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

WRIT PETITION NO. 8710 OF 2015

Ganesh Bapusaheb Darekar,
Age: 32 years, Occu: Education,
R/o. Ghari (Chari No. 8),
Taluka: Kopargaon,
District: Ahmednagar

..PETITIONER
(Orig. Plaintiff No.1)

VERSUS

1. Trupti Bapusaheb Darekar,
Age: 27 years, Occu: Education,
R/o. Ghari (Chari No. 8),
Taluka: Kopargaon,
District: Ahmednagar
2. Pramilabai w/o Bapusaheb Darekar,
Age: 44 year, Occu: Education and
Household, R/o. Ghari (Chari No. 8),
Taluka: Kopargaon,
District: Ahmednagar
3. Dashrath Bhagwat Dighe,
Age: 64 years, Occu: Agriculture
4. Sau. Sumanbai Dashrath Dighe,
Age: 54 years, Occu: Agriculture
and Household
5. Suresh Dashrath Dighe,
Age: 34 years, Occu: Agriculture,

Respondent No. 3, 4 and 5 are
resident of Ves, Taluka: Kopargaon,
District : Ahmednagar

..RESPONDENTS

Mr C. V. Korhalkar, Advocate for petitioner;
Mr P. B. Shirsath, Advocate for respondent Nos. 3 to 5

CORAM : N.W. SAMBRE, J.

**(Date of reserving
the order : 4th December, 2015**

**Date of pronouncing
the order : 7th December, 2015)**

ORAL ORDER :

The present petition is by original plaintiff no.1, in Regular Civil Suit No.52 of 2002, for specific performance and injunction, in relation to the agricultural property located at Kopargaon, District Ahmednagar. The petition is filed seeking following relief :-

“(b) The impugned order dated 10/8/15, below Ex.156 in R.C.S. No.52/2002, by the Court of the Joint Civil Judge, Kopargaon be quashed and set aside, with the direction that the court commissioner has carried out the investigation in respect of the specimen signature and the handwriting of the plaintiff No.2 which was duly recognized by the trial court by its order granting the application dated 17/10/2014, thereby overriding and or setting aside its own order, dated 25/8/14, below Ex.68 filed by the plaintiff-petitioner in the companion suit, being R.C.S. No.166/2002.”

2. Learned Counsel appearing on behalf of the petitioner, so as to give history of the present proceedings, has invited my attention to the order dated 27th November, 2007, passed below Exh.52, wherein the Trial Court has directed the alleged instrument submitted along Exh.23, for sending to Handwriting Expert for its analysis, five specimen signatures and five admitted signatures of Pramilabai and the defendants.

3. It appears that the petitioner-plaintiff no.1 since has not complied with the said order below Exh.52, the learned Trial Court, on 26th March, 2008, having noted that the petitioner-plaintiff no.1 has failed to produce

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the handwritings of Pramilabai, so also the specimen signatures, hence ignored the order below Exh.52 and ordered to proceed with the suit.

4. The petitioner then moved application Exh.68, complying the short-falls as were noted in the earlier order, which has prompted the learned Trial Court to pass an order on 25th August, 2014, of rejecting the specimen signatures and handwriting as are produced with Exh.61, as the same were not obtained before the Presiding Officer, however, directed the plaintiff to produce the admitted signatures of Pramilabai on other documents and specimen handwriting.

5. It appears that the petitioner thereafter complied with the same and pursuant to the prayer of the petitioner at Exh.73, on or about 17th October, 2014 granted permission to take photographs and copies of the orders, in compliance with Exh.68.

6. Subsequent to above, the evidence of the plaintiff was recorded in the matter, so also the evidence of the plaintiff's witness – Handwriting Expert was also complete and evidence of defendant has commenced. At such stage, the Handwriting Expert, namely, Dr. Shailesh Chandajkar, moved an application at Exh.153 bringing it to the notice of the Court that he has taken from the record such specimen signatures, which were disallowed by the Court by an order dated 25th August, 2014, passed below Exh.68 and as such, according to him, the line of examination of the signature adopted by him was completely misdirected. He then prayed

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that he be granted permission to carry out re-examination of the signatures of Smt. Pramilabai Darekar, in compliance with the earlier orders, as the earlier mistake committed by him was due to inadvertence and because of his mistake plaintiff may not be made to suffer.

7. The said application Exh.153 was rejected by the Court by an order dated 17th July, 2015, on the ground that the evidence of the said Expert is already over and in case if the permission is granted, what will be the effect of same on his evidence which was already recorded. In absence of any provision therefor, the same is not permissible. The Court then observed that the claim will be considered in the light of the prayer made in application Exh.156 and directed the defendants to complete the cross-examination. It is no doubt true that the said application is moved at the time of cross-examination of the said Expert witness.

8. The application Exh.156 is moved under Order XXVI, Rules 9 and 10 and section 151 of the Code of Civil Procedure by the plaintiff, with the above referred background, with a prayer for reappointment of Court Commissioner, in view of misdirected investigation carried out by the Handwriting Expert, as is narrated herein before, in Exh.153.

9. Learned Trial Court, after considering the respective submissions, was pleased to reject the same by an order dated 10th August, 2015, passed below Exh.156, on the ground that the said Handwriting Expert and the Advocate for the petitioner were not diligent in carrying out their duties.

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The learned Trial Court then proceeded to analyze that the burden to prove the document was on the defendant, as the same was not challenged by the plaintiff and then gave finding that since the parties are bound by the pleadings, no purpose will be served, if the matter is re-referred to Expert's opinion. The Court then noticed that even after a period of twelve years, suit has not gained any momentum and as such, rejected the application. Thus, the present petition.

10. Learned Counsel appearing on behalf of the petitioner, while questioning the legality and validity of both the order, i.e. below Exhs. 153 and 156, would urge that once the Court has formed opinion that a case for appointment of Court Commissioner, under Order XXVI, Rules 9 and 10 of the Code of Civil Procedure was made out and has granted the same, according to him, the said procedure that was adopted the order thereon and must be taken to its logical end. He would then urge that the evidence that is recorded, in spite of request under Exh.153 of Expert witness Dr. Chandajkar, will be required to be ignored, as the same is based on an admitted incorrect investigation carried out by the said witness. He would then urge that both the applications need to be allowed.

11. Mr Shirsath, learned Counsel appearing on behalf of respondents no.3 to 5, i.e. original defendants, would urge that the suit is pending since 2002 and for last twelve years, there is hardly any progress in the matter. He would then urge that the defendants are under constant pressure of the suit in question and in view thereof, the learned Trial Court, upon taking

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into account the conduct of respective parties, has rightly rejected the application Exh.156. He would then urge that the mistake on the part of the Handwriting Expert or the Lawyers of the plaintiff, is causing delay, as the same was intentional and *mala fide* and prayed for rejection of the petition.

12. Having bestowed my anxious thought over the submissions made, it is no doubt true that, the provisions of Order XXVI, Rules 9 and 10 of the Code of Civil Procedure are attracted at the time of recording of evidence in a suit. Pursuant thereto, the learned Trial Court has allowed reference to the Handwriting Expert on 27th November, 2007, however, same was ignored and suit proceeded further. As such, it is difficult to blame the petitioner for delay from 2007 till 2014, particularly till 25th August, 2014, when the Court disallowed the documents placed on record, for referring the issue for opinion of handwriting Expert and proceeded with the suit.

13. Learned Trial Court, in exercise of powers under Order XXVI, Rule 10 of the Code of Civil Procedure, has allowed the Expert to take the documents and photographs of the signature for its examination. It is required to be noted here that an Expert, though for the purpose of drawing photographs was having access to the original record, yet it cannot be inferred that it was well within his knowledge that the documents/the signature on which were disallowed by the Court by order dated 25th August, 2014, were taken into account for the purpose of verification of the signatures. The inadvertence/mistake as is noted, which has prompted the

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said Expert to move an application for re-examination of the documents in question, in my opinion, should have been granted by the Court below, particularly when it was moved at the stage of his cross-examination. Learned Trial Court, rather has proceeded with the cross-examination of the said Expert witness and has now formed to be basis for rejecting application Exh.156.

14. The law laid down by the Apex Court, in the matter of **Rafiq & anr. vs. Munshilal & anr.**, reported in **1981 AIR 1400**, is worth to be noted here, wherein the Apex Court has noted that for act for of a lawyer, a litigant cannot be blamed. In the present case, just because the leaned Counsel for the petitioner was not attentive or even the Expert also at the time of collecting the documents for the purpose of examination, the petitioner-plaintiff cannot be made to suffer.

15. It is also required to be noted here that the effect of already recorded evidence of the Expert would be that the said evidence will be required to be ignored, pursuant to the fact that Expert's evidence that is brought on record, was on misdirected examination/evaluation of the signatures, as signatures that were taken into account by the Expert for the purpose of evaluation, were not obtained before the Presiding Officer of the Court. Once the said fact is accepted, evidence of Handwriting Expert will also be required to be ignored and upon submission of fresh opinion, the same will be formed to be the part of the trial.

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16. It is also required to be noted here that the loss of time caused to the Court and the defendants cannot be ignored, particularly when the matter has reached at some what advanced stage.

17. It is also required to be noted here that the object with which the Expert's evidence is brought on record, is to corroborate the other documentary or oral evidence on record and Expert's opinion and the evidence, is not required to be appreciated independently. Such Expert is always subject to cross-examination by the contesting parties and as such, parties thereto get appropriate right to defend its case before the Court, in the light of evidence of the Expert.

18. In view of above, I pass the following order :-

The order dated 10th August, 2015, passed by Joint Civil Judge Junior Division, Kopargaon, below Exh.156, in Regular Civil Suit No.52 of 2002, is hereby set aside and said application is granted, subject to following terms :-

(a) The petitioner-plaintiff no.1 shall pay costs of Rs.15,000/- to the defendants, particularly defendants no.3 to 5, which shall be deposited by him before the Trial Court, within a period of four weeks from today;

(b) The Hand-writing Expert shall immediately collect the samples from the record of the learned Trial Court, in the light of the order passed by the

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Court on 25th August, 2014, below Exh.68, the order passed below Exh.73 and hall submit his report, as expeditiously as possible and in any case, within a period of fifteen days from the date of collection of samples, which he will be entitled to do within a period of one week from the date of passing of the order;

(c) The learned Trial Court shall ignore all evidence of said witness, which was recorded earlier, so also including that of the documentary and oral evidence of the said Expert, pursuant to mistaken examination carried out by him;

(d) The said Expert will be subjected to fresh examination-in-chief and cross-examination.

Learned Trial Court shall decide the suit as expeditiously as possible.

Writ Petition stands allowed in terms of above directions.

(N.W. SAMBRE, J.)

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