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

**SECOND APPEAL NO.466 OF 2017
WITH
CIVIL APPLICATION NO.14347 OF 2016**

Vijay s/o Keshavrao Adsul,
Age: 69 years, Occu: Agri.,
R/o Itkur, Tal. Kallam,
District Osmanabad

..APPELLANT

VERSUS

1. Keshav Bhaurao Adsul,
Died through L.Rs.
- 1-A. Sow. Satyashila Madhukar Jogdand,
Age: Major, Occu: Household,
R/o Itkur, Tal. Kallam,
District Osmanabad
- 1-B. Sow. Kalinda Shahaji Ritapure,
Age: Major, Occu: Household,
R/o Mangrul, Tal. Kallam,
District Osmanabad
2. Shahurao Keshavrao Adsul,
Age: 79 years, Occu: Agri.,
R/o Itkur, Tal. Kallam,
District Osmanabad
3. Ganpat Keshavrao Adsul,
Age: 76 years, Occu: Agri.,
R/o as above
4. Ashok Keshavrao Adsul,
Age: 57 years, Occu: Agri.,
R/o as above
5. Vilas Shahurao Adsul,
Age: 47 years, Occu: Agri.,
R/o as above
6. Chintamani Shahurao Adsul,
Age: 45 years, Occu: Agri.,
R/o as above

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7. Prakash Shahurao Adsul,
Age: 43 years, Occu: Agri.,
R/o as above

..RESPONDENTS

Mr S.S. Thombre, Advocate for appellant

CORAM : NITIN W. SAMBRE, J.

DATE : 7th September, 2017

ORAL ORDER:

The present appellant-plaintiff filed Regular Civil Suit No.39 of 2004 against defendant no.1 – his father, sisters and real brother for partition and separate possession. The said suit was resisted by the respondents-defendants by filing written statements at Exhs.37 and 36. It was the defence of the respondents-defendants that though the relationship between the parties was admitted, while partitioning the properties the plaintiff has not included all the properties, viz. house property, in the suit. It is further claimed that the plaintiff and defendants have sold certain properties and the purchaser thereof is not brought before the Court. According to them, the first partition took place in 1960, second in 1970 and third in 1976. The plea was that the property was already partitioned and as such suit be dismissed.

2. The learned Trial Court framed the issues at Exh.50 and answered them as follows :-

Sr. No.	ISSUES	FINDINGS
1)	Whether plaintiff prove suit lands are ancestral lands of joint family ?	In the negative

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2)	Is plaintiff entitled for partition and separate possession. If yes, what is his share	In the affirmative to the extent of land Gat no.222 Adm. 5 H. 75 R and in Gat no.182 Adm. 2 H. 02 R 1/6 th share each
3)	What order and relief ?	As per final order

3. The Trial Court decreed the suit vide judgment dated 17th March, 2010 granting injunction and separate possession of the suit properties to the extent of land Gat No.222, ad measuring 5 Hectares 75 Ares and land Gat No.182 ad measuring 2 Hectares 02 Ares, by awarding 1/6th share in favour of the appellant-plaintiff.

4. The aforesaid judgment and decree was subject-matter of challenge in Regular Civil Appeal No.146 of 2010. The said appeal came to be dismissed by judgment and decree dated 5th March, 2016, passed by Principal District Judge, Osmanabad. Thus, the present Second Appeal.

5. Mr Thombre, learned Counsel appearing on behalf of the appellant would raise following grounds so as to pursue this Court to frame substantial questions of law :-

(a) Whether the findings recorded by the Courts below that there was already partition of the properties is sustainable or not as the properties were not partitioned by metes and bounds.

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- (b) Whether the alleged partitions which were already effected were only for paper purpose, not to be acted upon so as to save the property from the clutches of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961.

6. In order to substantiate his contentions, Mr Thombre has invited my attention to the findings recorded by the Courts below.

7. Considered the submissions made by Mr Thombre in the light of the concurrent findings recorded by the Courts below. It is required to be noted that by well reasoned judgment the learned Trial Court partly decreed the suit. While doing so, the Trial Court considered the relationship between the parties, the evidence of plaintiff, defendants and their witnesses, the admission given by the plaintiff *qua* partition deed Exh.83 and proceeded to decree the suit partly. The Trial Court noticed that from the order of the Ceiling Officer passed on 29th January, 1977, defendant no.1 Karta was holding 99 Acres and 37 Gunthas of land. It is further noted that it was partitioned amongst the sons, who are plaintiff and defendants to the suit in question. The index extracts at Exhs.162 to 165 were taken into account which demonstrate purchase of some property by the parties to the suit and also the judgment rendered in Regular Civil Suit No.458 of 199, in which defendant no.2 and defendants no.5 to 7 were declared as owners. Apart from above, the plea as regards the family arrangement reflected in Exh.83 was dealt with by answering the same against the present appellant. The Trial Court proceeded to consider the

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contents of said document Exh.83 particularly in the light of the oral evidence of the respective parties and the order of the ceiling authority, mutation entries, conduct of the parties of disposing of the land and noticed that the partition was already effected in relation to the properties but for, which the suit was decreed.

8. The learned lower appellate court re-appreciated the entire gamut, analyzed the evidence of all the witnesses in detail and upon appreciating the same reached to a conclusion that there is no scope for interference in the findings recorded by the learned Trial Court. What weighed before the lower appellate court while dismissing the appeal is the admission given by the plaintiff in regard to the partition deed Exh.83 and the acts of the respective parties to the suit by acting thereon by carrying out mutation entries and disposing of part of the properties. Apart therefrom, it has also been taken into account that Exh.83 was drawn on 15th November, 1970 and the same was signed by the parties to the proceedings including that of the appellant. The defendants, in the opinion of the lower appellate court have rightly proved the contents of document Exh.83 and respective have acted upon the same. Based on the same, the appellate court has proceeded to dismiss the appeal.

9. In the backdrop of above, if the submissions in the form of substantial questions of law are appreciated, having regard to the concurrent findings recorded by the Courts below, in my opinion, the appreciation of evidence, in absence of perversity need not be gone into

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while exercising jurisdiction under Section 100 of the Code of Civil Procedure. Whether partition in 1970 vide Exh.83 was only for the purpose of saving the land from the clutches of the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961 or not is a mixed issue of facts and law, which is answered by the Courts below against the appellant.

10. In view thereof, I hardly see any reasons to re-appreciate the evidence in the background of factual matrix and pleadings so as to form any other opinion than the one expressed by the Trial Court and the lower appellate court. Second Appeal against concurrent findings recorded by the Courts below, in my opinion, lacks merit and, therefore, stands dismissed.

11. In view of dismissal of the appeal, pending Civil Application does not survive and stands disposed of.

(NITIN W. SAMBRE, J.)

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