

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.507 OF 2018
with
CRIMINAL WRIT PETITION NO.523 OF 2018**

Praful Shankarrao Ahire ... Petitioner

Vs

The State of Maharashtra & anr. ... Respondents

Mr.P.B. Shah with Ms.Gunjan Shah i/b K.P. Shah for the Petitioner
in both Petitions

Mrs.M.R. Tidke, APP, APP, for the Respondent – State

Mr.N.R. Bubna for Resp. No.2

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: APRIL 8 & 9, 2019

P.C.:

1. The parties have entered into registered sale deed on 21.3.2013 and on the same day i.e., 21.3.2013, the parties have entered into an Memorandum of Understanding in respect of some amount in respect of the same transaction. The said MoU is not registered and not fully stamped but it is made on a Rs.100/- stamp paper and signed by all the parties. The complainants are relying on the said MoU as it is referred to in the complaints. However, the said original MoU, as per the case of the

complainants, is with the petitioner/accused and not with the Complainants. Therefore, they moved applications for calling upon the petitioner/accused to produce the original MoU. Notice was issued to produce the original MoU, however, the original MoU was not produced. Therefore, the respondent/complainants moved two similar applications at exhibits 23 and 25 in both the cases seeking permission of the trial Court to lead secondary evidence i.e., the photocopy of the said MoU. The petitioner/accused replied to the said applications and opposed the said applications informing that the original is not with the petitioner/accused. The learned trial Judge considering the applications and the objections raised by the petitioner/accused allowed the said applications by its order dated 14.12.2017. Hence, these two Writ Petitions.

2. Mr.Shah, the learned Counsel appearing for the petitioner, submitted that the order of issuance of process itself is incorrect as it is not a reasoned order. While challenging the order of allowing secondary evidence, he has submitted that the MoU is neither registered nor is sufficiently stamped. He submitted that under section 17 of the Registration Act, the document is required to be registered and if not registered, then, it is not admissible in

evidence. He further submitted that the document is not sufficiently stamped and, therefore, under the Indian Stamps Act, this document cannot be impounded and cannot be considered as validated because it is not an original but it is a photocopy and hence, it cannot be read in evidence. On the point of leading secondary evidence under section 65, Mr.Shah relied on the judgment in the case of **Sita Ram Bhama vs. Ramvatar Bhama**¹. Thirdly, Mr.Shah relied on the case of **Hariom Agrawal vs. Prakash Chand Malviya**².

3. Mr.Shah submitted that the matters under section 138 of the Negotiable Instruments Act is basically a civil proceeding and, therefore, the provisions of section 35 of the Indian Stamps Act, is applicable. In support of his submission, he relied on **Dayawati vs. Yogesh Kumar Gosain**³. Mr.Shah has, therefore, submitted that this proceedings being civil in nature, the other provisions of the Stamp Act in respect of criminal trial cannot be attracted in the present proceedings. On illegal prosecution, he relied on the judgment of the **GHCL Employees Stock Option Trust and others vs. India Infoline Ltd. & Ors.**⁴

1 (2018) 15 SCC 130

2 (2007) 8 SCC 514

3 (2017) 243 DLT 117

4 2013 AIR (SC) 1433

4. Per contra, Mr.Bubna defended the orders of the trial Judge and issuance of process and also the order of the Sessions Court allowing the application to lead secondary evidence of MoU. The learned Counsel submitted that the submissions of Mr.Shah in respect of impounding the document or under section 35 of the Stamp Act, cannot be appreciated. Though it is a civil dispute and it is civil in nature and the proceeding is conducted by applying Criminal Procedure Code, it is a criminal trial. In support of his submissions, he relied on the provisions of sections 34c of Maharashtra Stamps Act and 35d of the Indian Stamps Act.

5. He also relied on section 34e and stated that by virtue of section 34e, the copy of any instrument is also admissible if the stamp duty or deficient portion of stamp duty and penalty as specified in clause (a) is paid.

6. Section 34e is applicable to civil proceedings also. He relied on the judgment of a learned Single Judge of Hyderabad High Court in **Preetesh Kumar vs. State of Telangana & anr.**⁵.

5 2017 Cr.L.J. 3481

7. Let me first advert to the case laws relied on by the learned Counsel.

In the case of **GHCL Employees Stock Option Trust and others (supra)** the accused were prosecuted for criminal breach of trust and falsification of accounts and conspiracy. The accused were the Company Secretary, Managing Director and Directors of the Company. The Supreme Court found that in the entire complaint, there were bald and vague allegations against accused Nos.2 to 7. The Supreme Court observed that the learned Magistrate. In the said case, at the time when the learned Magistrate issued summonses against the Managing Director and Company Secretary. The said order was challenged and the High Court held that issuance of summons against the company cannot be sustained and the Magistrate was directed to proceed with the trial against the other accused. Hence, the complainants challenged the said order before the Supreme Court. The Supreme Court held that summoning of accused in a criminal case is a serious matter. The order of Magistrate summoning the accused must reflect that he has applied his

mind to the facts of the case and the law applicable to that and the satisfaction of the Magistrate is to be recorded. In the present case, there are prima facie specific allegations with details of transaction.

8. In the case of **Sita Ram Bhama (supra)**, an unstamped and unregistered deed of family settlement was produced in the said matter. However, in the said judgment, the Supreme Court held that though an unregistered and unstamped document is not admissible in the evidence, it can be used for collateral purposes, however, it can be done only after it is duly stamped. However, in the said judgment, the Supreme Court has distinguished the nature of the documents. If the document is necessary for fixing or creating the rights in the family members in respect of immovable properties, then, it is to be registered and if it is a mere memorandum prepared by the family arrangement for the purpose of record or for information, then, the registration is not compulsory. In the said case, the Supreme Court held that the said deed of family settlement was prepared with a view to create or fix the rights of the family members and hence, it is required to be duly stamped and registered.

9. In **Hariom Agrawal (supra)**, the issue was about admissibility of the photocopy in the evidence and the Supreme Court held that the document cannot be validated by impounding and cannot be admitted as secondary evidence under the Stamps Act. In the said case, it was a civil suit between the landlord and the tenant and in the said civil suit, subsequently, in appeal, the Supreme Court had an opportunity to consider sections 33, 35, 37 and 48B of the Stamps (Madhya Pradesh Amendment) Act and Rules thereunder and also consider the Stamps Act, 1899. In the said judgment, the Supreme Court has taken a view that on a plain reading of sections 33,35 and 2(14) of the Act, the instrument which is not duly stamped, can be impounded and after payment of requisite fee and penalty only, this can be taken in evidence under section 35 of the Stamps Act. It also held that there is no scope for taking a copy of the document for the purpose of Stamps Act and it is a well settled law that the copy of the instrument cannot be validated by impounding and this cannot be admitted as a secondary evidence under the Stamps Act.

10. In the case of **Dayawati (supra)**, the Division Bench of the Delhi High Court has held that the proceedings under section 138

of the Negotiable Instruments Act stand categorised as quasi civil. It is also held that the proceedings under section 138 arise from a civil dispute relating to dishonour of a cheque which may result in criminal consequence. However, it is well settled that they are really in the nature of civil wrong which has been given criminal overtones.

11. The Memorandum of Understanding is pertaining to Rs.75,00,000/- and also a condition is mentioned therein. As per case of the complainant, the Memorandum of Understanding was signed by all the parties. Admittedly, this document was not registered, but it was prepared only on a stamp paper of Rs.100/-. However, in criminal matters, this particular document is admissible in view of section 35 of the Indian Stamp Act and sub-rule 34 (c) of the Maharashtra Stamps Act. Section 34c is similar to section 35d. Sections 34c and 35d read as under:

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

...

....

...

c. 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 IX of Part D of

Chapter X of the Code of Criminal Procedure, 1973 (2 of 1974);”

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

...

...

...

(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);

...”

12. On the basis of this document, though no right in respect of the immovable property can be created, it can be used for collateral purposes i.e., if at all there are other conditions agreed by the parties. The statements agreed and signed are the previous statements made by the parties and hence, very much relevant and admissible. The complainant has made out a case for non-production of the original document, as it is claimed that the original document is in custody of the petitioner/accused and, therefore, under section 65A of the Act, the production of this secondary evidence is allowed. However, the complainant will have to lead evidence to prove the document.

13. In the circumstances, the order dated 14th December, 2017

passed by the trial Court is maintained. The Writ Petitions are dismissed accordingly. However, all contentions about truthfulness of the document are kept open as appreciation of the said document is a subject matter of the trial Court.

14. The learned Counsel for the petitioner/accused submits that the petitioner/accused wants to challenge this order before the Hon'ble Supreme Court and, therefore, he prays for stay to the operation of this order. Mr.Bubna, the learned Counsel for the respondent No.2, while opposing this prayer, submits that the trial is to commence soon and because of the stay, the trial will be protracted.

15. As the petitioner/accused wants to challenge this order before the Hon'ble Supreme Court, the operation of this order is stayed till 11th June, 2019.

16. Writ Petitions are disposed of accordingly.

(MRIDULA BHATKAR, J.)