

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION STAMP NO.3423 OF 2015**

- | | | | |
|----|--|---|--------------------|
| 1] | Mrs. Laxmibai Bandhu Patil |] | |
| | Age : 61, Occupation Agriculturist |] | |
| | |] | |
| 2] | Mrs. Yesubai Bandhu Patil |] | |
| | Age : 65, Occupation Agriculturist |] | |
| | |] | |
| | Both residing at Village Manda |] | |
| | Titwala, Taluka Kalyan District |] | Petitioners |
| | Thane. |] | (Org. Plaintiffs) |
| | versus | | |
| 1] | Shri Rajaram Sitaram Patil |] | |
| | Age adult, Occupation Agriculturist] | | |
| | Residing at Barvegaon, Behind |] | |
| | Godrej Park, Taluka Kalyan |] | |
| | District Thane |] | |
| | |] | |
| 2] | Shri K. D. Jadhav |] | |
| | Adult, Occupation Builders and |] | |
| | Developers, Rajrang Apartments |] | |
| | Ground Floor, R.P.Road, Kalyan |] | |
| | District Thane |] | |
| | |] | |
| 3] | Shri Shirish Dalvi |] | |
| | Adult, Occupation business having |] | |
| | Address as Zojwalla Shopping |] | |
| | Complex, 1 st Floor, Kala Talao |] | Respondents. |
| | Kalyan, District Thane |] | (Org. Defendants) |

Mr. K S Deval with Mr. Roshan Tanna i/by Mr. J M Joshi for the Petitioners.
Mr. Anilkumar Patil with Ms. Nikita R Sawant I/by Mr. Sandeep S Salunkhe
for the Respondent Nos.1 and 2.

Respondent No.3 not necessary to be served since deleted in the suit.

CORAM : R. M. SAVANT, J.
DATE : 20th February 2015

ORAL JUDGMENT

1 Not on board. In view of the urgency, mentioned. The learned
counsel for the parties informed this Court that the Respondent No.-3/the
Defendant No.3 has been deleted in the Trial Court and hence is not necessary
to be served as he is not a contesting party.

2 In view of the order passed in Civil Application No.446 of 2015
today i.e. on 20th February 2015 the above Writ Petition, which was disposed of
by the order dated 17/02/2015, has been restored to file. In view of the
urgency, the above Writ Petition is taken up for hearing as to admission by
consent of the learned counsel for the parties.

3 Rule, with the consent of the learned counsel for the parties made
returnable forthwith and heard.

4 The above Petition takes exception to the order dated 27/01/2015
passed by the learned Joint Civil Judge, Junior Division, Kalyan rejecting the
Application (Exhibit 213) which had been filed by the Plaintiffs i.e. the
Petitioners herein seeking permission from the Trial Court that their witness
Mr. Shailesh Chandaskar may be allowed to inspect the thumb impression on
the revenue records and also obtain photographs of the disputed and
contemporary thumb impressions. The said Application (Exhibit 213) has its
genesis in the order dated 19/12/2014 passed by this Court in the earlier

round i.e. Writ Petition No.4777 of 2014. Though the said Petition was dismissed, this Court had observed to the following effect :-

“However, it would be open for the Plaintiffs to adduce such evidence, as is permissible in law in assertion of their case as regards the legality and genuineness of the Will. With the aforesaid observations, the Writ Petition is dismissed.”

5 The Plaintiffs accordingly filed the Application (Exhibit 213) thereby seeking relief which has been adverted to in the earlier part of this Order. The Plaintiffs seek to lead evidence of the said finger print expert in view of the fact that they are disputing the Will of one Kalu Padu Dhone. The said Application (Exhibit 213) was opposed to on behalf of the Defendants. The principal ground on which the said Application was opposed is that similar applications filed earlier have been rejected by the Trial Court, and therefore, the Plaintiffs are not entitled to any relief in so far as the present Application is concerned. The Trial Court considered the said Application (Exhibit 213) and has by the impugned order dated 27/1/2015 rejected the same. The rejection is on the ground that earlier similar applications filed by the Plaintiffs have been rejected. As indicated herein above it is the said order dated 27/1/2015 which is taken exception to by way of the above Writ Petition.

6 The learned counsel appearing on behalf of the Petitioners Shri K S Deval would contend that the evidence of the hand writing expert is vital to

the Plaintiffs case as the Plaintiffs are questioning the Will of one Kalu Padu Dhone. The learned counsel would contend that the Trial Court has misconstrued the order dated 19/12/2014 passed by this Court in Writ Petition No.4777 of 2014 whereby this Court has specifically granted liberty to the Plaintiffs to adduce such evidence as is permissible in law in assertion of their case as regards the legality and genuineness of the Will. The learned counsel would contend that the Plaintiffs are therefore entitled to lead evidence as they deem appropriate which in this case is the evidence of the finger print expert. It is the submission of the learned counsel for the Petitioners/original Plaintiffs Shri Deval that the Trial Court had erred in rejecting the Application (Exhibit 213) in the light of the earlier order dated 19/12/2014 passed by this Court in Writ Petition No.4777 of 2014.

7 Per contra, the learned counsel appearing for the Respondent Nos.1 and 2 herein i.e. the original Defendant Nos.1 and 2 Shri Anilkumar Patil would support the impugned order and would contend that once similar applications were rejected, it was not open for the Plaintiffs to file the instant Application (Exhibit 213). The learned counsel would contend that the Court Commissioner appointed by the Trial Court has opined that the thumb impression on the original document i.e. the Will and the thumb impression on the document with which it is to be compared is not legible and no useful purpose would therefore be served by allowing the instant Application.

8 Having heard the learned counsel for the parties I have considered the rival contentions. It is required to be noted that in the earlier round, this Court vide its order dated 19/12/2014 passed in Writ Petition No.4777 of 2014 had granted liberty to the Plaintiffs to adduce such evidence as is permissible in law in assertion of their case as regards the legality and genuineness of the Will. The said Application (Exhibit 213) is therefore referable to the said liberty granted. The Plaintiffs would be within their rights to adduce such evidence as they deem appropriate in support of their case in the suit. The evidenciary value of the said evidence would have to be considered by the Trial Court at the hearing of the suit and the said aspect cannot be pre-judged at the stage of considering the Application (Exhibit 213). In the light of the said order dated 19/12/2014 whereby the liberty was granted, the Trial Court had erred in rejecting the said Application (Exhibit 213) on the ground that similar applications were rejected earlier. In view of the said order dated 19/12/2014 passed in Writ Petition No.4777 of 2014 the factual position had changed inasmuch as the Plaintiffs were at liberty to adduce such evidence as they deem appropriate to support their assertions in the suit. Hence the permission to lead evidence to the Plaintiffs cannot be denied on the ground that no useful purpose would be served by granting such permission as the thumb impressions are illegible. In the interest of a fair trial opportunity would have to be given to the Plaintiffs.

9 Hence in so far as the evidence which the Plaintiffs desire to lead in respect of the thumb impression on the said Will is concerned, the Plaintiffs would be entitled to lead the said evidence for whatever it is worth and, as indicated above, it is for the Trial Court to consider the evidenciary value at the appropriate stage. In that view of the matter the impugned order dated 27/1/2015 is required to be quashed and set aside and is accordingly quashed and set aside and the following directions are issued :-

- i] That the Plaintiffs along with his witness would be allowed to take inspection of the alleged Will dated 24th November, 1968 of Kalu Padu Dhone as also the thumb impressions on the contemporary revenue records in the presence of a Court Officer, to be appointed by the Trial Court, and the Learned Advocate for the Defendants.
- ii] The said witness Mr. Shailesh Chandaskar would be allowed to take four photographs of each of the thumb impression on the alleged Will as also the contemporary revenue records at the same time. The said process to be completed on or before 27th February, 2015. If the aforesaid process is not completed by 27th February, 2015, no further time would be granted and the Plaintiffs would then have to proceed on the basis of whatever material is on record.

- iii] The impugned order should not be construed as any expression of opinion on merits by this Court. The suit would undoubtedly be decided on merits and in accordance with law.
- iv] Since the suit has already been expedited it is directed to be disposed of by 30th April, 2015, the Trial Court to endeavour to dispose of the suit within the said stipulated period. It is expected of the parties that they would co-operate in the aforesaid process and see to it that the same is completed within the time stipulated by this order. It is clarified that no further application on the said aspect would be filed or entertained by the Trial Court.
- v] If the learned Advocate of the Defendants does not remain present, the inspection and photographing would be done in his absence, but in the presence of the Court Officer. The trial should not be delayed in view of the absence of the learned Advocate of the Defendants at the time of inspection and photographing.
- vi] The above Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with parties to bear their respective costs of the Petition.

[R.M.SAVANT, J]