

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8697 OF 2014**

Sou Kamal Ramdas Kurade and Ors	Vs	Petitioners
Shri Laxman Mahadu Shinde and Ors		.. Respondents

Mr. Sandesh D. Patil, Advocate for the petitioners.

CORAM :	R.G.KETKAR,J.
DATE :	14/08/2015

ORDER:

1. Heard Mr. Sandesh D. Patil, learned counsel for the petitioners at length.
2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the Judgment and order dated 7.4.2014 passed by the learned Civil Judge, Jr. Dn., Junnar below Exhibit-41 in R.C.S.No.264 of 2001. By that order, the learned trial Judge rejected the application filed by the plaintiffs under Section 65 of the Indian Evidence Act, 1872 (for short, 'Act') for leading secondary evidence.
3. Mr. Patil submitted that in a suit filed by the petitioners they contended that on 19.4.1982 purported sale deed was executed by the original plaintiff-Savari alias Shantaram Mukinda Shinde in favour of defendant no.1. On the same day, document of reconveyance was executed by defendant no.1 in favour of

original plaintiff Savari. In paragraph 17, the plaintiffs asserted that on 26.11.1993 defendant no.1 took original document from the plaintiffs. The plaintiffs have retained copy of the original document. The plaintiffs instituted suit for reconveyance of the sale deed on 19.4.1982. During the pendency of the suit, the plaintiffs filed application Exhibit-31 for permission to lead secondary evidence. The plaintiffs prayed for withdrawal of the same and the application was disposed of as not pressed. The plaintiffs, thereafter, filed application Exhibit-41 for permission to lead secondary evidence. Defendant no.1 resisted the application by filing reply. By the impugned order, the learned trial Judge rejected the application.

4. In support of this petition, Mr. Patil submitted that the learned trial Judge observed that "it is settled legal position of law that permission to lead secondary evidence on photostat copy cannot be granted". The learned trial Judge further observed that the document dated 19.4.1982 is styled as 'document of reconveyance' which is unregistered and is also a photostat copy. Therefore, permission to lead secondary evidence of such document cannot be granted. He submitted that the learned trial Judge failed to consider section 49 of the Indian Registration Act, 1908.

5. Mr. Patel distinguished the decision of the Apex Court in the

case of Avinash Kumar Chauhan Vs. Vijay Krishna Mishra, (2009) 2 Supreme Court Cases 532. In that case, the Apex Court considered Sections 33, 35 and 36 of the Stamp Act, 1899 and Section 49 of the Registration Act, 1908. In paragraph 25 of that report, the Apex Court observed that Section 35 of the Stamp Act, 1899 rules out applicability of Section 49 as it is categorically provided therein that a document shall not be admitted for any purpose whatsoever. In paragraph 25, it was observed thus :-

“25. Section 35 of the Act, however, rules out applicability of such provision as it is categorically provided therein that a document of this nature shall not be admitted for any purpose whatsoever. If all purposes for which the document is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes.”

6. He also distinguished the decision of the Apex Court in the case of Omprakash Vs. Laxminarayan, (2014) 1 Supreme Court Cases 618 which also dealt with Sections 33, 35 and 38 of the Stamp Act, 1899 as amended by M.P. Second Amendment wherein the Apex Court reproduced paragraphs 21 and 22 of Avinash Kumar Chauhan's case. He distinguished these judgments by relying upon following decisions of the Apex Court:-

1. Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao, (1971) 1 SCC 545;
2. Harioam Agrawal Vs. Prakash Chand Malviya, (2007) 8 SCC 514.

He submitted that basically bar under section 35 of the Stamp

Act will be applicable for admitting original instrument on record. The said bar is, however, not applicable to admission of secondary evidence, namely, photocopy of Reconveyance Deed dated 19.4.1992 even if it is insufficiently stamped

7. With the assistance of the learned counsel appearing for the petitioners, I have perused the material on record including the document dated 19.4.1982 which is styled as 'Deed of Reconveyance". Perusal of this document shows that it is executed on a stamp paper of Rs.5/- (Rs.3/- + Rs.2/-). The said document records that total consideration was fixed at Rs. 30,000/-, out of which the plaintiffs paid Rs.7,000/- and balance amount of Rs.23,000/- was to be paid by the plaintiffs any time within five years. Thus, the transaction is for more than Rs.100/-. The document is compulsorily required to be registered and also stamp duty is required to be paid on the consideration mentioned therein. Prima facie, the document is insufficiently stamped.

8. In the case of Avinash Kumar Chauhan (supra), in paragraph 14 the Apex Court observed that Section 35 provides that an instrument is inadmissible in evidence if the same is not duly stamped. The Apex Court also considered its earlier decision in the case of Bondar Singh Vs. Nihal Singh, (2003) 4 SCC 161. In paragraph 26, the Apex Court considered the decision of the Privy Council in Ram Ratan vs Prama Nand, AIR 1946 PC 51 and observed thus:

“26. The view we have taken finds support from the decision of the Privy Council in *Ram Rattan V Parma Nand*, AIR 1946 PC 51 wherein it was held:

“That the words 'for any purpose' in Section 35 of the Stamp Act, should be given their natural meaning and effect and would include a collateral purpose and that an unstamped partition deed cannot be used to corroborate the oral evidence for the purposes of determining even the factum of partition as distinct from its terms.”

9. In the case of *Omprakash (supra)*, the Apex Court held that from a plain reading of Section 35 of the Stamp Act, an authority to receive evidence shall not admit any instrument unless it is duly stamped.

10. In the case of *Jupudi Kesava Rao (supra)*, the Apex Court observed in paragraphs 13 and 14 thus:-

“13. If Section 35 only deals with original instruments and not copies Section 36 cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit. The words "an instrument" in Section 36 must have the same meaning as that in Section 35. The legislature only relented from the strict provisions of Section 35 in cases where the original instrument was admitted in evidence without objection at the initial stage of a suit or proceeding. In other words, although the objection is based on the insufficiency of the stamp affixed to the document, a party who has a right to object to the reception of it must do so when the document is first tendered. Once the time for raising objection to the admission of the, documentary evidence is passed, no objection based on the same ground can be raised at a later stage. **But this in no way extends the applicability of Section 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped.**

14. The above is our view on the, question of admissibility of secondary evidence of a document which is unstamped or

insufficiently stamped, as if the matter were res integra. It may be noted however that the course of decisions in India in the Indian High Courts, barring one or two exceptions, have consistently taken the same view.”

The said decision was subsequently considered by the Apex Court in Hariom Agarwal (supra). In paragraph 7, it was observed thus :

“7. The instrument as per definition under Section 2(14) has a reference to the original instrument. In State of Bihar v. M/s. Karam Chand Thapar & Brothers Ltd., (1962) 1 SCR 827, this Court in paragraph 6 of the judgment held as under :-

6. It is next contended that as the copy of the award in court was unstamped, no decree could have been passed thereon. The facts are that the arbitrator sent to each of the parties a copy of the award signed by him and a third copy also signed by him was sent to the court. The copy of the award which was sent to the Government would appear to have been insufficiently stamped. If that had been produced in court, it could have been validated on payment of the deficiency and penalty under S.35 of the Indian Stamp Act, 1899. But the Government has failed to produce the same. The copy of the award which was sent to the respondents is said to have been seized by the police along with other papers and is not now available. When the third copy was received in court, the respondents paid the requisite stamp duty under S.35 of the Stamp Act and had it validated. Now the contention of the appellant is that the instrument actually before the court is, what it purports to be, a certified copy, and that under S.35 of the Stamp Act there can be validation only of the original, when it is unstamped or insufficiently stamped, that the document in court which is a copy cannot be validated and acted upon and that in consequence no decree could be passed thereon. The law is no doubt well- settled that the copy of an instrument cannot be validated.

That was held in *Rajah of Bobbili v. Inuganti China Sitaramasami Garu*, 26 Ind App 262, where it was observed :

The provisions of this section (section 35) which allow a document to be admitted in evidence on payment of penalty, have no application when the original document, which was unstamped or was insufficiently stamped, has not been produced; and, accordingly, secondary evidence of its contents cannot be given. To hold otherwise would be to add to the Act a provision which it does not contain. Payment of penalty will not render secondary evidence admissible, for under the stamp law penalty is leviable only on an unstamped or insufficiently stamped document actually produced in Court and that law does not provide for the levy of any penalty on lost documents.”.

11. Perusal of the above extracted portions clearly show that under section 35 of the Stamp Act there can be validation only of the original, when it is unstamped or insufficiently stamped, that the document in court which is a copy cannot be validated or acted upon. A secondary evidence of its contents cannot be given. To hold otherwise would be to add to the Act a provision which it does not contain.

12. As noted earlier, prima facie, document is insufficiently stamped. It is also not registered. In view of the decisions of the Apex Court referred herein, the plaintiffs cannot be permitted to lead secondary evidence of reconveyance deed. That part, the plaintiffs filed application Exhibit-31 on 5.1.2009 for the same

relief. This was resisted by the defendants. The plaintiffs withdrew that application and the same was disposed of as not pressed. In view thereof also the plaintiffs are not entitled to lead secondary evidence of reconveyance deed.

13. In the light of the above discussion, I do not find that the learned trial Judge has committed any error in dismissing the application. Hence, Petition fails and the same is dismissed.

14. 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 the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G. Ketkar,J.)