

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

**WRIT PETITION NO. 9369 OF 2014**

- 1] Pandu Vithoba Somvanshi,  
Age 60 Years, Occu. Agril.
- 2] Vithal Pandu Somvanshi,  
Age 42 Years, Occu. Agril.
- 3] Ramesh Pandu Somvanshi,  
Age 40 Years, Occu. Agril.
- 4] Uttam Pandu Somvanshi,  
Age 38 Years, Occu. Agril.  
All R/o. Nideban, Taluka Udgir,  
District Latur. ... Petitioners

**VERSUS**

- 1] Gitabai Gopal @ Tulsiram Somvanshi,  
Age 80 Years, Occu. Household
- 2] Sangubai Nagorao Gaikwad,  
Age 52 Years, Occu. Household,  
R/o. Kheshetrapphal, Taluka Udgir,  
District Latur.
- 3] Jijabai Sheshrao Gaikwad,  
Age 40 Years, Occu. Household
- 4] Mudrikabai Ravan Gaikwad,  
Age 46 Years, Occu. Household,  
R/o. Konali, Taluka Deoni,  
District Latur
- 5] Tejabai Gopal Somvanshi,  
Age 40 Years, Occu. Household.
- 6] Bharatbai Goroba Gaikwad,  
Age 42 Years, Occu. Household,  
R/o Ganesh Nagar, Udgir,  
Taluka Udgir, District Latur

- 7] Kondiba Gopal @ Tulsiram Somvanshi,  
Age 60 Years, Occu. Agril.
- 8] Narsing Gopal @ Tulsiram Somvanshi,  
Age 54 Years, Occu. Agril.
- 9] Bhaurao Gopal @ Tulsiram Somvanshi,  
Age 50 Years, Occu. Agril.  
Respondent Nos. 1, 3, 5, 7 to 9  
R/o. Nideban, Taluka Udgir,  
Dist. Latur. ...Respondents

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Advocate for Petitioners : Mr. P.V. Barde  
Advocate for Respondents 2-9 : Mr. R.R.Deshmukh h/f Mr.  
R B Deshmukh

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**CORAM : V.K. JADHAV, J.**  
**Dated: February 23, 2015**  
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**ORAL JUDGMENT :-**

1. The learned counsel for respondents No.2 to 9 submits that during the pendency of this Writ Petition, the respondent No.1 died. The learned counsel further submits that, legal heirs of deceased respondent No.1 are on record and they are respondents No. 2 to 9, respectively. Leave to delete the name of respondent No.1 since the L.Rs. of respondent No.1 are already on record.

2. The petitioner is the original plaintiff. He has filed an application to lead secondary evidence with regard to the partition deed as the original is not traceable. The

learned Judge of the Trial court has rejected the application filed by the petitioner seeking permission to lead secondary evidence with regard to the said partition deed, by passing impugned order dated 19.07.2014. Hence this Writ Petition.

3. The learned counsel for the petitioner submits that, so far as the existence and execution of the partition deed is concerned, the petitioner has come with a specific pleading in the suit that in the year 1983, on the basis of the partition deed, the Mutation Entry No. 190 was sanctioned by the Revenue authority on 06.06.1983. Though the same was cancelled in the year 2003, that entry remained for near about 20 years in the Revenue record. The learned counsel submits that the learned Judge of the Trial court has not considered this aspect while considering the execution and existence of the original document of partition deed in question.

4. The learned counsel for the petitioner further submits that the learned Judge of the Trial Court has not recorded any finding about the contention raised by the petitioner that the original document is not traceable and therefore the petitioner rely upon the photostat copy by way of leading secondary evidence.

5. The learned counsel for the respondent Nos. 2 to 9 supports the impugned order. The learned counsel for the respondents submits that the petitioner/original plaintiff has admitted in his cross-examination that he would file the original partition deed on record. The petitioner has not deposed before the Court below that the original partition deed is destroyed, lost or not traceable.

6. It appears that the learned Judge of the Trial court has not at all considered the existence and execution of the original partition deed. The learned Judge can very well look into the pleadings of the parties. The petitioner/original plaintiff has come with the specific pleading, most particularly in paragraph No. 4 of the plaint that, on the basis of the said partition deed, the Mutation Entry No. 190 was taken away back in the year 1983 and the said entry was remained there in the Revenue record for almost 20 years before it was cancelled as being challenged by the respondents in the year 2003.

7. The learned Judge of the Trial Court has not recorded any findings on this point. The petitioner has come with the specific case by contending in his application that the original partition deed is presently not traceable. The

learned counsel for the petitioner fairly admitted that the petitioner has not elaborated as to what efforts he has taken to trace out the said original partition deed, so as to justify leading of secondary evidence in the form of photostat copy of the partition deed. It also appears that the said application is disposed of by the learned Judge of the Trial Court in a summary manner. The petitioner has come with averments in his application Exh. 154 that the original partition deed is not traceable. Instead of directing the petitioner to file an affidavit explaining the efforts taken by him for tracing the original partition deed, the learned Judge of the Trial Court, without recording any specific finding to that effect, simply concluded in the impugned order that the petitioner has not taken any efforts to trace out the original partition deed. In the absence of any finding as aforesaid, the impugned order is not sustainable. Whether the unregistered document such as partition deed in the present case is admissible or not, is a question to be considered during the course of the trial of the suit. The learned counsel for the petitioner submits that the contents of the partition deed indicate that the partition had taken place and only the memorandum by way of deed came to be prepared between two real brothers. At present this question is not required to be decided in this writ petition. However, the admissibility of

the alleged partition deed in evidence is also required to be considered while deciding the application for permission to lead secondary evidence. Since the learned Judge of the trial Court has not recorded any finding in respect of above points, this Court is left with no other option but to remand the matter to the Trial Court for consideration afresh.

8. In view of this, petition is partly allowed. The impugned order dated 19.07.2014 is hereby quashed and set aside. The learned Judge of the Trial Court shall decide the application Exh.154 dated 11.7.2014 afresh in light of the observations made above. Writ Petition is disposed of. Rule is made absolute in the aforesaid terms. No costs.

**( V.K. JADHAV )**  
**JUDGE**

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aaa/-