

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

**WRIT PETITION NO. 3308 OF 2016**

1. Sheikh Ruknoddin Sheikh Husnoddin,  
Age: 68 years, Occupation: Nil,  
R/o. East HUDCO Colony,  
Room No.274, Chalisgaon Road,  
Dhule, Taluka and District Dhule.
  2. Sheikh Nuroddin Sheikh Husnoddin,  
Age: 66 years, Occupation: Business,
  3. Smt. Fatemabi Sheikh Husnoddin,  
Age: 78 years, Occupation: Household  
Work.
  4. Nasarinbano Sheikh Husnoddin,  
Age: 40 years, Occupation: Service,  
  
Nos.2, 3 and 4 resident at Room No.1,  
Lane No.9, Municipal Colony,  
Shivaji Nagar, Dhule  
Taluka and District Dhule. DIED. through  
Legal Heirs.
  - 4A. Sayyad Liyakat Ali Kudrat Ali,  
Age: 49 years, Occupation: Driver.
  - 4B. Sayyad Anamfirdos Liyakat Ali,  
Age: 14 years, Occupation: Education.
  - 4C. Sayyad Mohammad Raza Liyakat Ali,  
Age: 12 years, Occupation: Education.
- Nos.4A to 4C resident at  
Garib Nawaz Nagar,

Near Nawaz Cement Agency,  
Dhule Tal. and Dist. Dhule.

5. Sheikh Salimoddin Sheikh Husnoddin,  
Age: 60 years, Occupation Business,  
Resident of Garib Nawaj Nagar, Near  
Datar Flour-Mill, Dhule,  
Tal. & Dist. Dhule.

...PETITIONERS

VERSUS

1. Umravbi Yusufkha,  
Since deceased through L.Rs.  
i.e. Respondent No.2 Abbaskhan.
2. Abbaskhan Yusufkhan Pathan  
Since deceased through L.Rs.
- 2A. Sultanabano Habibbeg,  
Age: 55 years, Occupation: Household,  
R/o Shirpur Market, Shirpur,  
Taluka Shirpur Dist. Dhule.
- 2B. Ruksanabano Sk. Rounakali,  
Age: 45 years, Occupation: Household,  
R/o Champa Baug, Sakri Road,  
Dhule - 424 001,  
Taluka Shirpur Dist. Dhule.
- 2C. Hasinabano Babu,  
Age: 50 years, Occupation: Household,  
R/o. C/o Babu Hawaldar,  
Near Railway Station, Police  
Colony, Balsad (Gujrat State).
- 2D. Nafisabano Isak,  
Age: 50 years, Occupation: Household  
work, R/o. Soyat Nagar- B,

Behind Bhendi Bazar, Near Talab,  
Unpatiya (Surat).

- 2E. Rehanabano Habib,  
Age: Major, Occupation: Household,  
R/o. C/o. Habib Rockelwale,  
Shahada Road, Dhondaicha,  
Taluka Shindkheda Dist. Dhule.
- 2F. Meherbano Nasirkha,  
Age: 53 years, Occupation: Household.
- 2G. Mujaffarkhan Nasirkhan,  
Age: 35 years,
- 2H. Arshadkhan Nasirkhan,  
Age: 33 years,
- 2I. Nadimkhan Nasirkhan,  
Age: Major,
- 2J. Asmabi Nasirkhan,  
Age: Major, Occupation: Household,
- 2A to 2J-10 R/o. Awishkar Colony,  
Umraobi Manzil, Near Shop of Khatik,  
Chalisgaon Road, Dhule,  
Taluka and District Dhule.
3. Afjalkha Ayubkha,  
Since deceased through L.Rs.
- 3A. Akbalbi Afjalkhan Pathan,  
Age: 60 years, Occupation: Household  
work.
- 3B. Firozkhan Afjalkhan Pathan,

Age: 43 years, Occupation: Driver.

- 3C. Amjadkhan Afjalkhan Pathan,  
Age: 34 years, Occupation: Driver.
- 3D. Ashpakkhan Afjalkhan Pathan,  
Age: 30 years, Occupation: Labour.
- 3E. Samaiyabbi Afjalkhan Pathan,  
Age: 34 years, Occupation: Household.
- 3A to 3E R/o. Sutar Mohalla, Near  
Masjid, Nandurbar Tal. Nandurbar Dist.  
Nandurbar.
- 3G. Anisbai Mehboobkhan Pathan,  
Age: 45 years, Occupation: Household  
work, R/o Pathanpura, Nijampur,  
Tal. Sakri, Dist. Dhule.
- 3H. Ajijabai Salimbeg,  
Age: 40 years, Occupation: Household  
work, R/o. C/o. Salim Thekedar,  
Khalwadi Mohalla, Sendhwa,  
Dist. Khargon (M.P.)
- 3I. Aarefabe Mukhtarkhan Pathan,  
Age: 38 years, Occupation Household,  
R/o. Opp. Radiator Idgah, Khetia Road,  
Shahada, Dist. Nandurbar.
- 3J. Samimabi Parvejkhan Pathan,  
Age: 36 years, Occupation: Household  
Work, R/o Motibag, Sendhwa  
Dist. Khargon (M.P.)
4. Fatimabi Mohamad Musa,  
Since deceased through L. Rs.

- 4A. Pukhrajbi Mehboobkhan  
Since deceased through L. Rs.
- 4A-1. Farukkhan Mehboobkhan,  
Age: Major, Occupation: Business,  
R/o. Pir Talab Pada Murgi,  
Murgi Khana, Nandurbar District  
Nandurbar.
- 4A-2. Meherbano Nasirkhan,  
Age: 60 years, Occupation: Household,  
R/o Umrao Manzil, Avishkar Colony,  
Chalisgaon Road, Dhule, Dist. Dhule.
- 4A-3. Rafique Mehboobkhan,  
Age: 50 years, Occupation: Mechanic,  
R/o. Pir Talab, Pada Murgi,  
Murgi Khana, Nandurbar,  
Dist. Nandurbar.
- 4A-4. Rajiyabano Julfekar Shaikh,  
Age: Major, Occupation Household,  
R/o. Opp. S.T. Bus Stand,  
Ghoti Dist. Nashik.
- 4A-5. Parvinbano Najim,  
Age: 55 years, Occupation Household,  
R/o. Alisab Mohalla, House of Jainul  
Abedin Mohalla, Nandurbar, Dist.  
Nandurbar.
- 4A-6. Jakiyabano Mehboobkhan,  
Age: 45 years, Occupation: Household,  
R/o. Pir Talab, Pada Murgi,  
Murgi Khana, Nandurbar Dist.  
Nandurbar.

5. Jakiyabi Yusufkha,  
Age: Major, Occupation: Nil,  
R/o Shahada, Tal. Shahada  
Dist. Nandurbar.
6. Ayeshabi Ayub Sheikh,  
Age: 64 years, Occupation: Household,
7. Saberabano Ayub Sheikh,  
Age: 65 years, Occupation Household,

Respondents No.6 and 7  
R/o. Behind Pardi Bus STand,  
Opp. Office of Grampanchayat Pardi,  
Pardi, Surat Tal. and Sit. Surat (Gujrat).

8. Ahmed Ayub Sheikh,  
Since deceased through L.Rs.
- 8A. Saidabi Ahmed,  
Age: 55 years, Occupation: Household.
- 8B. Sheikh Tanveer Sheikh Ahmed,  
Age: 29 years, Occupation Labour.
- 8C. Sheikh Sharukh Sk. Ahmed,
- 8D. Junaid Sk. Ahmed,  
Age: 25 years, Occupation: Labour.
- 8E. Sohail Sk. Ahmed,  
Age: 23 years, Occupation: Labour.
- 8F. Nilofar Sk. Ahmed,  
Age: 21 years, Occupation: Household.  
Dismissed as per Court's order dated 29-  
07-2016.

8A to 8F R/o. Munni Beauth Parlour, Near  
Police Chowki, Moglai, Dhule.

9. Saidabi Ayub Sheikh,  
Age: 65 years, Occupation: Household.
10. Raheman Ayub Sheikh,  
Age: 63 years, Occupation: Labour.
11. Saidabi Mahammad Yusuf,  
Age: 67 years, Occupation: Household.
12. Jarinabano Mahamad Yusuf,  
Age: 47 years, Occupation: Household.
13. Jakiyabano Mahammad Yunus,  
Age: 45 years, Occupation: Household,
14. Sabir Mahammad Yunus,  
Age: 43 years, Occupation: Labour.
15. Kaisarbano Mahammad Yunus,  
Age: 40 years, Occupation: Household.

Respondent nos. 6 to 15  
R/o. Behind Pardhi Bus Stand,  
Opp. Office of Grampanchayat Pardi,  
Pardi, Surat, Tal. And Dist. Surat (Gujrat)

16. Salaoddin Jalaloddin,  
Since deceased through L. Rs.
- 16A. Sheikh Niyajoddin @ Najju Salaloddin,  
Age: Major, Occupation: Driver,  
R/o Behind Pardhi Bus Sand,  
Opp. Office of Grampanchayat Pardi,  
Pardi Surat Tal. And Dist. Surat (Gujrat).

- 16B. Sheikh Shamsoddin Sheikh Salaloddin,  
Age: Major, Occupation: Labour,  
R/o. Behind Pardhi Bus Sand,  
Opp. Office of Grampanchayat Pardi,  
Pardi Surat Tal. And Dist. Surat (Gujrat).
- 16C. Sheikh Najroddin Sheikh Salaloddin,  
Age: Major, Occupation: Labour,  
Electric Motor Garage,  
R/o Behind Pardhi Bus Sand,  
Opp. Office of Grampanchayat Pardi,  
Pardi Surat Tal. And Dist. Surat (Gujrat).
17. Husnoddin Jalaloddin,  
Age: 58 years, Occupation: Service,  
R/o Behind Pardhi Bus Sand,  
Opp. Office of Grampanchayat Pardi,  
Pardi Surat Tal. And Dist. Surat (Gujrat).
18. Shabnurbi Iliyaskha Pathan,  
Age: 60 yers, Occupation: Household,  
R/o Nandurbar, Dist. Nandurbar.
19. Kureshabi Ibrahimkha,  
Age: 75 years, Occupation: Household.
20. Rukaiyabi Ibrahimkha,  
Age: 50 years, Occupation: Household.
21. Saberabi Ibrahimkha,  
Age: 48 years, Occupation: Household.
22. Sultangbi Ibrahimkha,  
Age: 43 years, Occupation: Household.
23. Shamshadbi Ibrahimkha,  
Age: 39 years, Occupation: Household.

24. Mehabubkha Ibrahimkha,  
Age: 40 years, Occupation: Labour.

Respondent Nos. 19 to 24 R/o  
Unpathiya, Surat (Gujrat).

25. Fatemabi Mehamudkha,  
Age: 63 years, Occupation: Household.

26. Ajalkha Mehamudkha,  
Age: 35 years, Occupation: Labour.

27. Rahimkha Mahemudkha,  
Age: 33 years, Occupation: Labour.

28. Salimkha Mahemudkha,  
Age: 32 years, Occupation: Labour.

29. Tabsumbano Mahemudkha,  
Age: 28 years, Occupation: Labour.

30. Rajwanabano Mahemudkha,  
Age: 25 years, Occupation: Labour.

31. Tarannusbano Mahemudkha,  
Age: 24 years, Occupation: Labour.

32. Meharunnisa Mahemudkha,  
Age: 22 years, Occupation: Student.

Respondents No.25 to 32 R/o. Sutar  
Mohalla, Nandurbar, Tal. And Dist.  
Nandurbar.

33. Rehanabi Ahamadkha,  
Age: 56 years, Occupation: Household.

34. Abbaskha Ahamadkha,  
Age: 27 years, Occupation: Labour.
35. Ismailkha Ahamadkha,  
Age: 26 years, Occupation: Labour.
36. Salim Hussein Ahamadkha,  
Age: 25 years, Occupation: Labour.

Respondents No.33 to 36 R/o  
Shanimandal, Nandurbar,  
Tal. And Dist. Nandurbar.

37. Latifabi @ Jamilabi Abbaskha Pathan,  
Age: 71 years, Occupation: Household,  
R/o. Chamba Baag, Sakri Road,  
Dhule, Tal. And Dist. Dhule.  
(For herself and as Holder of Power of  
Attorney of Respondents No.1 to 36.)

(Summons of Defendants No.1 to 36  
may be served on respondent No.37 as  
the respondent No.37 is the Holder of  
Power of the defendants No.1 to 36.)

38. Nandkishor Pannalal Oswal,  
Age: 55 years, Occupation Business,  
R/o. Rupa Apartment,  
Ganpati Road, Dhule,  
Tal. And Dist. Dhule.
39. The Indira Sahakari Bank Ltd.; Dhule  
(The Manager, Indira Sahakari Bank Ltd;  
Dhule.)

...RESPONDENTS

Mr. S. P. Shah, Advocate for the petitioners.  
Mr. M. S. Kulkarni, Advocate for the respondent No. 38.

**CORAM : SUNIL P. DESHMUKH, J.**

**DATE : 9<sup>th</sup> AUGUST, 2017**

**ORAL JUDGMENT :**

1. Rule. Rule made returnable forthwith.
2. Heard learned counsel appearing on behalf of parties, finally by consent.
3. The petitioners who are plaintiffs in Regular Civil Suit No. 182 of 2012 (earlier bearing special civil suit bearing no. 27 of 2001) sought declaration and injunction against defendants in respect of the property bearing City Survey No.1800, admeasuring 161 Square wars (1448 Square feet), situated in lane No.8 at Dhule. Petitioners are aggrieved by order dated 19.1.2016 under which their application Exhibit-236 seeking permission to lead secondary evidence has been rejected by 3<sup>rd</sup> joint civil judge, senior division, Dhule.
4. It is the case of the petitioners that, they have rightful claim to property referred to in the plaint under a registered partition deed dated 9-10-1953 to the extent mentioned therein and despite

that, under sale deed dated 07-11-2000, defendants no. 1 to 37 illegally transferred said property in favour of defendant no. 38.

5. While evidence of other side had been completed, application came to be moved by the petitioners at Exhibit-236 seeking permission to adduce secondary evidence in respect of partition deed dated 9-10-1953 and the sale deed dated 7-11-2000, since originals of those documents are claimed to be in possession of defendants.

6. Application Exhibit-236 had been resisted by defendants No.1, 37 and 38 contending it to have been moved at the fag end of the trial and that requisite procedure therefor has not been followed.

7. The court while deciding the application has observed, though the plaintiffs submitted that original partition and sale deeds referred to above are in possession of the defendants against whom those documents are sought to be proved, plaintiffs had not issued notice to the defendants pursuant to section 66 of the Indian Evidence Act and as such, without compliance of legal procedure, the application cannot be considered and had rejected

the same.

8. Mr. Subodh P. Shah, learned counsel appearing for the petitioners/ plaintiffs submits that, going by pleadings of parties, it can be presumed that concerned registered documents, certified copies of which are placed on record, would be in possession of defendants in the suit and that those documents are to be proved against said defendants.

9. He further refers to that what had been impliedly subsisting in the pleadings of parties, had been made explicit under application Exhibit-236 and in such a case while there is no dispute about there have been certified copies of the concerned documents on record, technical and pedantic approach ought to have been avoided having regard to the facts and attending circumstances of the case.

10. He submits that, relevant provisions, particularly Sections 65 and 66 of the Evidence Act, and the sub provisions thereunder would not create an impediment to lead secondary evidence for want of notice as has been erroneously considered under impugned order. He submits that, provisions take care of the contingencies involved in present matter and would not impede

and prohibit making an application of the nature of Exhibit-236. He submits that, certified copies of the documents are placed on record proving existence of originals of the partition deed and sale deed as averred by the petitioners though denied by the other side. Original of sale deed executed in 2000, certified copy of which is on record, is in possession of defendant No.38, and in the circumstances, the case is fully covered by Section 65 (a) Clause- I and secondly, the case is justifiable and largely covered by the contingencies referred to under proviso to section 66, obviating necessity of a notice.

11. He further submits that, even otherwise the request made under Exhibit-236 can be deemed to be notice for production of originals and the way in which it had been responded to by filing say, to a large extent, stands denied.

12. Countering aforesaid submissions, learned counsel Mr. M. S. Kulkarni appearing for respondent No.38 submits that, application for adducing secondary evidence at early stage of matter could have been possibly made. He submits that, apart from the same, prosecution of suit can be flawed from initial stage. It is an obligation particularly under Order VII, Rule 14 of Civil Procedure

Code to produce such documents and give an indication as to in whose possession original documents are and certified copies of which have been filed along with plaint. This particular obligation appearing under the rule has not been complied with or adhered to nor, while section 66 of Evidence Act obligates issuing notice, the same has also been adhered to.

13. In the circumstances, the trial court while deciding the application had to observe that without proper procedure being followed such request would not be accepted. He, therefore, submits that, having regard particularly to that impugned order cannot be faulted with or can be said to be defective or illegal, this court may not disturb the same.

14. Supporting aforesaid submissions learned counsel Mr. C. R. Deshpande appearing for respondents No.2-F to 2-I submits that, going by the language employed by legislature in Section 66, the obligation cast is mandatory as the word 'shall' has been used.

15. He submits that, secondary evidence of contents of documents cannot be given unless party proposing to give such evidence, gives notice to other side since original document is claimed to be in possession of such party. Notice to produce

original documents may not only be in accordance with the prescription of law but such notice has to be there as court deems reasonable. He submits that not even an attempt by whisper has been made and in the circumstances no indulgence be given to request made under the writ petition.

16. Having heard the learned counsel as aforesaid, the situation emerges that the petitioner from the institution of the suit has referred to and relied on a document of partition of 1953 which is stated to be registered one and certified copy of the same has been placed on record, so is the case in respect of sale deed of the year 2000. So far as this aspect is concerned, there is no dispute among the parties.

17. Perusal of the record particularly the plaint and written statement of defendants No.1 to 37, indicates that the defendants have denied partition and contents in the deed or for that matter, very existence of the same, so is their case while submitting say to the application exhibit-236. Defendant No.38 has opposed the application referring to that it is not filed at proper stage since the same has been moved after evidence close pursis has been given. It is not the case of the petitioners that, said document has been

destroyed or has been lost and while there had been an opportunity to have the documents exhibited, the same has not been done and the application as such is filed at the fag end of the trial.

18. It would be appropriate to refer to section 65 particularly to relevant for present matter. It reads thus,

*"65. Cases in which secondary evidence relating to documents may be given.-- Secondary evidence may be given of the existence, condition or contents of a document in the following cases:--*

*(a) when the original is shown or appears to be in the possession or power –*

*of the person against whom the document is sought to be proved, or*

*of any person out of reach of, or not subject to, the process of the Court, or*

*of any person legally bound to produce it,*

*and when, after the notice mentioned in section 66, such person does not produce it;"*

While section 66 reads thus,

*"66. Rules as to notice to produce.-- Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by*

*law, then such notice as the Court considers reasonable under the circumstances of the case:*

*Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:--*

- (1) when the document to be proved is itself a notice;*
- (2) when, from the nature of the case, the adverse party must know that he will be required to produce it;*
- (3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;*
- (4) when the adverse party or his agent has the original in Court;*
- (5) when the adverse party or his agent has admitted the loss of the document;*
- (6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.:”*

19. The main reason for which impugned order appears to have been passed is that the procedure prescribed for letting production of secondary evidence has not followed. Overall, the situation emerges that just for want of explicit notice for production by petitioners of the original documents, would not prevent letting them adduce secondary evidence of those documents as has been claimed in the application particularly after the majority of ingredients requiring letting such secondary evidence are amply satisfied in the facts and circumstances and the pleadings of the parties. Technical and pendantic approach would better be

avoided.

20. In the circumstances, the impugned order stands set aside and the application Exhibit-236 stands allowed. Writ petition is disposed of. Rule made absolute accordingly.

21. Appropriation of the amount deposited pursuant to the direction of this court would be in accordance with decision that would be rendered at the end of the trial.

**( SUNIL P. DESHMUKH, J.)**

vjg/-