

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

954 WRIT PETITION NO.5681 OF 2014

TRIMBAK SITARAM ALIAS SITYA MUNESHWAR
VERSUS
VASANT UNDRAJI ALIAS UNDRYA MUNESHWAR AND OTHERS

...
Advocate for Petitioner : Mr. Uday S. Malte
...

CORAM : SANDEEP V. MARNE, J.

DATE : 24-11-2022

PER COURT :

. By this petition, petitioner has challenged two orders passed by Civil Judge Junior Division, Mahur. By order dated 16.11.2013 petitioner's application for striking off defence of defendant no.3 has been rejected and by order dated 05.04.2014 petitioner's application for sending the Will for verification of signature to the handwriting expert is rejected.

2. One of the prayers sought for in the plaint is for declaration to the effect that the alleged Will dated 22.01.2010 be declared as null and void. Defendant no.3 has been relying on the alleged Will dated 22.01.2010. Plaintiff disputes existence of such a Will. Plaintiff sought production of original Will before the Court and the Court directed defendant no.3 to produce the same. It appears that the defence of defendant no.3 about the original Will

being filed before revenue authorities has apparently been turned out to be false in view of the Tahsildar's letter that the original Will was never filed before him. Defendant no.3 did not obey the order passed by the trial Court and failed to produce the original Will. Petitioner therefore moved application at Exh.91 for striking off the defence of defendant no.3 for violation of order passed by the trial Court. An application seeking review of order dated 16.11.2013 has been rejected on 02.04.2014.

3. It is well settled law that the provision for striking off defence of defendant is a drastic provision and should be used sparingly. Reference in this regard can be made on the judgment of this Court in **Kavita Krishnamurthy v. K.N. Krishnamurthy, 2015 (1) Mh.L.J. 941.**

4. The Will is being relied upon by defendant no.3. It is his responsibility to produce original Will and to prove its existence. If defendant no.3 fails to produce original Will, he will suffer in the matter of his defence. It is also a matter of fact that there are various other prayers made in the suit unconnected with the Will. Therefore striking off the defence of defendant no.3 is not warranted. The trial Court has rightly rejected plaintiff's application at Exh.91 by order

dated 16.11.2013.

5. Coming to the order dated 05.04.2014 passed below Exh.113, that application was filed seeking sending of the Will for signature verification to the handwriting expert. The trial Court has proceeded to reject the application holding that there are special modes of proving existence of a Will by examination of the attesting witnesses. The trial Court has held that if a doubt is cast on existence of Will by plaintiff, the burden lies on defendant no.2 to repel such doubts and to prove that the Will is a genuine document. Thus, the entire responsibility of proving that the Will is a validly executed document is on the shoulders of defendant no.3 alone. So far as defendant no.3 has failed to produce original Will before the Court despite direction issued by the trial Court in that regard. It is not known whether defendant no.3 would actually produce the original Will before the Court or not and whether he will examine the attesting witnesses, if any. In absence of any attempt being made by defendant no.3 to prove the Will, it is too premature to send the Will for signature verification by an expert. Of course, if an occasion arises for plaintiff after recording of evidence of defendant no.3, he would be at liberty to move an appropriate application for sending the Will for signature verification. Reserving that right in favour of plaintiff,

the order passed by the trial Court on 05.04.2014 is upheld.

6. The writ petition is devoid of merits and the same is dismissed without any orders as to costs.

(SANDEEP V. MARNE, J.)

GGP