

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2418 OF 2018

(Shaikh Gafuroddin Shaikh Yasin, died, through representatives and
others Vs. Babakhan Noorkhan Pathan and others)

Mr.V.M.Chate, Advocate for the petitioners.

Mr.H.V.Tungar, Advocate for respondent No.3.

Mr.S.H.Pathan h/f Mr.S.S.Shaikh, Advocate for respondent No.5.

Ms.S.G.Sonawane h/f Mr.B.R.Kedar, Advocate for respondent Nos.1,
7 and 8.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 13/03/2019

PER COURT :

1. On 09/03/2018, when I had considered the submissions of the
learned Advocate for the petitioners, the following order was passed :-

"1] The petitioners are aggrieved by the order dated 30/11/2017 by which the Trial Court has rejected the application Exhibit 200 in Regular Civil Suit No. 70/2006.

2] The petitioners submit that they have preferred the suit for declaration of ownership and perpetual injunction. The suit property was originally given to the father of the plaintiff by the Nizam Government through a document which is termed as a 'Kabala'. It is an Urdu document. A statement is made before me that the said

document on a Rupee One Stamp of 1942, is an original document placed before the Trial Court and an original translation is also placed before the Trial Court. On these statements, it is contended that unfortunately the translator has not been examined and both these original documents have not been proved through his evidence and hence not executed.

3] *All the litigating sides have closed the recording of oral evidence. It was only after the notice of the new advocate of the plaintiffs noticed this deficiency which would seriously affect the rights of the plaintiffs, that he moved an application Exhibit 200 praying for leave to examine the translator and prove the translated document. The said application has been rejected as it was moved after the recording of oral evidence.*

4] *Prima-facie, I am of the view that, in the larger interest of justice and to ensure that the rights of the parties are not truncated, the Trial Court could have considered the said application by imposing some costs.*

5] *As such, issue notice to Respondent Nos.1 and 3 to 8, returnable on 13/04/2018. On the condition that these petitioners would deposit an amount of Rs. 20,000/- (Rupees Twenty Thousand only) before the Trial Court on/or before 26/03/2018, the impugned order shall stand*

stayed and the Trial Court shall adjourn RCS No. 70/2006 till the returnable date in this matter. If the amount as directed, is not deposited, this ad-interim protection shall stand vacated without reference to the Court on 27/03/2018.

6] Copies of the petition paper book shall be supplied for issuance of notice on/or before 16/03/2018, failing which, the petition shall stand dismissed without reference to the Court on 17/03/2018.”

2. The direction to deposit Rs.20,000/- before the Trial Court was complied with after being granted an extension of time.

3. Learned Advocates appearing on behalf of some of the defendants, have strenuously opposed this petition. It is submitted that application Exhibit 200, filed by the petitioners, was for examining the translator of 3 documents viz. an *Urdu Kabala*, *Vasihatnama* and *Mehernama*. There is no dispute that the translated versions of these 3 Urdu documents have been placed on record before the Trial Court by the plaintiffs. Grievance, however, is that though the *Kabala* and the *Mehernama* have been referred to in the pleadings of the plaintiffs, there is no reference to the *Vasihatnama*. Considering the law laid down in **Hanumant**

Gangaram Khamkar (died) through his heirs and LR's Vs. Satish Parbati Gaikwad and others [2018(2) Mh.L.J.868], unless there are pleadings, additional evidence or for that reason, evidence cannot be led.

4. It is further submitted that the description of the suit property as appearing in paragraph No.1 of the plaint, does not match with the revenue records and especially the *Kabala*. The description of the property in the *Kabala* is completely different and this aspect is bound to crop up before the Trial Court since the *Kabala* would not support the description of the property in the plaint.

5. In my view, since there is no pleading as regards the *Vasihatnama* and which is an important aspect to be established in a suit, the plaintiffs cannot be permitted to lead evidence on an aspect which is not pleaded in the plaint. As such, to the extent of the *Vasihatnama*, I would not find fault with the impugned order dated 30/11/2017.

6. However, in so far as the *Kabala* and the *Mehernama* is concerned, keeping in view that the probative value of these

documents would be considered by the Trial Court, there cannot be an impediment for permitting the petitioners to lead evidence to that extent.

7. In view of the above, this petition is partly allowed. The impugned order is modified and Exh.200 is partly allowed thereby permitting the plaintiffs to examine Shri Syed Khalekh Syed Yasin to the extent of proving the translation of the *Kabala* and the *Mehernama*.

8. The plaintiffs shall prepare an affidavit in lieu of examination-in-chief and supply copies thereof to all the defendants, on or before 29/03/2019. The plaintiffs shall keep the said witness present before the Trial Court on 05/04/2019 and the litigating sides are at liberty to cross examine the said witness and conclude the cross examination on the same date. The plaintiffs shall not seek an adjournment and if these directions are not scrupulously followed, the plaintiffs shall lose their right to examine the said witness anytime after 05/04/2019.

9. The Trial Court shall thereafter post the matter on a suitable

date for recording the fresh oral submissions of the litigating sides and shall decide the said suit as expeditiously as possible and preferably on or before 29/06/2019.

10. Respondent Nos. 3, 5, 7 and 8 in this petition shall withdraw the amount of Rs.20,000/- deposited in the trial Court in equal proportions, without conditions, as they have appeared in these proceedings.

11. Since the learned Advocate for respondent No.1 brings it to the notice of the plaintiff that respondent No.1 Babakhan has passed away, the said information shall be considered under Order XXII Rule 10A of the CPC and the plaintiffs shall take steps to bring the LR's of Babakhan, on record in the suit, if not already done, within 30 days from today. If this direction is not complied with, the suit shall stand abated to the extent of respondent No.1 Babakhan.

(Ravindra V.Ghuge, J.)