

HIGH COURT OF CHHATTISGARH, BILASPUR**WP (227) No.558 of 2015**

1. Shashank Shekhar, Age 40 years,
2. Mahabir, Age 37 years,
3. Smt.Durgavati, Age 45 years,
4. Smt.Ratnavati, Age 42 years,
5. Smt.Saraswati, Age 34 years,

Petitioner No.01 to 05 S/o and D/o Late Chandrabhan Prasad Saraf, R/o Sonarpara, Ward No.05, Champa, Tehsil-Champa, Distt.-Janjgir-Champa (CG)

6. Smt. Haribai W/o Late Chandrabhan Prasad Sharaf, Aged about-65 years, R/o Sonarpara, Ward No.-05, Champa, Tehsil-Champa, Distt.Janjgir-Champa (CG)

---- Petitioners

Versus

1. Jagdish Prasad Saraf, S/o Late Lochan Prasad Sharaf, Aged about-55 years, R/o Sonarpara, Ward No.-05, Tehsil-Champa, Distt.-Janjgir-Champa (CG)
2. Santosh Kumar, S/o Late Lochan Prasad Sharaf, Aged about-50 years, R/o. Sonarpara, Ward No.05, Tehsil-Champa, Distt.-Janjgir-Champa (CG)
3. Ashok Kumar S/o Late Lochan Prasad Sharaf, Aged about-47 years, R/o Sonarpara, Ward No.05, Tehsil-Champa, Distt.-Janjgir-Champa (CG)
4. Narayan Prasad, S/o Late Lochan Prasad Sharaf, Aged about-57 years, R/o Sonarpara, Ward No.05, Tehsil-Champa, Distt.-Janjgir-Champa (CG)
5. Smt.Kusum Bai D/o Late Lochan Prasad Sharaf, W/o Jagdish Prasad Soni, Aged about-63 years, R/o Farasvani, Tehsil-Barpali, Distt.-Korba (CG)
6. Smt. Shantilata Soni @ Shyamlata Soni, D/o Late Lochan Prasad Sharaf, W/o Biharilal Soni, Aged about-52 years, R/o Farasvani, Tehsil-Barpali, Distt.-Korba (CG)
7. State of C.G., Through-District Collector, Janjgir, Distt.-Janjgir-Champa (CG)

---- Respondents

For Petitioners	:	Mr.Anish Tiwari, Advocate
For Res.No.1,3, 5 & 6	:	Mr.Harsh Wardhan, Advocate
For State	:	Mrs.M.Asha, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

20/02/2017

1. The petitioners are the plaintiffs before the trial Court. During the course of examination of plaintiff No.1, the petitioners/plaintiffs sought to exhibit two *Ikrarnamas* dated 2.9.87, which was objected by the respondents/defendants stating inter-alia that said *Ikrarnamas* are compulsorily registrable and it is not duly stamped. The trial Court after hearing learned counsel appearing for the parties at that stage held that it is not *Ikrarnama* but it is conveyance and not admissible in evidence and declined to exhibit the aforestated documents by order dated 27.4.2015.
2. Feeling aggrieved against the order passed by the trial Court declining to exhibit two *Ikrarnamas* dated 2.9.87 for want of registration and requisite stamp duty, this writ petition under Article 227 of the Constitution of India has been filed by the petitioners/plaintiffs.
3. Mr.Anish Tiwari, learned counsel appearing for the petitioners/plaintiffs, would submit that the order passed by the trial Court runs contrary to proviso to Section 49 of the Registration Act, 1908 (hereinafter called as "Act of 1908")

and also runs contrary to Sections 33 and 35 of the Indian Stamp Act, 1899 (hereinafter called as "Act of 1899"), therefore, the impugned order deserves to be set aside.

4. Mr. Harsh Wardhan, learned counsel appearing for respondents No.1, 5 and 6, would support the impugned order.
5. I have heard learned counsel appearing for the parties, considered their rival submissions made herein and also gone through the record with utmost circumspection.
6. The short question that has cropped up for consideration is whether the trial Court is justified in not permitting the petitioners/plaintiffs to exhibit two *Ikrarnamas* dated 02.09.1987 for want of registration and requisite stamp duty.
7. In a suit instituted by the plaintiffs, documents have to be exhibited in accordance with provisions contained in Order 13 Rule 4 of the CPC. Order 13 Rule [4](#) of the CPC reads as under:--

"4. Endorsement on documents admitted in evidence.-(1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:--

- (a) the number and title of the suit,
- (b) the name of the person producing the documents,
- (c) the date on which it was produced, and
- (d) a statement of its having been so admitted,

and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.”

8. Order 13 Rule [4](#) of the CPC provides that every document admitted in evidence in the suit being endorsed by or on behalf of court, which endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the admissibility of document should be raised before such endorsement is made and the Court is obliged to form its opinion, on the question of admissibility and express the same on which opinion would depend the document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was placed.
9. The Supreme Court in the matter of **R. V. E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V. P. Temple and another**¹ has occasioned to classify the objections as to admissibility of documents in evidence in two classes namely: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where

1 (2003) 8 SCC 752

the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient.

It was observed as under:--

"20.....Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such *mode of proof* as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious the evidence to act on an assumption that the opposite party is not serious about the *mode of proof*. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of

admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior of court."

10. The aforesaid decision of the Supreme Court in **R.V.E. Venkatachala Gounder** (supra) has been followed with approval by the Supreme Court in the matter of **Malay Kumar Ganguly v. Dr. Sukumar Mukherjee and others**².
11. In the matter of **Ram Rattan (dead) by LRs. v. Bajrang Lal and others**³, the Supreme Court has indicated the procedure to be followed by the trial Court when the document is tendered in evidence by the plaintiff while in witness box and objection is taken by the defendant that the document is inadmissible in evidence as it is not duly stamped and for want of registration and held that the trial court has to apply its judicial mind and laid down as under:-

² (2009) 9 SCC 221

³ AIR 1978 SC 1393

“6. When the document was tendered in evidence by the plaintiff while in witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for want of registration, it was obligatory upon the learned trial Judge to apply his mind to the objection raised and to decide the objection in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however, would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial court admits a document in evidence, S. 36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The Court, and of necessity it would be trial court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting S. 36 (see *Javer Chand v. Pukhraj Surana*, AIR 1961 SC 1655). The endorsement made by the learned trial Judge that "objected, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation S. 36 would not be attracted.”

12. Their Lordships further held in **Ram Rattan** (supra) that

where an instrument who is not duly stamped or insufficiently stamped is tendered in evidence before the Court, then duty and penalty has to be recovered by the court having authority to receive document and held as under:-

“7. Mr. Desai then contended that where an instrument not duly stamped or insufficiently stamped is tendered in evidence, the Court has to impound it as obligated by S. 33 and then proceed as required by S. 35, viz., to recover the deficit stamp duty along with penalty. Undoubtedly, if a person having by law authority to receive evidence and the civil court is one such person before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded. The duty and penalty has to be recovered according to law. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid. The plaintiff has neither paid the duty nor penalty till today. Therefore, *stricto sensu* the instrument is not admissible in evidence. Mr. Desai, however, wanted us to refer the instrument to the authority competent to adjudicate the requisite stamp duty payable on the instrument and then recover the duty and penalty which the party who tendered the instrument in evidence is in any event bound to pay and, therefore, on this account it was said that the document should not be excluded from evidence. The duty and the penalty has to be paid when the document is tendered in evidence and an objection is raised. The difficulty in this case arises from the fact that the learned trial Judge declined to decide the objection on merits and then sought refuge under S. 36. The plaintiff was, therefore, unable to pay the deficit duty and penalty which when paid subject to all just exceptions, the document has to be admitted in evidence. In this background while holding that the document Ext. I would be inadmissible in evidence as it is not duly stamped, we would

not decline to take it into consideration because the trial court is bound to impound the document and deal with it according to law.”

13. It is well settled law that mere marking or exhibiting the document does not dispense with the proof of the document. Mere marking of the document does not take away the right of the opposite party to say that such document cannot be relied upon as it is not registered. Similarly, when the law declares for collateral purposes an unregistered document could be looked into, it makes clear that such a document could be marked. Under these circumstances, it would be proper to the trial Court to mark such document subject to objections and permit the parties to adduce evidence, instead of putting questions to the lawyers at the time of argument to state for what purpose they are relying on the said document, thereafter consider the respective contentions at the time of final hearing and then decide whether the said document could be looked into for collateral purposes and whether non-registration of the said document has made it inadmissible in evidence.
14. This would bring me to the relevant provision contained in the Registration Act. Section 17 (1) (d) of the Act of 1908 and Section 107 of the Transfer of Property Act, 1882 (hereinafter called as “Act of 1882”) provide that lease of immovable property from year to year, or for any

term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. Section 49 of the Act of 1908 provides the effect of non-registration of documents required to be registered, which states as under:-

“49. Effect of non-registration of documents required to be registered.—No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) 55, 56 [***] or as evidence of any collateral transaction not required to be effected by registered instrument.”

15. Section 49 of the Act of 1908 prohibits receiving as evidence the documents requiring registration under Section 17 which are compulsorily registrable. The proviso to the said section provides for receiving such documents in the circumstances narrated therein. Therefore, there is no total prohibition for receiving unregistered document in evidence and it can be received in evidence to prove any collateral transaction.

16. The Supreme Court in the matter of **SMS Tea Estates Private Limited Vs. Chandmari Tea Company Private Limited**⁴ while considering the proviso to Section 49 of the Act of 1908 held as under:-

“11. Section 49 makes it clear that a document which is compulsorily registrable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. The question is whether a provision for arbitration in an unregistered document (which is compulsorily registrable) is a collateral transaction, in respect of which such unregistered document can be received as evidence under the proviso to section 49 of the Registration Act.”

Thus, unregistered documents can be received in evidence under proviso to Section 49 of the Act of 1908.

17. The next question for consideration would be if the Ikrarnamas are unregistered documents, which are not duly/insufficiently stamped, then what is the course available to the trial Court?
18. In order to answer the said question, reference to Section 33 of the Act of 1899 is necessary. Section 33 of the Act of 1899 states as under:-

4 (2011) 14 SCC 66

“33. Examination and impounding of instruments.—(1) Every person having by law or consent of parties, authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in 62 [India] when such instrument was executed or first executed: Provided that—

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,—

(a) 62 [the 63 [State Government]] may determine what offices shall be deemed to be public offices; and

(b) 62 [the 63 [State Government]] may determine who shall be deemed to be persons in charge of public offices.”

19. Section 35 of the Act of 1899 provides that instruments not duly stamped are inadmissible in evidence and cannot be acted upon. Section 35 of the Act of 1899 states as under:-

“35. Instruments not duly stamped inadmissible in evidence, etc.-

No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

(a) any such instrument shall, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by section 323 or any other provision of this Act.”

20. The Supreme Court in the matter of **SMS Tea Estates**

Private Limited (supra) has considered the question and summed up the procedure to be adopted, whether the document in question is unregistered and which is not duly stamped and answered as under:-

“22.1 The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

22.2 If the document is found to be not duly stamped, Section 35 of Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under section 33 of the Stamp Act and follow the procedure under section 35 and 38 of the Stamp Act.

22.3 If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in section 35 or 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

22.4 Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the arbitration agreement, without any impediment.

22.5 If the document is not registered, but is compulsorily registrable, having regard to section 16(1)(a) of the Act, the court can delink the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration

agreement is also void and unenforceable, as pointed out in para 8 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

22.6 Where the document is compulsorily registrable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the Arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance and (b) as evidence of any collateral transaction which does not require registration.”

21. In the matter of **Avinash Kumar Chauhan Vs. Vijay Krishna Mishra**⁵, Their Lordships of the Supreme Court have also held that there is no prohibition under Section 49 of the Registration Act to receive unregistered document in evidence for collateral purpose but document so tendered should be duly stamped or should comply with the requirement of Section 35 of the Indian Stamp Act. If not stamped, document cannot be received in evidence even for collateral purpose unless it is duly stamped or stamp duty and penalty are paid under Section 35 of the Indian Stamp Act.
22. In view of the principle of law laid down in the above-stated judgments, it is held that the trial Court is absolutely unjustified in not permitting the petitioners/plaintiffs to exhibit two unregistered *Ikarnamas* and further unjustified

⁵ (2009) 2 SCC 532

in not taking recourse to Section 33 read with Section 35 of the Act of 1899 for impounding those documents. Therefore, the impugned order is set aside. The trial Court is directed to permit the plaintiffs to exhibit the said documents and thereafter adopt the procedure envisaged in Section 33 read with Section 35 of the Act of 1899 for impounding of those documents and decide the question for which purpose the said documents are permitted to be admitted in evidence (collateral purpose or otherwise) at the time of final hearing as indicated hereinabove and keeping in view the binding observation of the Supreme Court in the matter of **Ram Rattan** (supra).

25. The writ petition is allowed to the extent indicated hereinabove.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-