

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

WRIT PETITION NO.3522 OF 2017

SHAKILABEE BASHIRKHAN PATHAN AND OTHERS
VERSUS
GOPAL HARIKISHAN ZANVAR AND OTHERS

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Advocate for the Petitioners : Shri Deshmukh Sachin S..
Advocate for Respondents 1 and 2/ Plaintiffs : Shri Rathi Swapnil S..

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 04th December, 2018

Per Court:

1 The Petitioners, who are the legal heirs of the deceased Defendant No.1 (Kadarkhan) in Special Civil Suit No.122/2009, are aggrieved by the impugned order dated 04.01.2017 by which, their application Exhibit 139 praying for leave to recall all the witnesses of the Plaintiffs for further cross-examination, has been rejected.

2 The learned Advocate for the Petitioners has strenuously criticized the impugned order. He points out that Defendant No.1 (Kadarkhan) passed away on 23.12.2015. His daughters moved an application to be brought on record as his legal heirs. Though Defendant Nos.2 to 7 are the sons of the deceased Kadarkhan and are his legal heirs, four married daughters of the deceased Kadarkhan were permitted to be

brought on record as his legal heirs as well and therefore, they were arrayed as Defendant Nos.1(1) to 1(4). They were permitted to file their common written statement on 13.04.2016.

3 These legal heirs preferred the application Exhibit 139 invoking Order 18 Rule 17 of the Code of Civil Procedure praying for recalling the witnesses of the Plaintiffs for cross examination at the hands of these legal heirs. In Exhibit 139, it is stated in paragraph 3 that the newly added Defendants have moved a separate application for framing of additional issues and the said application is pending.

4 The learned Advocate for the contesting Respondent Nos.1 and 2/ original Plaintiffs submits that the suit had reached the final stage. The Plaintiffs had concluded their oral arguments. At the stroke of beginning the submissions of the Defendants, Defendant No.1 (Kadarkhan) passed away. Had the final arguments been advanced, the matter would have been closed for judgment. In these peculiar circumstances, the daughters of the deceased were arrayed as Defendants and that has led to the filing of the common written statement.

5 I find that Order 22 Rule 4(2) of the Code of Civil Procedure would permit the added Defendant to file a written statement in his/ her capacity of being a legal heir of the deceased defendant. This provision permits such a legal heir to file a written statement befitting his/ her character in the said suit.

6 I find from Order 18 Rule 17 that primarily it is a prerogative of the court to recall the witness for further cross-examination and pose questions to such witness. The Plaintiff and his witnesses have been fully cross examined by the deceased Kadarkhan and all his defendant sons. All the Defendants agreed to lead evidence on their behalf through one son and the evidence was closed.

7 I am not required to consider as to what would be the effect of recasting of issues if the Trial Court allows the application of these Petitioners and if these Petitioners seek leave to lead fresh evidence either after recasting of issues or in their own capacity.

8 This petition is restricted to the effect of Order 18 Rule 17. Though the learned Advocate for the Petitioners has made a valiant effort to contend that the pleadings in Exhibit 139 are not properly drafted, are not happily worded and the prayers are not properly framed, I find from Exhibit 139 that the entire thrust of the Petitioners was towards seeking leave to cross examine all the Plaintiff's witnesses and for which, they had sought a direction to keep all the Plaintiffs present. I do not find that such a request could be covered by Order 18 Rule 17.

9 In view of the above, I do not find that the Trial Court has committed any error in rejecting Exhibit 139. This Writ Petition being devoid of merit is, therefore, dismissed.

10 It is made clear that this Court has not dealt with any aspect

of recasting of issues and rights of the parties to lead evidence either after recasting of issues or any request of the legal heirs to lead evidence.

11 The learned Advocate for the Plaintiffs submits that the suit is of the year 2009. It is a special civil suit and the pendency is not too much. It is, therefore, prayed that the suit may be expedited.

12 Considering this request, the Trial Court would endeavour to decide the said suit on or before 30.06.2019.

kps

(RAVINDRA V. GHUGE, J.)