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

924. SECOND APPEAL NO. 413 of 2017
WITH
CIVIL APPLICATION NO. 7527 OF 2017
WITH
CIVIL APPLICATION NO. 7528 OF 2017
WITH
CIVIL APPLICATION NO. 7529 OF 2017
WITH
CIVIL APPLICATION NO. 7530 OF 2017
IN
SECOND APPEAL NO. 413 OF 2017

Shaikh Khairuddin S/o Shaikh Gayas Uddin,
age 69 years occupation retired
R/o Kurshid Ali Chopda Taluka Chopda District Jalgaon,
Through Power of Attorney Holder Tanvir S/o Shaikh Kairuddin,
age 69 years occupation retired R/o Kurshid Ali, Chopda
Taluka Chopda Dist. Jalgaon. **...PETITIONER**

VERSUS

Hasinabi W/o Jahurbeg,
age 52 years occupation housewife
R/o Kurshid Ali Chopda Taluka Chopda Dist. Jalgaon.
..RESPONDENT

Mr Vilas D. Sonawane, Advocate for appellant

Mr Prakashsingh B. Patil for respondent sole.

CORAM : NITIN W. SAMBRE, J.

DATE :22nd September, 2017

ORAL ORDER :

1. The respondent/plaintiff filed a Regular Civil Suit No. 38 of 2005 for declaration that she is in lawful possession of suit property. The suit for specific performance was based on the document dated August 18, 2004 viz. agreement, through which the possession was received by the respondent/plaintiff from present appellant/original defendant. The suit came to be decreed on March 30 2013, against which appeal being Regular Civil Appeal No. 15 of 2013 was dismissed by the learned Adhoc District Judge-1, Amalner. As such this second appeal.

2. The learned Counsel for the appellant/original defendant raised following grounds (a) whether the agreement dated August 18, 2004 was properly accepted in the evidence when the same being conveyance was not registered under the Indian Registration Act.

3. It is also sought to be canvassed that, by virtue of producing on record doctor's certificate pursuant to prayer made under Order XLI Rule 27 of the Civil Procedure Code that the present appellant is a person of unsound mind. As such, he is incapable of defending himself.

4. The learned Counsel in that view of the matter sought recording of finding that the Court below has failed to follow provisions of

Order XXXII Rule 15 of C.P.C. and other provisions except Rule 2A of Order XXXII.

5. Per contra, Shri Patil, learned Counsel for the respondent/plaintiff would urge that issue of improper acceptance of agreement Exh. 92 is raised before this Court for the first time, and as such, this Court should ignore the same in view of Full Bench Judgment in the matter of **Hemendra Rasiklal Ghia Vs. Subodh Mody**, reported in **2008 (6) Mh.L.J 886**. According to him, both the Courts below have concurrently held in his favour, and as such, appeal needs to be dismissed.

6. With consent of the parties, I have taken out this Second Appeal for final disposal at this stage. The question of law, which in my opinion, needs to be framed is, whether both the Courts below have committed an error apparent on the face of record in recording finding that document Exh. 92 is proved when the same can be termed as conveyance within the meaning of Article 25 Explanation 1 of the Maharashtra Stamp Act.

7. Said Article, in my opinion, reads thus:

“Description of instrument	**Paper Stamp Duty**
1	**2**
25. CONVEYANCE (not being a transfer charged or exempted under Article 59)	

On the (true market value) of the property which is the subject matter of the Conveyance.---	
[(a) if relating to movable property	3 per cent. of the market value of the property]
[(b) if relating to immovable property situated,--	
(i) within the limits of any Municipal Corporation or any Cantonment area annexed to it or any urban area not mentioned in sub-clause(ii).	5 per cent. Of the market value of the property.
(ii) within the limits of any Municipal Council or Nagar Panchayat or Cantonment. Area annexed to it, or any rural area within the limits of the Mumbai Metropolitan Region Development Authority, or the Influence Areas as per the annual statement of rates published under the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995.	5 per cent. of the market value of the property.
(iii) within the limits of any Grampanchayat area or any such area not mentioned in sub-clause (ii)	4 per cent. Of the market value of the property.
(c) if relating to both movable and immovable property.	The same duty as is payable under clauses (a) and (b)
[(d)***	
[(da) if relating to the order of High Court in respect of the amalgamation or reconstruction of companies under section 394 of the Companies Act, 1956 or under the order of the Reserve Bank of India under section 44A of the Banking Regulation Act, 1949.	10 per cent. Of the aggregate of the market value of the shares issued or allotted in e3xchange or otherwise and the amount of consideration paid for such amalgamation: Provided that, the amount of duty, chargeable under this clause shall not exceed, – (i) an amount equal to [5 per cent.] of the true market value

	of the immovable property located within the State of Maharashtra of the transferor company; or (ii) an amount equal to 0.7 per cent, of the aggregate of the market value of the shares issued or allotted in exchange or otherwise and the amount of consideration paid, for such amalgamation, whichever is higher: Provided further that, in case of reconstruction or demerger the duty chargeable shall not exceed,-- (i) an amount equal to (5 per cent.) of the true market value of the immovable property located within the State of Maharashtra transferred by the Demerging Company to the Resulting Company; or (ii) an amount equal to 0.7 per centum of the aggregate of the market value of the shares issued or allotted to the Resulting Company and the amount of consideration paid for such demerger, whichever is higher]
Exemption Assignment of copyright under the Copyright Act, 1957 (IXV of 1957). [***Explanation I.] ---****For the purposes of this article, where in the case of agreement to sell an immovable property, the possession of any immovable property is transferred [or agreed tobe transferred] to the purchaser*	

before the execution, or at the time of execution, or after the execution of, such agreement, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly: *Provided that, the provisions of section 32A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section:* *Provided further that, where subsequently a conveyance is executed in pursuance of such agreement of sale, the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance, shall be adjusted towards the total duty leviable on the conveyance.]* *[Provided also that where proper stamp duty is paid on a registered agreement to sell an immovable property, treating it as a deemed conveyance and subsequently a conveyance deed is executed without any modification then such a conveyance shall be treated as other instrument under section 4 and the duty of one hundred rupees shall be charged.]"*	

8. In the aforesaid legal backdrop, the claim of respondent/plaintiff is evaluated. It is the case of the plaintiff that by virtue of agreement, she was put in possession of the suit property and,

as such, the suit for specific performance of contract and declaration that she is in lawful possession by virtue of agreement came to be filed and decreed.

9. It is the case of the present respondent/plaintiff that she being in possession of the suit property, in view of requirement under provision of Article 25 Explanation 1 of the Maharashtra Stamp Act, the said document has to be termed as a conveyance and once such document is termed to be a conveyance, it was expected of the Court below to impound the same, in accordance with provisions of the Maharashtra Stamp Act. The Courts below are also expected to deal with effect of non-registration of the document provided the circumstances warrant so.

10. What could be noticed from the judgments of both the Courts below is, both the Courts below by ignoring aforesaid legal provision have proceeded to accept said document in evidence after simplicitor appreciating evidence, and as such, conducted itself contrary to the aforesaid provision.

11. In this view of the matter, in my opinion, the judgment and order of decreeing the suit in favour of respondent/plaintiff is not sustainable in law, and as such, is liable to be quashed and set aside.

12. However, this will not prompt this Court to keep present respondent remediless. In the aforesaid factual backdrop, since this Court has taken recourse to the provisions of Article 25 and Explanation 1 framed thereunder, the same is noticed to be curable defect, and as such, it was open for the parties to cure the same defect by paying requisite court fees and penalty thereunder.

13. In view thereof, it will be appropriate, in my opinion, to relegate the party to the learned Trial Court, before whom they have undertaken to appear on 30th November 2017.

14. No fresh notice is required to be served on parties as they have agreed, as aforesaid.

15. It shall be open for the learned Trial Court to pass an order of impounding document Exh. 92 and, if prayed by the plaintiff, pass such consequential order under the provisions of the Maharashtra Stamp Act and Registration Act.

16. The Court shall thereafter decide the proceedings afresh after affording opportunity to the parties to the suit.

17. This Court while parting with the judgment has noticed that respondent has moved an application claiming that he is a person with some neurological issue, and as such, should be adjudged as a person of unsound mind, pursuant to Order XXXII and Rules framed thereunder except Rule 2-A. Suffice it to observe that said issue will be open for adjudication before the learned Trial Court, if so raised.

18. With above observations, the Second Appeal stands partly allowed.

19. Civil Applications moved thereunder also stand disposed of in above terms.

(NITIN W. SAMBRE, J.)

pjm.