

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9308 OF 2017

Kumar Dattoba Ekhande,
Age: 55 years,
Occupation : Private Business,
R/o. Near Terna College, in front of
Advocate Hemant Naikwad ,
Nilanga Tq. Nilanga Dist. Latur

...Petitioner
(Orig. Plaintiff/ Decree

holder)

Versus

1 Samindar Bhimrao Nitnaware
Age: 59 years,
Occupation: Business,
R/o. Vidya Nagar, Nilanga
Tq. Nilanga, District Latur.

2. Raju Samindar Nitnaware
Age: 31 years,
Occupation: Business,
R/o. Vidya Nagar,
Nilanga Tq. Nilanga,
District Latur.

...Respondents

...

Mr. Patil Milind, Advocate for petitioner
Mrs. Madhaveshwari D. Thube-Mhase, Advocate for
respondents

...

[CORAM: SUNIL P. DESHMUKH, J.]
Date: 12th October, 2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.
2. The petitioner – original plaintiff – decree holder takes exception to order dated 4th/5th January, 2017 passed by civil judge, junior division, Nilanga, permitting exhibition of document i.e. memorandum of partition produced by respondents under list Exhibit – 31 in execution petition bearing no. 9 of 2014 in respect of decree in regular civil suit bearing no. 464 of 2012.
3. The petitioner is plaintiff - decree holder in regular civil suit bearing no. 464 of 2012. The suit had been instituted by him for specific performance of the agreement of sale dated 26th June, 2012 executed by Respondent no. 1 and for possession of property mentioned therein. Accordingly, suit was decreed. Petitioner has filed execution proceedings bearing no. 9 of 2014 against respondent no. 1.

4. In execution proceeding, present respondent no. 2 has filed petition under Order XXI, Rule 97 of the Civil Procedure Code, 1908 raising objection to execution of decree. The same is under adjudication. In the course of evidence, document under list Exhibit - 31 claiming to be memorandum of partition purportedly executed on stamp paper of Rs. 100/- had been filed by respondent no. 1.

5. It appears to be case of respondent no. 1, that admissibility of memorandum of partition document produced under list at Exhibit - 31 by him had been questioned by petitioner as the same has been titled as "partition deed". Since, according to petitioner, it is a partition deed, it would require registration pursuant Registration Act and, as a matter of fact, document of memorandum of partition tantamounts to alienation, as such, it shall have to bear stamp duty pursuant Maharashtra Stamp Act. It is, thus, the case of the petitioner, the document is not admissible on very ground.

6. Learned counsel for petitioner contends that before letting proper opportunity to petitioner despite oral objection, court has passed order, permitting exhibition of document claimed to be memorandum of partition filed along

with list Exhibit – 31. He submits that more damaging aspect is that, court before hearing finally, let evidence in respect of said document placed on record. The court has considered that the document is memorandum of partition on a stamp paper and, as such, does not require registration or requisite stamp duty. He submits that the title right in such a case stands pre-empted. He, therefore, urges for indulgence and requests to quash and set aside said order dated 5th January, 2017 passed permitting production of document under list Exhibit – 31 by respondent no. 2.

7. On the other hand, learned counsel Mrs. Madhaveshwari Thube-Mhase appearing on behalf of respondents contends that the document, in substance, establishes that it is, in fact, memorandum of partition and not partition deed as claimed on behalf of petitioner. The trial court has properly considered the nature document and has found the same to be memorandum of partition and further that it does not require either registration or payment of stamp duty, it having been executed on stamp paper in accordance with valuation. She goes on to submit, since the document is already exhibited, position would hardly be reverted. In view of the same, she submits that

writ petition carries no substance and deserves to be dismissed.

8. In the present matter, it appears that there is no particular dispute about document under list Exhibit-31 in the proceedings before execution court had been produced for the first time along with the affidavit of examination-in-chief by the respondent and while the objection to its' admissibility had been raised by petitioner, for, the document being not registered and for want of payment of proper stamp duty, it appears, considering the facts and circumstances of the case and particularly taking into account observations of full bench of this court in paragraph no. 76, in case of *Hemendra Rasiklal Ghia vs. Subodh Mody* reported in 2008 (6) *Mh.L.J* 886, admissibility of the document produced along with application Exhibit-31 would have to be kept open to be decided at the time of final hearing of suit without being overwhelmed by observations appearing under order dated 4th/5th January, 2017. Keeping in view observations of full bench appearing in paragraph no. 76 in the citation reading, thus,

" 76. In the third case merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded. It is available to be raised even at later stage or

even in appeal or revision. There is no question of inadmissible document being read into evidence merely on account of such documents being given exhibit numbers in affidavit filed by in examination-in-chief or while recording oral evidence. For example in case of unregistered sale-deed or gift-deed or lease-deed requiring registration, no evidence of the terms thereof can be given. On the ground of public policy, evidence derived from unpublished official records of the State cannot be given except with the permission of the head of the department concerned as laid down under section 123 of the Evidence Act. Such a document, therefore, can be tentatively exhibited and the decision thereon can be postponed till the suit reaches the stage of judgment. However, such objection has also to be decided before the judgment is delivered. The objection to the admissibility of such evidence can always be taken at any stage of the suit. " ,

admissibility of document produced under Exhibit - 31 is kept open to be decided at the hearing of the suit.

9. Rule made absolute in above terms.

10. Writ petition, as such, with aforesaid observations, stands disposed of.

**[SUNIL P. DESHMUKH]
JUDGE**

vdk