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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4442 OF 2016

Suresh Bajirao Patil

PETITIONER

Age - 53 years, Occ - Agriculture

R/o At Post Warkhede, Taluka - Chalisgaon

District - Jalgaon

VERSUS

1. Shankar Kalu Patil

RESPONDENTS

Age - 65 years, Occ - Nil

R/o At Post Laxmi Nagar,
Chalisgaon, Taluka - Chalisgaon
District- Jalgaon

2. Bajirao Kalu Patil,
Deceased through Legal Heirs

3. Pratap Kalu Patil,
Age: 51 years, Occu: Agriculture,

4. Parvatabai Kalu Patil,
Age: 80 years, Occu: Household

All above R/o At/Post: Warkhede,
Tal: Chalisgaon, Dist: Jalgaon

5. Sau. Bhanubai Ganpat Patil
Since deceased through heirs on record

A] Nanabhau Ganpat Patil,
Age: 53 years, Occu: Agriculture,

B] Shri Dayaram Ganpat Patil,
Age: 48 years, Occu: Agriculture,

C] Sudam Ganpat Patil

Since deceased through Heirs

- C-1] Shri Kailas Sudam Patil
Age: 32 years, Occu: Agriculture
- C-2] Kapur Sudam Patil
Age: 28 years, Occu: Agriculture
- C-3] Anjanabai Sudam Patil,
Age: 60 years, Occu: Household
- All above R/o At/Post Kherde,
Tal. Chalisgaon, Dist. Jalgaon
- C-4] Sunita Suresh Patil,
Age: 30 years, Occu: Household
R/o: At/Post: Wadi (Shewale),
Tal. Pachora, Dist. Jalgaon
- D] Popat Ganpat Patil
Age: 34 years, Occu: Agriculture,
R/o: At/Post: Kherde,
Tal. Chalisgaon, Dist. Jalgaon
- E] Durgabai Rajdhar Patil
Age: 58 years, Occu: Household,
R/o: At/Post: Raver, Tal. Raver,
Dist: Jalgaon
- F] Jankabai Nathu Patil,
Age: 55 years, Occu: Household,
R/o: At/Post: Galan, Tal. Pachora,
Dist. Jalgaon
- G] Anusayabai Govind Patil,
Age: 45 years, Occu: Household,
R/o. At/Post: Morane, Dhule,
Tq. & Dist: Dhule
- H] Smt. Yashoda Pitambar Sonawane
Age: 40 years, Occu: Household,
R/o. Chandsar, Tq. Dharangaon (Erandol),
Dist. Jalgaon

- I] Manik Keshav Patil,
Age: 54 years, Occu. Agriculture,
- J] Dipak Manik Patil,
Age: 30 years, Occu: Agriculture,
- K] Shri. Kiran Manik Patil,
Age: 38 years, Occu: Agriculture,

All above R/o: Tarangana,
Sane Guruji Nagar, Chalisgaon,
Tal. Chalisgaon, Dist. Jalgaon

- 6. Smt. Vaijabai Pandit Patil,
Since deceased through LR's
- 6A] Shri Narayan Pandit Bhosale (Patil),
Age: 50 years, Occu: Agriculture,
- 6B] Shri. Raghunath Pandit Bhosale (Patil),
Age: 35 years, Occu: Agriculture,
Both R/o: Daregaon, Tal. Chalisgaon,
Dist: Jalgaon
- 6C] Sumanbai Laxman Patil
Age: 45 years, Occu: Household,
R/o. Bodhagaon, Tal & Dist. Dhule
- 6D] Shobha Ramesh Pawar,
R/o: Dhamangaon, Tal. Chalisgaon,
Dist: jalgaon
- 6E] Vimalbai Kashinath Patil (Pawar),
Age: 48 years, Occu: Household,
R/o: Bhoras, Tal. Chalisgaon,
Dist: Jalgaon
- 7. Smt. Sarubai Gajmal patil
Age: 50 years, Occu: Household,
R/o: Dhamnar, Tal. Sakri, Dist. Dhule
- 8. Gangubai wd/o Babulal Patil

Since deceased through Legal Heirs

- 8A] Shobhabai Arjun Kachave
Age: 50 years, Occu: Household,
R/o: Padalde, Tal. Malegaon,
Dist: Nashik
- 8B] Amruta Sukadeo Pawar,
Age: 30 years, Ocu: Household,
R/o. Ganraj Society, Near Water Tank,
Alandi Road, At/Post: Bhosari, Pune.
- 8C] Jayshree Dagadu Saindane (Patil),
Age: 26 years, Occu: Household,
R/o: Sant Tukaram Nagar, Moriya Colony,
Shinde Chal, Alandi Road, Bhosari, Pune
- 8D] Nisha Ajit Chavan (Patil),
Age: 28 years, Occu: Household,
R/o: At/Post: Nimgul, Tal & Dist. Dhule
- 8E] Mahesh Arjun Kachave (Patil),
Age: 25 years, Occu: Agriculture,
R/o: Padalde, Tal. Malegaon, Dist. Nashik
- 8F] Jijabai Krushna Kachave (Patil),
Age: 45 years, Occu: Household,
- 8G] Suvarna Shivaji Patil,
Age: 25 years, Occu: Household,
Both R/o: Ratan Chwk, Plot No.554,
Nava Nagar, Surat (Gujarat)
- 8H] Kavita Sandeep Patil,
Age: 23 years, Occu: Household,
R/o. Thakur Galli, Dondaicha,
Tal. Shindkheda, Dist. Dhule
- 8I] Gita Dnyaneshwar Patil,
Age: 21 years, Occu: Household,
R/o. Survey No.35/1, Nalvade Park,
Chinchavade Nagar, Nandanwan,
Chinchwad, Pune

- 8J] Sunita Vijay Pawar
Age: 20 years, Occu: Household,
R/o. Lonawade, Tal. Malegaon,
Dist. Nashik.
- 8K] Bhushan Krushna Kachave (Patil),
Age: 19 years, Occu: Education,
R/o: Ratan Chowk, Plot No.554,
Nava Nagar, Surat (Gujarat)
- 8L] Meenabai Baliram Kachave (Patil),
Age: 44 years, Occu: Household,
R/o. Padalde, Tal. Malegaon,
Dist. Nashik
- 8M] Yogita Samadhan Kadam
Age: 24 years, Occu: Agriculture,
R/o. Nimgul, Tal. Malegaon,
Dist. Nashik
- 8N] Sheetal Baliram Kachave (Patil),
Age: 19 years, Occu: Household,
R/o. Padalde, Tal. Malegaon,
Dist. Nashik.
- 8O] Kalabai @ Annapurna Pralhad More,
Age – 55 years, Occ – Household
R/o At Post Nimgul, Taluka and District – Dhule
- 8P] Kasubai Jibhau Patil,
Age – 50 years, Occ – Household
R/o At Post Nimgul,
Taluka and District – Dhule
9. Uttam Bajirao Patil,
Age – 40 years, Occ – Agriculture
10. Sakubai wd/o Bajirao Patil,
Age – 60 years, Occ – Household
Both R/o At Post Warkhede (Bk)
Taluka – Chalisgaon,
District – Jalgaon
11. Keshav Pratap Patil (Warkhedekar)

Age – 40 years, Occ – Agriculture
R/o Udesing Anna Gurha Nirman Society,
Dhule road, Chalisgaon, Taluka – Chalisgaon
District – Jalgaon

12. Hirakan Nanabhau Patil,
Age – 55 years, Occ – Household
R/o Kherde, Post – Lonaje,
Taluka – Chalisgaon, District – Jalgaon
13. Sunanda Deoram Patil,
Age – 49 years, Occ – Household
R/o At post Goradkhede, Taluka – Pachora,
District – Jalgaon
14. Mangal Yuvraj Patil,
Age – 46 years, Occ – Household
R/o At post Ronje, Taluka – Erandol
District – Jalgaon
15. Vilas Ramesh (Shravan) Kadekar,
Age – 37 years, Occ – Agriculture
R/o At Post Warkhede (Bk)
Taluka – Chalisgaon
District – Jalgaon
16. Krushna Prabhakar Chudhari,
Age – 32 years, Occ – Agriculture
R/o At Post Londhe, Taluka – Chalisgaon
District – Jalgaon
17. Sandeep Ratilal Chaudhari,
Age – 28 years, Occ – Agriculture
R/o Londhe, Taluka – Chalisgaon
District – Jalgaon
18. Kailas Himmat Patil,
Age – 35 years, Occ – Agriculture
R/o Chinchagavan, Taluka – Chalisgaon
District – Jalgaon
19. Deelip Eknath Patil,
Age – 37 years, Occ – Agriculture
R/o Chinchagavan, Taluka – Chalisgaon

District – Jalgaon

20. Ramesh Raghunath Rathod,
Age – 35 years, Occ – Agriculture
R/o Londhe (Krushnapuri)
Taluka – Chalisgaon,
District – Jalgaon
21. Meena Keshav Patil,
Age – Adule, Occ – Agriculture / Household
R/o Warkhede, Taluka – Chalisgaon
District – Jalgaon

**(Respondents No.2 to 21 stand deleted
at the request of learned advocate for
the petitioner)**

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Mr. Shailesh P. Brahme, Advocate for the petitioner
Mr. S.S.Kulkarni h/f Mr.P.D.Bachate, Adv. for respondent No.1
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WITH

WRIT PETITION NO.4778 OF 2016

Shankar Kalu Patil
Age: 65 years, Occu: Nil,
Through his GPA Girish Shankar Patil,
Age: Major, Occ: Agri,
R/o: At/Post: Laxmi Nagar,
Chalisgaon, Tal. Chalisgaon, Dist: Jalgaon

PETITIONER

VERSUS

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Age: 53 years, Occu: Agriculture,
2. Bajirao Kalu Patil,
Deceased through Legal Heirs
3. Pratap Kalu Patil,
Age: 51 years, Occu: Agriculture,

4. Parvatabai Kalu Patil,
Age: 80 years, Occu: Household

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Tal: Chalisgaon, Dist: Jalgaon
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Age: 28 years, Occu: Agriculture

C-3] Anjanabai Sudam Patil,
Age: 60 years, Occu: Household

All above R/o At/Post Kherde,
Tal. Chalisgaon, Dist. Jalgaon

C-4] Sunita Suresh Patil,
Age: 30 years, Occu: Household
R/o: At/Post: Wadi (Shewale),
Tal. Pachora, Dist. Jalgaon

D] Popat Ganpat Patil
Age: 34 years, Occu: Agriculture,
R/o: At/Post: Kherde,
Tal. Chalisgaon, Dist. Jalgaon

E] Durgabai Rajdhar Patil
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Dist: Jalgaon

- F] Jankabai Nathu Patil,
Age: 55 years, Occu: Household,
R/o: At/Post: Galan, Tal. Pachora,
Dist. Jalgaon
- G] Anusayabai Govind Patil,
Age: 45 years, Occu: Household,
R/o. At/Post: Morane, Dhule,
Tq. & Dist: Dhule
- H] Smt. Yashoda Pitambar Sonawane
Age: 40 years, Occu: Household,
R/o. Chandsar, Tq. Dharangaon (Erandol),
Dist. Jalgaon
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Age: 54 years, Occu. Agriculture,
- J] Dipak Manik Patil,
Age: 30 years, Occu: Agriculture,
- K] Shri. Kiran Manik Patil,
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Tal. Chalisgaon, Dist. Jalgaon

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Dist: Jalgaon
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Age: 45 years, Occu: Household,

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Dist: jalgaon
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R/o: Sant Tukaram Nagar, Moriya Colony,
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Age: 28 years, Occu: Household,
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R/o: Padalde, Tal. Malegaon, Dist. Nashik
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Age: 21 years, Occu: Household,
R/o. Survey No.35/1, Nalvade Park,
Chinchavade Nagar, Nandanwan,
Chinchwad, Pune
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Age: 20 years, Occu: Household,
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Age: 19 years, Occu: Education,
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Age: 24 years, Occu: Agriculture,
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Dist. Nashik
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Age – 55 years, Occ – Household
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District – Jalgaon
14. Mangal Yuvraj Patil,
Age – 46 years, Occ – Household
R/o At post Ronje, Taluka – Erandol
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15. Vilas Ramesh (Shravan) Kadekar,
Age – 37 years, Occ – Agriculture
R/o At Post Warkhede (Bk)
Taluka – Chalisgaon
District – Jalgaon
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Age – 32 years, Occ – Agriculture

R/o At Post Londhe, Taluka – Chalisgaon
District – Jalgaon

17. Sandeep Ratilal Chaudhari,
Age – 28 years, Occ – Agriculture
R/o Londhe, Taluka – Chalisgaon
District – Jalgaon
18. Kailas Himmat Patil,
Age – 35 years, Occ – Agriculture
R/o Chinchagavan, Taluka – Chalisgaon
District – Jalgaon
19. Deelip Eknath Patil,
Age – 37 years, Occ – Agriculture
R/o Chinchagavan, Taluka – Chalisgaon
District – Jalgaon
20. Ramesh Raghunath Rathod,
Age – 35 years, Occ – Agriculture
R/o Londhe (Krushnapuri)
Taluka – Chalisgaon,
District – Jalgaon
21. Meena Keshav Patil,
Age – Adule, Occ – Agriculture / Household
R/o Warkhede, Taluka – Chalisgaon
District – Jalgaon

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Mr. Sanket S. Kulkarni, Advocate for the petitioner
Mr. Shailesh P. Brahme, Advocate for respondent No.1

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 29th APRIL, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with

consent of learned advocates for the appearing parties.

2. At the outset, Mr. Brahme, learned advocate appearing for petitioner in writ petition No.4442 of 2016 on instructions seeks leave to delete respondents No.2 to 21. Leave granted at the risk and peril of the petitioners.

2. Both these petitions have been moved against a common order dated 21st March, 2016 passed on Exhibits-611 and 613 in Regular Civil Suit No.313 of 1976. Writ petition No.4442 of 2016 has been filed by defendant No.9 in the suit, whereas writ petition No.4778 of 2016 has been filed by the plaintiff. By common order on Exhibits-611 and 613, Joint Civil Judge, Junior Division, Chalisgaon has partially allowed application Exhibit-611 permitting to lead secondary evidence of certified copy of a sale deed filed as document No.4 pursuant to a list appended to Exhibit-595. [Said document is referred to at serial No.1 in the table contained in the impugned order] Consequently, rest of the requests under application Exhibit-611 for allowing to lead secondary evidence in respect of documents from serial No.2 to 6 as have been referred to in table appearing in the order, stand rejected. As far as application Exhibit-613 is concerned, it has been rejected. None of the petitioners have challenged order on

Exhibit-613. As such, both writ petitioners are considered together for decision by this common order.

3. Writ petition No.4442 of 2016 at the instance of defendant No.9 is against dis-allowance of leading secondary evidence in respect of documents at serial No.3 to 6 in the table appearing in the impugned order, whereas, writ petition No.4778 of 2016 is against allowance of application Exhibit-611 to the extent permitting defendant No.9 to lead secondary evidence in respect of document No.4 from the list appended to Exhibit-595. [Said document is referred to at serial No.1 in the table contained in the impugned order]

4. After hearing learned advocates for the parties, the position which emerges is that the suit has been instituted by the plaintiff seeking partition, possession and injunction in respect of the properties referred to in the plaint. Whereas defendant No.9 resisted the suit contending that the same being not tenable for non inclusion of all the properties *viz.*, the ones which have been purchased from the income of joint family property. According to defendant No.9, said properties were as per the list appended to Exhibit-595 and that the originals of the documents could not be procured despite efforts. The plaintiff,

despite order for production of original sale deeds of properties which were purchased by the plaintiff and also the ones in the name of his wife and sons, had failed to produce originals on record, filing fallacious affidavit before the court and as such, application Exhibit-611 had been moved for allowing defendant No.9 to lead secondary evidence in respect of aforesaid documents and application Exhibit-613 had been moved for taking action for willful disobedience of the order of the court. Petitions are not concerned with order on application Exhibit-613.

5. The plaintiff had filed say to Exhibits-611 and 613 stating that the applications are false and frivolous. In his affidavit he has submitted that he is not in possession of documents of sale in favour of his wife and sons, whereas documents at serial No.4 in the list appended to Exhibit-595 may be in his possession.

6. While deciding application Exhibits-611 and 613, the court has recorded events as they occurred, in paragraph No.7 of the impugned order viz.,

“7.Before I embark further, it is necessary to make reference to the other applications and details of proceeding which took place in the present matter. It has direct bearing on the merits of present application. Defendant No.9 had also filed application below Exhibit-591 and 953 for leading secondary evidence. As the application was vague, this

application (Exhibit-593) was rejected in limine. In the application (Exhibit-591) generalized submission was made that the plaintiff had purchased number of properties from the income of the ancestral property. Again, generalized submission was made that the plaintiff be directed to file the copies of these sale transactions. The details of properties was not mentioned in this application (Exhibit-591). It is further prayed therein that, if, the plaintiff fails to produce, the permission for leading secondary evidence be given. This application (Exhibit-591) was decided to the extent of first part i.e. for production of documents, if any. The plaintiff was called upon to file affidavit in prescribed form. Accordingly, the plaintiff filed affidavit below Exhibit-596. He stated that the documents which are in the name of his sons and wife are not in his possession or power. There is no clear reference about the document mentioned in Sr. No.1 of above table. Nevertheless, it has to be said that there is compliance of the Court order. Furthermore, application (Exhibit-591) was not finally decided to the extent of second prayer of leading secondary evidence. Be as it may, so one thing is very clear that there is no willful non-compliance of the Court order”

7. The court has taken note of that the document mentioned at serial No.2 in the order had not been placed on record and further went on to consider that as far as documents at serial No.3 to 6 as given in the table appearing at pages No.3 and 4 of the impugned order annexed to the writ petition, were not executed by plaintiff and plaintiff had stated that they are not in his possession and power. The court purported to consider legal provision as contained in sections 58, 65 and 130 of the Indian Evidence Act and had quoted section 65 of the Evidence Act.

The court considered that since the documents from serial No. 3 to 6 given in the table cannot be said to be in power or possession of the plaintiff, application Exhibit-611 seeking permission to lead secondary evidence in respect of those documents is not tenable and since document at serial No.1 from the table is in possession of the plaintiff, request for leading secondary evidence in respect of the same can be considered and as such, went on to allow application Exhibit-611 to the extent of document No.1 from the table and rest of the prayers were rejected.

8. Mr. Brahme, learned advocate for defendant No.9 vehemently submits that the impugned order fails to take into account full purport of section 65 of the Evidence Act in spite of having been quoted the same, which clearly refers to that secondary evidence of documents would be available, if the original is shown or appears to be in possession or power of any person out of reach or not subject to process of court, taking into account clause (a) of section 65 of the Evidence Act. This particular aspect having been overlooked, the impugned order has been rendered untenable. A valuable right in favour of defendant No.9 is being smothered in the process. He further submits that this is gravely prejudicial to his claims in the suit.

He, therefore, submits that the order *ex facie* is untenable.

9. Countering these submissions, Mr. Sanket Kulkarni, learned advocate appearing for the plaintiff submits that looking at the conduct of defendant No.9, who had ample time all through the pendency of the suit, had not moved making such application, however, it is at the fag end of the trial, when the plaintiff had completed his evidence, such an application has been moved. He submits that the impugned order as far as rejection of request in respect of documents at serial No.3 to 6 from the table in the order is concerned is unimpeachable. However, it had been error on the part of the court to allow secondary evidence in respect of document at serial No.1 from the table in the impugned order. He submits that in view of framing of issues, particularly issue No.13, which is in respect of tenability of the suit, having regard to the defence been taken by defendant No.9, suit being not tenable for non inclusion of all the alleged properties, in such a case, the application which has been belatedly moved, should not have been given any regard to and ought to have been rejected straight away.

10. Although respective parties have argued as aforesaid, law as has been quoted under section 65 of the Evidence Act may

play a significant role in the matter. It is not the case of the parties that the documents at all are non existing. As a matter of fact, certified copies of the documents in the list appended to Exhibit-595 have been produced, save document at serial No.2 from table in the impugned order. It is indisputable position that original sale deeds are not in possession of defendant No.9 and that the proceedings hitherto clearly give an indication that procedure contemplated under sections 65 and 66 of the Evidence Act for production of the originals from the plaintiff in whose possession the documents were, reasonably expected to have been asked to be produced. The court, upon such a request had directed the plaintiff to file affidavit. The plaintiff had filed an affidavit referring to that original of document at serial No.1 is in his possession, however, originals of documents No.2 to 6 are not in his possession. In the circumstances, it emerged that existence of documents is not disputed and the situation would be covered by section 65 sub section (a) of the Evidence Act, wherein said document appears to be out of reach of defendant No.9 and in possession of persons, who are not subject to the process of the court. The court, while passing the order, appears to have overlooked this aspect in respect of section 65 and has considered only partially that document does not appear to be in

possession and power of the plaintiff and thus request of permitting to lead secondary evidence cannot be considered.

11. However, looking at the provisions of section 65 of the Evidence Act itself, the consideration by trial court appears to be half-way. The application Exhibit-611, therefore, will have to be considered keeping in view the provisions of section 65 of the Act and the object underlying the same. The reason which has detained the court from refusing to accede to the request of secondary evidence of documents at serial No.3 to 6 appears to be incongruous with the provisions of law. Application Exhibit-611, therefore deserves a positive consideration and deserves to be allowed.

12. In view of aforesaid consideration, request being made under writ petition No.4778 of 2016 is difficult to be considered. Writ petition No.4778 of 2016, therefore, stands dismissed. Rule stands discharged in the same.

13. Application Exhibit-611 in Regular Civil Suit No.353 of 1976 pending before Civil Judge, Junior Division, Chalisgaon stands allowed in respect of documents at serial No.1 and 3 to 6 as given in the table at pages No.3 and 4 in the impugned order. Writ petition No.4442 of 2016, as such, stands allowed. Rule is

made absolute in terms of prayer clause "D" to aforesaid extent.

14. Having regard to that the suit is of 1976, it would be expedient that the same would be proceeded with expeditiously.

[SUNIL P. DESHMUKH, J.]

drp/wp4442-16