

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

WRIT PETITION NO.67 OF 2015

Kamleshsingh Harnamsingh Chowhan : Petitioner.
Versus
Dilip Jham : Respondent.

**Mr. Vivek Kantawala a/w Mr. Amey Patil i/by Vivek Kantawala & Co. for
the Petitioner.**
Mr. S S Redij for the Respondent.

CORAM : R. M. SAVANT, J.
DATE : 26th November 2015

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 08/11/2015 passed by the learned Judge, Small Causes Court, Mumbai by which order the application (Exhibit 75) for issuance of witness summons to the Assistant Medical Officer, Sub-Registrar of Births and Deaths, G/North Ward, Municipal Corporation, Greater Mumbai came to be allowed.

2 The Petitioner herein is the original Plaintiff and the Respondent herein is the original Defendant No.2. The Plaintiff has closed his evidence on 25/06/2013. Thereafter the evidence of the Defendant No.2 has started. The Defendant No.2 has sought to produce by way of documentary evidence the death certificate of one Nanoomal Issardas Jham purportedly being the death certificate of the Defendant No.1 Nanumal Iswardas. The Trial Court has not exhibited the said document but has marked the same as "Article" and has

observed in the order dated 11/10/2013 that the said document would remain marked as "Article" unless the details mentioned therein about the death of the person are proved which relate to the name of the Defendant No.1. The Trial Court has therefore kept the issue of exhibition of the said document open subject to the Defendant No.2 who has produced the said document proving the same. The said order dated 11/10/2013 rejecting the application for exhibiting the said death certificate was challenged by the Defendant No.2 by filing Writ Petition No.12111 of 2013 in this Court. A learned Single Judge of this Court did not deem it appropriate to interfere with the order dated 11/10/2013 for the reasons mentioned in the said order amongst which is the reason that there is a discrepancy in the date mentioned in the plaint and the date appearing in the said certificate.

3 It is after the dismissal of the said Writ Petition that the instant application (Exhibit 75) came to be filed in September 2014. The said application (Exhibit 75) was founded on the fact that the said document is a very important document in the context of the Defendant No.2 and therefore witness summons was requested to be issued to the Assistant Medical officer, Sub-Registrar of Births and Deaths, G/North Ward, Municipal Corporation, Greater Mumbai. The said application was replied to on behalf of the original Plaintiff and the said application was opposed to on the ground that since the Trial Court has already rejected the application for exhibiting the document

which order has been confirmed by this Court and that the said application is in violation of the provisions of Order XVI Rule 1 of the Code of Civil Procedure. In support of his contention before the Trial Court, the Plaintiff sought to place reliance on the judgment of this Court reported in 2014(5) Mh. L.J. 321 in the matter of Sanjay Sham Bagade and another v/s. Ramesh Hari Madan and others which is on issuance of witness summons under Order XVI of the Code of Civil Procedure. The Trial Court considered the said application and as indicated above has by the impugned order dated 08/11/2014 allowed the same. The Trial Court was of the view that since there is a dispute as regards the death of Defendant No.1 and since the Defendant No.2 wants to prove that the Defendant No.1 is not living and therefore wants to adduce evidence of the authority which has issued the death certificate an opportunity should be granted to the Defendant No.2. The Trial Court has accordingly allowed the said application by the impugned order dated 08/11/2014.

4 The learned counsel appearing on behalf of the Petitioner i.e. the original Plaintiff Shri Kantawala sought to reiterate the case of the Plaintiff before the Trial Court. In so far as opposition to the said application (Exhibit 75) is concerned, the learned counsel sought to place reliance on judgment of this Court in *Sanjay Bagade's* case (supra) to contend that the application if allowed would be in violation of Order XVI of the Code of Civil Procedure. In

my view, there is no merit in the said submission of the learned counsel for the Petitioner. As indicated herein above, the said document has been marked as “Article” subject to the same being proved by the Defendant No.2. This is a case where the evidence of the Defendant No.2 is not yet closed. It is having regard to the said fact that the Trial Court was right in allowing the application for witness summons being issued to the concerned authority as the Defendant No.2 ought to be given an opportunity to prove the said document. In so far as **Sanjay Bagade's** case (supra) is concerned, the facts involved in the said case stand apart from the facts involved in the present case. In the case of **Sanjay Bagade** the Plaintiff's evidence was over and thereafter the issuance of witness summons was sought on behalf of the Plaintiff. It is in the said context, this Court observed that unless the ground is made out, no witness summons could be issued. The facts in the instant case, as can be seen, are that the said document has been marked as “Article” subject to the same being proved by the Defendant No.2. The evidence of the Defendant No.2 is on going and therefore the impugned order can be justified also on the ground of the same being in the interest of a fair trial. In that view of the matter, no case for interference in the writ jurisdiction of this Court is made out. The above Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]