

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 12613 OF 2015**

Shri Bhanudas Bhimrao Patil

..Petitioner

Vs

Shri Rajshekhar Shivmurtayya
Hiremath and Ors

.. Respondents

Ms. A.R.S.Baxi, Advocate for Petitioner.

CORAM : R.G.KETKAR,J.

DATE : 04/01/2016

PC:

1. Heard Ms. A.R.S Baxi, learned counsel for the petitioner at length.
2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 31.7.2014 passed by the learned Civil Judge, Jr. Dn, Miraj below Exhibit 69 in R.C.S. No.38 of 2012. By that order, the learned trial Judge rejected the application made by the petitioner, hereinafter referred to as plaintiff', for appointment of Commissioner under Order XXVI Rule 9 read with Section 75 of CPC for sending forms no. 35 and 60 for opinion of handwriting expert.
3. Ms. Baxi submitted that the plaintiff has instituted suit for declaration that fiat car bearing registration no. MH-10-E 1518 belongs to him and for possession of the said vehicle. The

plaintiff has also claimed damages to the tune of Rs.3,40,000/- from the defendant. The plaintiff filed application Exh.69, inter alia, on the ground that forms no.35 and 60 are not in his handwriting and also they do not bear his signatures. Signatures on forms no. 35 and 60 may be compared with the admitted signatures of the plaintiff by sending these forms and admitted signatures to the documents to the handwriting expert. She submitted that earlier the plaintiff had filed application Exh.63 on 2.3.2007 for identical reliefs and in view of the direction given by the Court, the plaintiff did not press that application. Now, the suit is ripe for recording evidence and, therefore, the plaintiff has filed fresh application. The learned trial judge, however, rejected the application on the ground that as the plaintiff did not press earlier application, the present application cannot be entertained. Apart from that, the documents were signed in the year 1999 and though the documents relating to transfer of vehicle show that it is upto 2001 and also the stamp of the sale deed shows that it is of 2001. Therefore, prima facie, it cannot be inferred that same of 2001 was signed in the year 1999.

4. As noted earlier, the plaintiff had filed application dated 2.3.2007 at Exh.63 for identical relief. It was not pressed by the plaintiff. The reason given by Ms Baxi that at the direction of the court the plaintiff did not proceed, the application cannot be

accepted. While rejecting the application, the learned trial Judge noted that the suit is of the year 2003 and since 2008 it is fixed for hearing and at that stage the plaintiff has filed application. The conduct of the plaintiff shows that he wants to prolong the matter and the initially burden is on him to prove that the documents are forged and, therefore, at this juncture there is no need to take opinion of the expert. In other words, the learned trial Judge was of the view that at this stage opinion of the expert is not necessary. In view thereof, as also having regard to the fact that the earlier application filed by the plaintiff for the self-same relief was not pressed, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order affecting the decision of the case, may be set forth as a ground of objection in Memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)