

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

WRIT PETITION NO. 2557 OF 2016

RAFIQ AHMED ILAHI BAKSH THROUGH HIS GPA NADEEM AHMED
FAROOQ AHMED.

VERSUS

GAUSODDIN KHAJODDIN AND OTHERS

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Advocate for the Petitioner : Shri Pathan Hamzakhan I..

Advocate for Respondents 4 and 5 : Shri A.D.Kasliwal.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 19th December, 2017

Per Court:

1 I have heard the learned Advocate for the Petitioner/ original Plaintiff No.4 and the learned Advocate on behalf of Respondent Nos.4 and 5. Rest of the Respondents, though served, have not caused an appearance in this matter.

2 The Petitioner/ Plaintiff No.4 is aggrieved by the order dated 02.01.2016 passed by the Trial Court rejecting the application Exhibit-67 for leading further evidence of Plaintiff No.4 when the final hearing in the matter had commenced and the Plaintiffs had also completed their final oral submissions.

3 It is contended that Plaintiff No.4 is a resident of New Jersey, United States of America and does not reside in Aurangabad. The suit

property is claimed to be a self acquired property of the deceased Zainab Bee w/o Ilahi Baksh, who is the mother of Plaintiff Nos.4 to 7. Zainab Bee was the wife of Ilahi Baksh. They are survived by four sons, namely, Farooq Ahmed, Aateeq Ahmed, Rafeeq Ahmed, Shafeeq Ahmed and one daughter by name Noori Hussain. Farooq Ahmed and Aateeq Ahmed have passed away.

4 Plaintiff Nos.4 to 7 are represented by Plaintiff No.1 (Nadeem Ahmed s/o Farooq Ahmed), who, therefore, is the nephew of Plaintiff Nos.4 to 7, under a power of attorney executed in his favour and he is conducting the suit along with the other Plaintiffs.

5 The Petitioner has contended in the petition as to how the Defendants have no right to the property and the transactions entered into by them affecting the property, are illegal and void. It is further contended that as Plaintiff No.4 got a VISA to visit India in February, 2015, that he approached the Trial Court and filed the application Exhibit-67 for setting aside the order of forfeiting the rights of the Plaintiffs to lead further evidence. It is in this backdrop that the request is made that the Petitioner/ Plaintiff No.4 be permitted to lead evidence.

6 The learned Advocate for Respondent Nos.4 and 5 has strenuously opposed this petition. He draws my attention to the entire dates and sequence of events as have been recorded by the Trial Court in paragraphs 13 to 18 of the impugned order.

7 He further submits that though the suit may not be too old as it has been instituted in 2012, after the Plaintiffs had completed their final oral submissions, an application was filed by Plaintiff No.4 at Exhibit-67. Prior thereto, no application was filed even by the power of attorney holder to suggest that Plaintiff No.4 desires to lead evidence after returning to India.

8 The learned Advocate for the Petitioner has placed reliance upon the judgment of this Court, in the matter of Trustees Company Limited vs. Ashok Raju Shetty and others, 2014 (1) Mh.L.J. 323, to support his contention that if no prejudice is caused to the Defendants, the Plaintiff can lead evidence even at the stage when the final oral submissions are being canvassed.

9 The Trial Court has passed an order on 22.04.2014, thereby, closing evidence of the Plaintiffs and permitted the Defendants to commence their evidence. Since the dates and sequence of events have been set out by the Trial Court in paragraphs 13 to 18, it would be apposite to reproduce the said paragraphs herein below for ready reference :-

"13. *Perusal of the record reveals the following things:-
The matter is of 2012, the issues were framed and the additional issues were framed in June 2013 and the matter was posted for evidence of plaintiff on 26.06.2013. The matter suffered 15.07.2013, 31.07.2013 date. The plaintiff did not lead evidence,*

but sought adjournments. The plaintiff lead his evidence of PW-1 on 14.08.2013 vide Exh.33. On 31.08.2013 plaintiff sought adjournment. On 26.09.2013 plaintiff withdrew the affidavit at Exh.33 and filed affidavit of PW-2 at Exh.32. The matter was adjourned to 17.10.2013 and 16.11.2013. Plaintiff filed affidavit of PW-3 at Exh.36 on 16.11.2013. The cross-examination was recorded on 03.12.2013. The matter was for further evidence of plaintiff on 17.12.2013, 16.01.2014 and 27.01.2014. The plaintiff did not lead further evidence and so the further evidence of plaintiff was closed on 27.01.2014 and matter was adjourned to 07.02.2014 for evidence of defendant. On 07.02.2014, plaintiff moved application Exh.51 to set aside evidence close order and it was allowed at cost. The plaintiff filed his evidence affidavit on 26.02.2014 and the cross-examination was recorded by the defendant nos.4 and 5. The matter was for further evidence of plaintiff on 04.04.2014 and 22.04.2014. The plaintiff was absent on 22.04.2014 and therefore, by order below Exh.1, his further evidence was closed. To set aside this order dated 22.04.2014, the plaintiff moved the present application on 09.02.2015 i.e. almost after 10 months. The matter was for evidence of defendant on 16.06.2014, 25.06.2014, 10.07.2014 and 31.07.2014. The defendant nos. 4 and 5 filed their affidavit evidence on 31.07.2014. The cross-examination of witness of defendant nos.4 and 5 was recorded on 29.09.2014 and the matter was for further evidence of defendant nos.4 and 5 on 18.10.2014.

14. This shows that since filing of affidavit of PW-3, the plaintiff did not move any application to the court requesting to adjourn the matter on the contention that the presence of plaintiff No.4 is awaited from abroad for his evidence before this Court. On the contrary, the plaintiff allowed/ constrained the court to close the further evidence of plaintiff and to proceed with the evidence of defendant. Not only this, the plaintiff conducted cross-examination of defendant also.

15. *On 18.10.2014, the defendant nos.4 and 5 closed their evidence and the matter was adjourned for final arguments on 14.11.2014. On 08.12.2014, vide Exh.64 and on 19.12.2014 vide Exh.65, the plaintiff sought adjournments for final arguments.*
16. *As per order sheet dated 03.02.2015, the arguments of plaintiffs were heard and the matter was posted on 09.02.2015 for the arguments of defendants.*
17. *On this 09.02.2015, the plaintiff moved the present application.*
18. *The aforesaid developments in the matter categorically reflect that the plaintiff nowhere reserved their right to examine plaintiff No.4."*

10 It is, therefore, obvious from the dates and sequence of events that not only did the Plaintiffs lead their evidence through three witnesses, they have also proceeded to cross examine the Defendants after they led their evidence. Subsequent thereto, the Plaintiffs have advanced their oral final submissions and the matter was adjourned on 09.02.2015 to enable the Defendants to submit their final arguments.

11 It is undisputed that during this entire period from 26.06.2013 till 09.02.2015, the Plaintiffs never tendered any application that Plaintiff No.4 desires to travel to India and lead his oral evidence. In fact, the Petitioner/ Plaintiff No.4 along with Plaintiff Nos.5 to 7 were represented by the power of attorney holder Plaintiff No.1, who has led evidence on behalf of all the Plaintiffs. Once the power of attorney holder has led evidence for and on behalf of the Petitioner/ Plaintiff No.4, the Petitioner cannot get an independent right to once again pray for stepping

into the witness box without either making that request at the proper time or without withdrawing the power of attorney issued in favour of Plaintiff No.1.

12 I do not see any allegations in Exhibit-67 indicating that the power of attorney holder has jeopardized the case of the Petitioner herein and has put the Petitioner/ Plaintiff No.4 into a grave risk. There are no contentions that the power of attorney holder has neglected the rights of the Petitioner or has compromised his rights or has jeopardized them.

13 The learned Advocate for the Petitioner submits that no prejudice would be caused to the Defendants if Exhibit-67 is allowed. It is not a matter of whether, any prejudice would be caused to the Defendants. The issue is as to whether, the Petitioner/ Plaintiff No.4 can seek leave to step into the witness box when evidence on behalf of the Plaintiffs has been led by three witnesses, who have been fully cross-examined by the Defendants and when the Plaintiffs themselves have completed the cross examination of the Defendants and had never moved an application praying for adjournment so as to enable Plaintiff No.4 to visit India and lead evidence.

14 Considering the above, reliance placed on the judgment in the matter of Trustees Company Limited (supra) is misplaced since the facts in the case in hand are quite distinguishable from the facts before this Court in the Trustees Company Limited case (supra).

15 The Honourable Supreme Court has laid down the law, in Syed Yakoob v/s K.S.Radhakrishnan, AIR 1964 SC 477 and Surya Dev Rai v/s Ram Chander Rai, AIR 2003 SC 3044, that this Court can exercise its supervisory jurisdiction only when the impugned order appears to be perverse, erroneous and likely to cause gross injustice.

16 Considering the above, this Writ Petition being devoid of merit is, therefore, dismissed.

17 The amount deposited by the Petitioner in this Court under order dated 07.03.2016 is permitted to be withdrawn by the Petitioner with accrued interest subject to the Petitioner submitting his identity proof in the nature of the copy of PAN Card and/or Voters Identity Card and along with the Passport and the identification by the learned Advocate.