

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

SECOND APPEAL NO.341 OF 2021

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Daudkhan Hamidkhan Pathan & Ors. ..Appellants
Versus
Smt. Saguma Abdulrahiman Pathan & Ors. ..Respondents

Smt. Anjali Helekar a/w Anu C. Kaladharan & Manali Chipkar, for the
Appellants.

CORAM : NITIN W. SAMBRE, J.

DATE : 7th OCTOBER, 2022

PC.:

1. Deceased Husenkhan/plaintiff executed two Hibanamas i.e. an oral Hibanama in 1979 and written Hibanama on 1st August, 1988 in favour of his wife Bilalbi.
2. Bilalbi/defendant No.2 in turn executed another Hibanama in favour of her brother's son i.e. defendant No.1. Defendant No.3 i.e. appellant herein is the son of brother of deceased Husenkhan.
3. The Hibanama since was executed by Husenkhan before proceeding to Haj, after his return, he questioned Hibanama by his wife in favour of defendant No.1 i.e. her nephew/brother's son.
4. After the death of Husenkhan, defendant No.3 his brother's

son was transposed as plaintiff so as to continue with the challenge. The execution of Hibanama is questioned on following grounds :-

- (a) that it is an unregistered document;
- (b) the possession was not passed on.

5. Both these contentions were resisted by the respondents/defendants in the aforesaid civil suit being RCS No.267 of 1991 which was for declaration of aforesaid Hibahnama illegal and possession. Trial Court vide its impugned judgment and order delivered on 17th December, 2011 dismissed the suit. Appeal being RCA No.88 of 2012 preferred by the present appellants suffered similar fate of dismissal vide order dated 17th December, 2019. As such, this second appeal.

6. Heard counsel for the appellants Smt. Anjali Helekar.

7. According to her, the Hibanama which was questioned by the appellant was nephew of deceased Husenkhan who has preferential right of succession under the Muslim Law. As such, according to her, appellants have every right to question the legality and validity of the Hibanama. She would further urge that once the Hibanama does not contain specific recital of passing of possession to the defendant No.2 who in turn had claimed to have passed on possession to defendant No.1, same ought to have been held to be illegal by both the Courts below. She would further urge that since the

Hibanama was executed during the lifetime of Husenkhan, so also defendant No.2/Bilalbi, it was necessary that document should have been registered one. As such, according to her, the question of law which warrants consideration is, whether both the Courts below have committed an error in recording a finding that the Hibanama which is subject matter of suit is not mandatorily required to be registered. According to her, the additional ground which requires consideration in absence of recitals about the passing of possession, where the Hibanama can be termed as valid document.

8. I have appreciated the said submissions.

9. Appellants have examined witness on their behalf one Mr. Abdul (PW-2 at Exh.103), plaintiff No.7 at Exh.99 and Hakim Mahibub (PW-3 at Exh.104). In addition, documentary evidence in the form of Ration Card is relied on.

10. The fact remains that the witness of the appellants i.e. PW-1 admitted that the deceased Husenkhan got entered the name of deceased defendant No.2 i.e. his wife in the 7/12 extract. Once the aforesaid statement has come from the witness of the appellants, the Court below particularly in the backdrop of the claim in the suit for possession, has rightly formed an opinion as regards passing of possession in favour of defendant No.2/Bilalbi who in turn passed on the same to defendant No.1. Even if we appreciate the claim put forth

by the appellants that the possession was taken over by the defendant No.1 in execution of an order of temporary injunction passed in Regular Suit No.159 of 1991, however, final outcome of the said suit is not brought on record of this Court so also the Trial Courts so as to dwell upon said issue.

11. The fact remains that under the Mohammedan Law, the oral Hibanama is very much admissible. The Appellate Court while dealing with the claim of the validity of the Hibanama has relied on Sections 138, 139, 142, 146 to 150 and 152, 153 and 167 of the Muslim Law by Mulla and specifically recorded a finding that the appellants/plaintiffs have failed to produce documents on record of which the legality is under challenge. The revenue record which is brought on record particularly in relation to the entries in favour of defendant No.1 speaks of the possession of the respondents over the suit property. The evidence of PW-1 to that effect is already considered and dealt with in the matter.

12. As such, there are concurrent findings against the appellants which are borne out of the evidence and the legal position.

13. In this background, present second appeal is sans question of law and same stands dismissed.

(NITIN W. SAMBRE, J.)