

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4244 OF 2020

1. Shaikh Aftab Ahmed s/o Shaikh Akhlaque Ahmed,
Age : 56 years, Occu. Business,
R/o C.T.S. No.11591/2,
Delhi Gate, Bashera Building,
Aurangabad

2. Gazi Zubair Ahmed s/o Gazi Zahi Ahmed,
Age : 51 years, Occu. Business,
R/o Manzoorpura,
Aurangabad

PETITIONERS
(Orig. Plaintiffs)

VERSUS

1. Bhimrao s/o Sandu Waghmare,
Age : 71 years, Occu. Agri./Pensioner,
R/o House No.5/15/29-P,
Bhimnagar, Bhausingpura,
Aurangabad

2. Tanabai w/o Bhimrao Waghmare,
Age : 45 years, Occu. Household,
R/o As above

3. Pratik s/o Bhimrao Waghmare,
Age : 30 years, Occu. Education,
R/o As above

4. Komal d/o Bhimrao Waghmare,
Age : 28 years, Occu. Education,
R/o As above

5. Swapnalata d/o Bhimrao Waghmare,
Age : 26 years, Occu. Education,
R/o As above

6. Prajakta d/o Bhimrao Waghmare,
Age : 25 years, Occu. Education,
R/o As above

RESPONDENTS
(Orig. Defendants)

Mr. Ajit D. Kasliwal, Advocate for the petitioners

CORAM : MANGESH S. PATIL, J.

DATE : 12.10.2020

ORAL ORDER :

Heard the learned Advocate for the petitioners.

2. The petitioners, who are the original plaintiffs before the learned Civil Judge, Senior Division, are impugning the order passed by the learned Civil Judge on 24.02.2020 during the course of recording of the examination-in-chief of the petitioners. By the impugned order, the learned Civil Judge refused to exhibit a copy of the Agreement of Sale dated 12.06.2014, on the ground that by earlier order on Exhibit-19 dated 19.09.2015, the document being insufficiently stamped, it was impounded treating it to be a conveyance as defined under the definition "Conveyance Deed" contained in Section 2 (10) of the Indian Stamp Act.

3. Mr. A.D. Kasliwal, learned Advocate for the petitioners submits that in fact, the original document was lost and permission to lead secondary evidence under Section 68 of the Evidence Act was solicited, which request was turned down, but this Court, in Writ Petition No.14468 of 2019, by the order dated 05.12.2019, permitted the petitioners to lead secondary evidence. It is pursuant to such permission that a copy of the Agreement of

Sale was sought to be exhibited during examination-in-chief of the petitioners. But, by the impugned order, it has been refused to be exhibited relying on the decision in the case of ***Omprakash Vs. Laxminarayan and others; 2013 AIR SCW 5826***. The learned Advocate submits that in fact, the decision in the case of ***Omprakash*** (supra) was distinguished in a subsequent decision of the Supreme Court in the case of ***M/s. Z. Engineers Construction Pvt.Ltd. Vs. Bipin Bihari Behera; AIR 2020 SC 1140***. He would submit that as has been laid down in this subsequent decision, the Trial Court ought to have decided the issue as to the nature of the document by permitting the parties to lead evidence regarding transfer of possession. That having not been done, the petitioners' right to seek specific performance is at the risk of being rejected for want of the Agreement.

4. I have carefully gone through the papers and the impugned order. It is a matter of record that admittedly, by a order dated 19.09.2015 passed on Exhibit-19, the Trial Court had recorded the specific finding about the Agreement of Sale being insufficiently stamped. Though the learned Judge seems to have referred the provisions of the Indian Stamp Act, when he should have considered the provisions of the Maharashtra Stamp Act, the scenario does not change. There is a specific bar under Section 34 of the Maharashtra Stamp Act preventing a document, which is insufficiently stamped, being led in evidence. Admittedly, pursuant to the order passed by the Trial Court on Exhibit-19 on 19.09.2015, the petitioners have not paid the

deficit stamp duty and penalty, if any. It is pertinent to note that by virtue of the proviso to Section 34 when the insufficient stamp duty and penalty is recovered, the law permits the instrument or document to be admitted in evidence.

5. The submission of learned Advocate Mr. A.D. Kasliwal that since this Court has permitted to lead the secondary evidence of the Agreement of Sale, the original of which is lost, the Trial Court ought to have permitted the petitioners to lead secondary evidence by accepting the copy of the Agreement of Sale, is not legally tenable. If such a course is to be adopted, that would put the provisions of Chapter-IV of the Maharashtra Stamp Act to naught. Even if it is a document in the form of a copy of the original Agreement of Sale, which was impounded but lost, this copy would be inadmissible in evidence by virtue of Section 34 of the Maharashtra Stamp Act. This is what has been precisely concluded by the learned Civil Judge in the impugned order.

6. The learned Civil Judge has also rightly placed reliance on the decision in the case of ***Omprakash*** (supra), wherein it has been specifically held that the version of the parties is inconsequential if the recitals of the document themselves mention about delivery of possession and would be susceptible to stamp duty as a conveyance.

7. The Supreme Court, in the case of ***M/s. Z. Engineers***

Construction Pvt.Ltd. Vs. Bipin Bihari Behera (supra) , in paragraph 8 , has referred to the decision in the case of *Omprakash* (supra) and has distinguished it on facts. As is pointed out above, the facts in the matter in hand are exactly similar to the one that were before the Supreme Court in the case of *Omprakash* (supra). Therefore, the petitioners are not entitled to derive any benefit from the decision in the case of *M/s. Z. Engineers Construction Pvt.Ltd. Vs. Bipin Bihari Behera* (supra). There is no merit in the Writ Petition.

8. The Writ Petition is dismissed in limine.

[MANGESH S. PATIL]
JUDGE

npj/WP4244-2020