IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3220 OF 2015

M/s. Harbell Hotels Pvt. Ltd.
& Another .. Petitioners.
V/s.
Mr. Mirza Nazeer Beg
& Others .. Respondents.

Mr. P. S. Dani, Sr. Advocate i/b. Mr. T. D. Deshmukh, for the Petitioners.
Mr. Nikhil Wadikar i/b. Mr. N. V. Pawar, for Respondent No.1.

CORAM: M.S.SONAK,J.
DATE : 13th APRIL, 2015.

P.C:-

Mr. Dani, learned Senior Counsel appearing for the Petitioners seeks leave to delete Respondent Nos.2 and 3 for the purpose of the present Petition. Leave as prayed for, is granted. Amendment to be carried out forthwith.

2 This Petition challenges certain clauses from the portion of the operative order dated 24th February, 2015 made by Civil Judge, Senior Division, Satara below Exh. 198 in Special Civil Suit No.70 of 2010 as also orders dated 30th March, 2015 which have effect of exhibiting Power of Attorney dated 5th October, 2009 and disabling the Petitioners from cross examining the Respondents, inter alia with regard to the said Power of Attorney.

3 The impugned order, in fact, allows Petitioners' application under Exh. 198 and ordered the impoundment of Power of Attorney dated 5th October, 2009. However, by the same order, the learned Civil Judge proceeded to impound Power of Attorney dated 19th August, 2005 and letter of confirmation dated 28th January, 2010, which were the Petitioners' documents. Further, clause 4 of the impugned order also suggests that the Civil Court has itself proceeded to determine valuation of the property in relation to which the Power of Attorney dated 5th October, 2009 pertains. The Powers of Attorney and letter of confirmation have been forwarded to the Collector of Stamps, Satara for collection of stamp duty and penalty payable. Further, directions have been issued to proceed with the suit, keeping open the issue of admissibility of the Powers of Attorney.

4 Mr. Dani, learned Senior Counsel for the Petitioners, submits that clauses 2,4 and 7 of the operative portion of the impugned order dated 24th February, 2015 are required to be interfered with, because the same run counter to the decisions of this Court in case of ***Santosh Anant Raut v/s. Pukharaj Chogmal Rathod 2010 (4) Mh. L. J. 22*** and ***M/s. Conwood Agencies Pvt. Ltd. v/s. Namdeo P. Panchal & Another 2005 (1) ALL MR 335.*** Mr. Dani submits that the subsequent orders made on 30th March 2005 are to a certain extent consequential upon the Petitioners expressing inability to examine the Respondents, in the context of impounded Power of Attorney dated 5th October, 2009.

5 Mr. Wadikar, learned Counsel appearing for the Respondent No.1 submitted that there are directions issues in Writ Petition Nos. No.1670 of 2010 and 1178 of 2011 for expeditious disposal of the suit.

The Petitioners are not co-operating in the matter of expeditious disposal of the suit and the institution of the present Petition is yet another attempt to protract the proceedings in the suit. Mr. Wadikar, learned Counsel appearing for Respondent No.1 further submits that there is no illegality in the impugned order and the valuation was determined by the Civil Judge, on the basis of averments in the Petitioners' own application. Mr. Wadikar, learned Counsel appearing for Respondent No.1 submits that there is no bar to the trial in the suit proceedings, keeping open the issue of admissibility of Powers of Attorney.

6 Mr. Wadikar, further submitted that the Collector of Stamps, Satara had already determined the stamp duty in respect of Power of Attorney dated 5th October, 2009 and in so determining the same, the Collector, has gone by his own valuation. Mr. Wadikar submitted that the Respondents have no objections to the determination and shall, within a period of one week pay the deficit stamp duty and penalty.

7 The rival contentions now fall for determination.

8 The operative portion of the impugned order dated 24th February, 2015 reads thus:-

> *"(1) Application (Exh. 198) stands allowed.*
>
> *(2) Power of Attorney (Exh. 192/1) dated 05/10/2009, Power of Attorney (Exh. 25/4) dated 19/08/2005 and letter of confirmation (Exh. 25/6) dated 28/01/2010, are taken into custody of this Court.*
>
> *(3) The concerned clerk is directed to prepare certified copies of these documents and forward the same to the Collector of Stamp, Satara and call the amount of stamp duty and penalty thereon.*

(4) The Collector of Stamps, Satara shall inform to this Court the amount of stamp duty and penalty on the amount of Rs.5,00,00,000/- (Rs. Five Crores only) from the date of execution of Power of Attorneys.

(5) Plaintiff and the defendants shall deposit amount in the court within 30 days thereafter. Meanwhile, the plaintiff and the defendants shall proceed with the suit, as if there is no order is passed till the stage of argument, as the matter is time bound.

(6) If the parties to the suit bring the order of stay, then the Court will stop with the proceeding.

(7) The Court will proceed with the suit keeping open regarding admissibility of the Power of Attorneys.

(8) If the Collector of Stamp, Satara failed to obey the order, the Court will initiate legal action against the authority.

(9) Parties concern are directed to submit explanation as to why charge of stamp duty and penalty should not be kept on leasehold rights.

(10) Costs in cause.

9 The situation, which has arisen, is required to be governed by the provisions contained in the Sections 31 to 34 of the Bombay Stamps Act, 1948 (said Act). These provisions, cumulatively lay down the procedure to be adopted, when a document, which is alleged to be insufficiently stamped, is sought to be tendered in evidence before the Court. In this regard, reference can usefully be made to the decision of this Court in case of *Santosh Anant Raut (supra)*, which, upon analyzing the provisions contained in Sections 31 to 34 of the said Act, has laid down the following:-

*“**5:-** When a document is sought to be tendered in evidence before the Court, if it is found that the document/ instrument is not sufficiently stamped, it is the duty of the Court to impound the said document in accordance with section 33 of the said Act. In view of section 34 of the said Act, the said document cannot be admitted in evidence. Proviso makes it clear that if the deficit stamp duty is paid and if penalty as provided therein is paid, the document can be admitted in evidence. Under the said Act, no power is conferred on the Court to determine the stamp duty chargeable in respect of any instrument. In view of sections 31 and 32 of the said Act, the said power is vested in the Collector. Jurisdiction of the Civil Court is confined to recording a finding on the question whether an instrument is duly stamped. The Civil Court cannot determine the stamp duty payable on a particular instrument.*

***6:-** If the Civil Court finds that the document which is not duly stamped is sought to be tendered in evidence, the power under section 33 of the said Act will have to be exercised and the document will have to be impounded. After impounding the document, the Court is under an obligation to send a true copy of the said document o the adjudication of the Collector in accordance with sub-section (3) of section 32-A of the said Act. Only after adjudication is made by the Collector, the party relying upon the document will have to pay deficit stamp duty and penalty. After a certificate issued by the Collector regarding compliance with the requirement of payment of deficit stamp duty and penalty, Civil Court can exercise power under proviso (a) to section 34 of the said Act. Thereafter, the document can be admitted in evidence if the same is proved and if it is otherwise admissible in evidence.*

***7:-** There is nothing wrong if a party relying upon a document applies for impounding his own document to enable the Court to exercise power under proviso (a) to section 34. In the present case, though the trial Court was justified in impounding the document, further exercise made by the trial Court of determining of deficit stamp duty and penalty is without jurisdiction and to that extent, the impugned order will have to be modified. A grievance has been made by the learned*

> *counsel for the petitioner that the document is already marked as exhibit. Even if the document is marked as exhibit, it cannot be read in evidence unless the procedure as laid down above is followed."*

10 Similarly, reference can usefully be made to the decision of this Court in the case of *M/s. Conwood Agencies Pvt. Ltd. (supra)*, which has, *inter alia*, laid down that where admissibility of an instrument is objected on the ground that it is insufficiently stamped, the Court, at the outset, has to determine the question of admissibility, before permitting any party to rely upon such instrument in the course of evidence. This decision also makes reference to the procedure to be adopted by the Court when confronted with an instrument, which may be insufficiently stamped. Paragraphs 7.1 and 7.2, which are relevant, read thus:-

> *"**7.1:-** The provisions contained in sections 33, 34 and 37 of the Act of 1958 in particular, are clear which provide the procedure to be adopted by a Court whenever a question is raised that an instrument is not duly stamped. Whenever such instrument is tendered in evidence, the Court has to impound it as obligated by section 33 and then proceed as required by section 34. That section empowers the Court to recover deficit stamp duty along with penalty. Section 33 provides that if a person having by law authority to receive evidence and the Civil Court is one such person before whom any document chargeable with duty is produced and it is found that such document is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 34 prohibits its admission in evidence till such duty and penalty is paid. Therefore, unless the stamp duty and penalty is paid, such document is not admissible in evidence. In other words, such document cannot be received in evidence and the opposite party cannot be invited to cross examine the witness in respect of such document.*

> ***7.2:-*** *Sub-section (1) of section 37 provides that the Court has power to admit the document in evidence if the party producing the same would pay the stamp duty together with a penalty as provided by section 34 or duty as provided by section 36. When the Court chooses to admit the document on compliance with such condition, the Court need forward only a copy of the document to the Collector, together with the amount collected from the party for taking adjudicatory steps. But if the party refuses to pay the amount aforestated, the Court has no other option but to impound the document and forward the same to the Collector, as provided under sub-section (2) of section 37. On receipt of the document through either of the said avenues the Collector has to adjudicate on the question of deficiency of stamp duty. If the Collector is of the opinion that such document is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same together with the penalty provided by section 34. Unless the aforestated procedure is scrupulously followed by the Court, a document which is not duly stamped is not liable to be looked into for any purpose or received in evidence. The question of inviting the opposite party to cross-examine the witness to prove such document, does not arise. The opposite party cannot be compelled to cross-examine the witness unless the procedure contemplated under sections 33, 34 and in particular 37 of the Act of 1958 is scrupulously complied with."*

11 Applying the aforesaid principles, to the facts and circumstances of the present case, it cannot be said that the Civil Judge exceeded jurisdiction in impounding the Power of Attorneys dated 5th October, 2009, 19th August, 2005 and Letter of Confirmation dated 28th January, 2010. It is true that no application was made, either by the Respondents or any other parties, seeking impoundment of the Petitioners' documents i.e. Power of Attorney dated 19th August, 2005 and Letter of Confirmation dated 28th January, 2010. However, once it is established, that at least, *prima facie*, such documents were also insufficiently

stamped, nothing barred the learned Civil Judge from *suo moto* exercising powers under Sections 31 to 34 of the said Act. Accordingly, the challenge to the impoundment of the Petitioners' documents i.e., Power of Attorney dated 19th August 2005 and Letter of Confirmation dated 28th January, 2010 is required to be rejected.

12 Mr. Dani is right in his submission that the issue of valuation was required to be left for determination of the Collector of Stamps. To this extent, the direction contained in clause '4' of the operative order, is incorrect and is required to be set aside. However, there is no necessity to fault the determination of the stamp duty and penalty by the Collector of Stamps, Satara in so far as the Power of Attorney dated 5th October, 2009 is concerned, because, it was submitted that independent valuation has been made by the Collector and the same is in the range of Rs.4.5 Crores or thereabouts. Therefore, even though the direction in clause '4' of the operative part of the impugned order dated 24th February, 2015 is being set aside, there is no necessity to direct the Collector of Stamps, Satara to redetermine the court fees and penalty upon the Power of Attorney dated 5th October, 2009. The direction in clause '7' of the operative part of the impugned order dated 24th February, 2015, is also inconsistent with the law laid down by this Court in the two decision referred to earlier. The issue of admissibility of documents, is required to be decided prior to insisting that parties leading evidence, in the context of the documents alleged to be insufficiently stamped. Accordingly, the direction in clause '7' of the operative part of the impugned order dated 24th February, 2015 is set aside. As a result of setting aside the direction in clause '7', the two orders dated 30th March, 2015, which are, in a sense consequential, are required to be set aside and are hereby set aside.

13 The suit can now proceed in so far as cross-examination of the Respondents is concerned. This is because the stamp duty and penalty in respect of Power of Attorney dated 5th October, 2009 has already been determined by the Collector and the learned counsel for the Respondents has made a statement that the stamp duty and penalty, so determined, will be paid within a period of one week from today. Accordingly, it is directed that the cross-examination of the Respondents shall proceed no sooner such stamp duty and penalty upon Power of Attorney dated 5th October, 2009 is paid by the Respondents and such fact is brought to the notice of the learned Civil Judge by the parties.

14 In so far as the evidence, in respect of the Petitioners' documents, i.e., Power of Attorney dated 19th August, 2005 and Letter of Confirmation dated 28th January, 2010 is concerned, the same can commence, once the Collector of Stamps, Satara has determined the stamp duty and penalty (if any) payable thereon. Considering that there are directions for expeditious disposal of the suit, it would be appropriate if the Collector of Stamps, Satara decides such issue within a period of one month from the receipt of certified copy of the said document from the Civil Court. The Civil Court to forthwith transmit the certified copy as directed in the impugned order itself to the Collector of Stamps, Satara, in case, the same has not already been done in the meanwhile. The Collector is directed to afford an opportunity of hearing to all parties concerned before determining stamp duty and penalty, if any. This is more so, because there was no formal application to impound the Petitioners' documents, i.e. Power of Attorney dated 19th August, 2005 and Letter of Confirmation dated 28th January, 2010. The Petitioners are granted liberty

to make formal application to the Collector of Stamps, Satara within a period of one week from today, urging adjudication of stamp duty and penalty (if any) upon the said documents. Further, in the said application, the Petitioners are at liberty to urge that the impounded documents are only some out of the series of documents, used in a single transaction, as contemplated by Section 4 of the said Act. Needless to add, that decisions in this regard, shall be taken by the Collector of Stamps, Satara on its own merits and in accordance with law. It is clarified that this Court has not expressed any opinion in such matters.

15 As there are directions for disposal of the suit in time bound manner, it is only appropriate that the Civil Court decides the suit with expedition, no sooner the decision from the Collector of Stamps, Satara is received in the matter the Petitioners' impounded documents. However, considering that time of one month is granted to the Collector of Stamps, Satara to determine the stamp duty and penalty payable on the Petitioners' impounded documents, the period for disposal of the suit is extended upto 30th June, 2015.

16 Accordingly, Rule is made partly absolute to the aforesaid extent only. There shall be no order as to costs.

17 All parties to act upon an authenticated copy of this order.

(M.S.SONAK,J.)