Agri.,
R/o. Tambari Vibhag, Osmanabad
Tq. Dist. Osmanabad
4. Mahesh s/o Nivruti Mali,
Age: 33 years, Occu: Agri.,
R/o Tambari Vibhag, Osmanabad
Tq. Dist. Osmanabad ..RESPONDENTS
(ori. Pltffs & deft. 2 & 3)

Mr Dhananjay Deshpande, Advocate for appellant

CORAM : N.W. SAMBRE, J.

DATE : 29th June, 2017

ORAL ORDER

Respondents no.1 & 2 – original plaintiffs filed Regular Civil Suit
No.88 of 2008 in the Court of Joint Civil Judge Senior Division,

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Osmanabad for partition and separate possession against the appellant-original defendant no.1, which came to be dismissed on 25th February, 2010 against which an appeal being Regular Civil Appeal No.96 of 2010 came to be filed. However, learned Principal District Judge, Osmanabad by judgment and decree dated 10th March, 2016 allowed the said appeal and decreed the suit for partition. Thus, the present Second Appeal.

2. The substantial question of law which is sought to be raised by Mr Deshpande, learned Counsel appearing on behalf of the appellant is, whether the lower appellate court was right in shifting burden on the present appellant-defendant no.1 to prove a fact as regards blood relations between the parties to the suit. Mr Deshpande then would urge that the burden is incorrectly shifted on the appellant to prove the said fact and for the said purpose he relied upon the judgment of the Apex Court in the matter of **Rangammal vs. Kuppuswami & anr.**, reported in **AIR 2011 SC 2344**. He would then invite attention of this Court to the factual matrix that in the school leaving certificate of respondent no.1 – plaintiff no.1 Chandrakala the surname of the parties is not mentioned as “Mali” but it is “Gore”, which raises a serious doubt on the issue of relationship between the parties and their lawful right to claim partition. Mr Deshpande then would urge that once the school leaving certificate of the present respondents does not dispute that they are born to late Dagadu, the suit should not have been decreed by the lower appellate Court.

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3. With the assistance, I have perused the findings recorded by the Courts below. The Trial Court vide impugned judgment and decree dated 25th February, 2010 has framed the issues at Exh.30 and answered the issue of joint ownership in negative. While making such observations, the Trial Court has relied upon document Exh.33 – the school admission register. The Trial Court then considered that since the father of the parties i.e. plaintiffs and defendant no.1 late Dagadu was styled as “Dagadu Mali” and not “Dagadu Gore”, the relationship between the appellant and the respondents was not proved and dismissed the suit.

4. In the appeal, the lower appellate court shifted the burden on the present appellant-defendant no.1. The cause for shifting burden under Section 101 of the Evidence Act is the defence which is raised by the present appellant-defendant no.1 in the claim for partition. The plaintiffs claim that they were born to Dagadu and Saraswati being their parents, whereas the present appellant-defendant no.1 has stated that there was no relationship whatsoever between respondents, late Dagadu and Saraswati. Once the respondents-plaintiffs have brought on record the documentary evidence viz. the death certificate of Dagadu and other oral evidence, particularly the evidence of their witness, their cousin brother and evidence of defendants no.2 and 3 who are also cousin brothers who supported the cause of the plaintiffs, the plaintiffs have discharged their burden.

5. It is the defendant who claimed a finding from the court below that there is no blood relation or the plaintiffs are not sisters of the appellant-

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defendant no.1. In such eventuality, if the language employed in Section 101 of the Evidence Act is appreciated, in my opinion, the learned lower appellate court has rightly shifted the burden on the present appellant-defendant no.1 to prove that plaintiffs are not his sisters and are not entitled to the share in the property.

6. Though the learned Counsel for the appellant has relied upon the judgment of the Apex Court in the matter of Rangammal (supra), particularly paragraph 14 thereof, in my opinion, from the findings recorded by the Apex Court in the said judgment it has to be inferred that it is the appellant who sought a finding from the courts below that there does not exist any blood relation between the parties and as such the burden was rightly shifted on the appellant.

7. In view thereof, I hardly see any infirmity in the findings recorded by the lower appellate court on the issue of shifting burden. The present appeal does not involve any substantial question of law. The same, therefore, stands dismissed. In view of dismissal of the appeal, pending civil application does not survive and stands disposed of.

(N.W. SAMBRE, J.)

amj