IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 2937 OF 2015

Shri Avatarsing Harmansing Sethi … Petitioner
Vs.
Smt. Hausabai Waghu Ubale & Ors. … Respondents

Mr.Dushyant S. pagare, for the petitioner
Mr.Harshad Inamdar for respondent No.1.
Mr. Swapnil V. Walve i/b. Mr. Sham Walve for respondent No.3.

CORAM: SMT.SADHANA S.JADHAV, J.
DATE : 11th October, 2017.

P.C.

Heard. Rule. Rule made returnable forthwith with consent of the parties.

2. The petitioner herein is the original plaintiff in RCS No.135 of 2012 pending before the Civil Judge, Junior Division, Igatpuri. The suit was filed for specific performance against the defendant No.1. The second prayer in the suit was for seeking the relief of declaration that the sale deed executed between the defendant No.1 and defendant No.2 and 3 inter-se as null and void and thirdly not to create any third party interest during the pendency of the suit. The suit has proceeded ex-parte as against defendant Nos. 2 and 3. Defendant No.1 had filed his written statement. The plaintiff had also filed his affidavit in evidence.

3. On 14.11.2014, the plaintiff filed an application seeking the relief of impounding the document i.e. the agreement to sale on the basis of which he had claimed prayer clause (1) in the suit for specific performance. According to the plaintiff, the agreement to sell was not duly stamped and, therefore, he had prayed for proper adjudication of the valuation of the said document. By an order dated 14.11.2014, the application was rejected by the Civil Judge, J.D.Igatpuri. The learned Judge had observed that the plaintiff is ready and willing to pay the deficit stamp duty as well as the penalty after the said document is adjudicated by the appropriate authority.

4. The learned counsel for the petitioner submits that in fact the plaintiff has implicitly relied upon the said document and the same is filed by the plaintiff and he is seeking adjudication of the stamp duty. The learned counsel further submits that the application ought to be allowed. However, the learned counsel for the defendant vehemently objects the same and submits that there are no pleadings to that effect in the plaint and that the application seeking impounding of document was filed at a belated stage i.e. after filing of affidavit of evidence and that the defendant No.1 had filed his written statement and disclosed his evidence.

5. It is pertinent to note that Section 34 of Maharashtra Stamp Act reads as follows :-

> *"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 or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument."*

6. In view of this, in the eventuality that the said document cannot be read in evidence, the prayer for specific performance cannot be considered, the prayer for specific performance would not survive as the whole suit is filed on the basis of the special document i.e. agreement to sale. It is in view of this, this Court is inclined to allow the Petition subject to payment of costs of Rs.1,000/- before the trial Court. Hence, the following order :-

<u>O R D E R</u>

(i) The Petition is allowed.

(ii) The order dated 14.11.2014 passed by the Civil Judge, Junior Division,Igatpuri, is hereby quashed and set aside.

(iii) The plaintiff shall file a fresh application along with costs for seeking impounding of the document and proper adjudication of the stamp duty.

(iv) The application be accepted only in the eventuality it is filed on or before 18.11.2017 subject to payment of costs of Rs.1,000/-.

(v) The plaintiff would be at liberty to invoke Section 34 of the Maharashtra Stamp Act in the application itself.

Rule is made absolute in the above terms. The Petition stands disposed of.

[SMT. SADHANA S.JADHAV, J.]