

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

WRIT PETITION NO.8317 OF 2023

Shivaji Shrikant Mahadik Petitioner

Vs.

Vinayak Kashinath Natu Respondent

Mr. Padmanabh D. Pise a/w. Mr. Sejal A. Hariyan i/b P.
Padmanabh & Associates for the Petitioner.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 11 JULY 2023.

P. C.

1. Heard.

2. The challenge in the petition is to the order dated 3/5/2023 allowing the petitioner's application for sending the agreement in question to the handwriting expert.

3. The petitioner-the original plaintiff has preferred Special Civil Suit No.329/2022 seeking specific performance of the agreement of sale deed dated 16/5/2019 executed between the petitioner and defendant. Defendant has resisted the claim by contending that the signature of the defendant on the Deed in

question is forged and fabricated and that he has never signed.

4. Heard Mr. Padmanabh D. Pise for the petitioner.

5. Learned counsel appearing for the petitioner submits that by way of present application the defendant is seeking to collect evidence prior to framing of the issues. He would submit that application under section 45 of the Evidence Act cannot be preferred at this stage specifically when the matter is fixed for hearing on application Exhibit 5 .

6. Learned counsel for the petitioner has relied upon the decision of the Andhra Pradesh High Court in the case of *J. L. Babu v. S. Gowri Shankar & Anr., AIR 2009 Andhra Pradesh 203.*

7. Considered the submissions.

8. In the written statement the specific case of the defendant is that he has not executed document in question and has not signed these agreement and that the signatures appearing on the said document are forged and fabricated. Before the trial

could commence the defendant filed an application under Order 26 Rule 10A of CPC read with section 45 of Evidence Act with a prayer to send the disputed agreement for opinion of handwriting expert. The provisions of section 45 of the Indian Evidence Act provide that when the Court has to form an opinion as to identity of handwriting, the opinions upon that point of persons specially skilled are relevant facts. In other words, if the Court is of the opinion that experts report is required to assist at arriving at a conclusion it is open to the Court to send the document in question for expert's opinion. This is precisely what has been done in the present case. Learned counsel is not able to demonstrate any provision of law which indicates at which stage such an application can be made. The fact remains that even if the document is sent for opinion of handwriting expert the same will have to be proved by putting the handwriting expert into the witness box and handwriting expert will be subject to cross examination. It cannot be said that merely on the basis of opinion of handwriting expert , trial Court would conclude the issue as regards the signature on the alleged document. It need not be stated that opinion of the handwriting expert is not conclusive. The objection of learned

counsel for petitioner is that the sending of disputed document to handwriting expert cannot be permitted before framing of issues. I am not inclined to accept the submission that it is the discretion of the Court to permit local investigation if it considers it requisite for purpose of elucidating matter in dispute. In present case as the defendant has disputed his signature the handwriting experts opinion will assist Court at arriving at right conclusion. In that view of the matter, there is no cause for interference with the impugned order.

9. As regards the decision of the Andhra Pradesh High Court relied upon by learned counsel for petitioner in the facts of that case the prayer was made for sending of the document under section 45 of the Evidence Act to the Expert. The Andhra Pradesh High Court has held that burden of proving agreement is upon the plaintiff. The Court further observed the priority to be followed in context of adducing evidence and observed that it could not at all be the genuine concern of the respondents to initiate steps to disprove it. The Court held that taking any steps under Section 45 before the actual stand of parties emerges is prone to lead to several

complications. In my opinion, the said decision is not a decision for proposition of law that application under Order 26 Rule 10A of CPC read with section 45 of the Evidence Act for sending document to handwriting expert cannot be made before commencement of the trial. The decision is therefore not applicable to the facts of the case.

10. Considering the above, the writ petition stands dismissed.

SHARMILA U. DESHMUKH, J.