IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO.82/2017

APPELLANT/ : **ORG. DEFENDANT No.1 on R.A.**	Smt. Babybai w/o Pandurang Madankar, aged – 63 years, occupation – Household, r/o Plot No.335, Hiwari Layout, Wathoda Road, Nagpur, Tahsil & District – Nagpur (Maharashtra State)

...VERSUS...

RESPONDENTS/ : **ORG. PLAINTIFF No.1 on R.A.**	1.	Shri Ghelabhai Narayanji Sakariya aged about 70 years, occupation – Business, (Dead) Thr. Lrs.

Legal heirs of deceased respondent no.1.

His widow is already on record as respondent no.2 – Smt. Shardabai wd/o Ghelabhai Sakariya

R.1 a. Pravin Kumar s/o Ghelabhai Sakariya aged about 50 years, Occ. Business, R/o Garoba Maidan, jagjivan Nagar, Plot No.237, Central Avenue, Nagpur.

b. Ishwarlal Ghelbhai Sakariya, Aged about 60 years, Occ. : Business, R/o Satnami Nagar, Jagjivan Nagar, Central Avenue, Nagpur.

c. Smt. Yashwanti w/o Pravinchand Pomal, Aged about 52 years, Occ. : Household, R/o Raipur (Chattisgarh).

d. Smt. Usha w/o Surendrabhai Soni,
aged about 55 years, Occ. : household,
R/o Raipur (Chattisgarh).

e. Smt. Pushpa w/o Hemendrakumar Soni,
Aged about 54 years, Occ. : household,
R/o Raipur (Chattisgarh).

(Amended as per Court's order Dt. 26.06.2018)

ORG. PLAINTIFF No.2 on R.A.

2. Smt. Sharadabai w/o Ghelabhai Sakariya
aged about 65 years, Occupation - Household.

Both resident of Plot No.237, Jagjiwanram Nagar, Garoba Maidan, Nagpur, Tahsil & District – Nagpur (Maharashtra State)

ORG. DEFENDANT No.2 on R.A.

3. Pandurang s/o Vithobaji Madankar
aged about – 65 years, occupation - Retired, r/o Plot No.335, Hiwari Layout, Wathoda Road, Nagpur, Tahsil & District Nagpur (Maharashtra State)
(Deleted)
(Amended as per Court's order dated 26-6-2018)

ORG. DEFENDANT No.3 on R.A.

4. Shri Gulabrao Sakharam Bobade,
aged about 46 years, occupation – Truck owner, r/o Plot No.237, Jagjiwanram Nagar, Garoba Maidan, Nagpur, Tahsil & District – Nagpur (Maharashtra State)

(Dead) through L.Rs.

<u>Legal heirs of deceased respondent no.4</u>

a. Sumitra wd/o Gulabrao Bobade,
Aged about 55 years, Occ. : Household,
Wife.

b. Narendra s/o Gulabrao Bobade,
aged about 35 years, Occ. : Private
Son.

c. Ravindra Gulabrao Bobade,
aged about 32 years, Occ. : Private,
Son.

d. Vandana Suresh Diwte,
Aged about 45 years, Occ. : Household,
Daughter.

e. Kalpana Shinde,
Aged about 30 years, Occ. : household,
Daughter.

All resident of Plot No.243, Jagjiwanram Nagar, Garoba Maidan, Nagpur, Tah. And District – Nagpur.

(Amended as per Court's order Dt. 26.06.2018)

ORG. DEFENDANT No.4 on R.A. 5. Nagpur Improvement Trust, Sadar, Nagpur Through its Chairman.

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders	Court's or Judge's orders

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Shri A.V. Khare, Counsel for appellant
Shri P.K. Mishra, Counsel for respondent nos.1 (a to e) and 2
None for respondent nos.4 (a) to (e)

CORAM : AVINASH G. GHAROTE, J.

RESERVED ON : 06/01/2020
PRONOUNCED ON : 17/03/2020

O R D E R :

1. On 22/9/2017, while issuing notice, the following substantial question of law was framed :-

> "*An objection being raised to the admissibility of documents at Exhibits-49 and 50 which aspect was not decided by the trial Court, whether the appellate Court was precluded from entertaining this objection in the light of provisions of Section 35 of the Maharashtra Stamp Act* ?"

2. I have heard learned Counsel Shri A.V. Khare for the appellant and learned Counsel Shri P.K. Mishra for the respondent nos.1 (a to e) and 2. Respondent no.3 stands deleted by order dated 26/6/2018. None appears for the respondent nos.4 (a) to (e), though served.

3. To appreciate the back ground, it is necessary to state a few facts :-

(a) The suit property is a house bearing No.1149 known as 'Parwati Bhavan' on plot No.237, situated in Central Avenue Section – III, Middle Precincts Layout, Jagjiwanram Nagar, Nagpur.

(b) The plaintiff/Parwatibai Akre on 27/6/1994, executed an agreement of sale of the suit property in favour of the defendants for total consideration of Rs.3,10,000/- which is claimed to have been resettled as Rs.3,05,000/-, out of which a part consideration of Rs.40,000/- was received by her on the date of the agreement of sale. Sale-deed (Exh.49) was to be executed in three months.

(c) Parwatibai expired on 9/4/1995 leaving behind her the defendant no.1 as her only legal heir.

(d) Possession of portion of suit property is delivered to plaintiffs under the agreement of sale.

(e) By a supplementary agreement dated 29/9/1994 time was extended till 31/12/1994 (Exh.50).

(f) Plaintiffs claim to have paid consideration of Rs.2,55,000/- from time to time till 29/9/1994.

(g) On failure to execute sale-deed, notice was issued on 27/1/1995 to which reply was given on 20/3/1995, denying the transaction.

(h) Due to demise of Parwatibai, a notice was issued to defendant no.1 on 20/9/1995, calling upon defendant no.1 to execute sale-deed, and upon denial, suit for specific performance was filed.

(i) Written Statement was filed in which a plea was taken that the agreement was not properly stamped as required under Section 25 of the Maharashtra Stamp Act.

(j) The Trial Court decreed the suit granting specific performance. The Appellate Court dismissed the appeal.

4. The only question urged is that the Courts below ought not to have read the agreement of sale (Exh.49) and the supplementary agreement of sale (Exh.50), as they were insufficiently stamped and therefore, grant of a decree on its basis was clearly an illegality.

5. The submission of Shri Khare, learned Counsel for the appellant is that the documents (Exh.49 and 50) since they evinced delivery of possession and were written on stamp of Rs.20/-, the same were therefore insufficiently stamped, and therefore unless and until the same were impounded and proper stamp duty paid along with the penalty thereupon, the same could not have been read and relied upon by the Trial Court for grant of a decree for specific performance. Learned Counsel further contends that

since it is an admitted position on record that the agreement of sale was not duly stamped and an objection to that effect, was raised in written statement, even though such an objection was not raised at the time of exhibiting the document during the course of evidence, it was the duty of the Trial Court, to have taken the objection as raised in the written statement into consideration and refused to exhibit the document unless and until the same was impounded and proper stamp duty with penalty was paid thereupon. He therefore submits that failure on part of the Trial Court to do so, has clearly resulted in an illegality, which goes to the root of the matter which has been carried forward by the Appellate Court, in light of which, the judgments need to be set aside. In support his contentions, he places reliance upon the following judgments :-

(1) 1978 (3) SCC 236 [Ram Rattan (dead) by legal representatives Vs Bajrang Lal and others]

(2) 2004 CJ (Bom.) 2093 [Indrakant Kishordas Shah Vs Keshrinath D. Mhatre]

(3) (2005) 1 ALL MR 335 [Conwood Agencies Pvt. Ltd. Vs Namdeo Pandurang Panchal and another]

(4) Writ Petition No.803/2012, decided on 07/05/2012, Bombay High Court (Nagpur

Bench) [Shri Gruha Nirman Sahakari Sanstha Ltd. Vs Smt. Chandrakala Dhage and others]

6. Shri Mishra, learned Counsel for the respondent nos.1 (a to e) & 2 submits that in light of the provisions of Section 34 read with Section 35 of the Maharashtra Stamp Act, any such objection, regarding insufficiency of stamp, has to be raised at the time when the document is at the stage of being admitted in evidence. He submits that even if an objection as to insufficiency of stamp is taken in the written statement, failure to raise the same at the time the document is admitted in evidence would amount to waiver resulting in the provisions of Section 35 of the Maharashtra Stamp Act coming into picture, thereby creating a bar to raise this plea at a subsequent point of time. He invites my attention to the evidence of P.W.1/Ghelabhai at Exh.37, in which the two agreements were marked as Article-A and Article-B and specifically paragraph no.2 of her examination-in-chief in which it was specifically stated that the agreement was typed over stamp paper of Rs.20/- denomination. He therefore contends that it is not a case as if the Counsel for the defendant no.1 was not aware as to the nature of the document or denomination of the stamp paper on which it was typed, as this was specifically spelt out during the course of examination of P.W.1 at Exh.37. He further submits that not a single question as to insufficiency of stamp has been

put to the witness, in the course of cross-examination. He further draws my attention to the evidence of P.W.2 - Mananbhai, who was the witness to both the agreements, in whose examination-in-chief the agreements were exhibited as Exh.49 and 50. He further submits that during the course of exhibition of these documents, in spite of the fact that the Counsel for the defendant no.1 was present, he did not take any objection whatsoever as to any insufficiency of stamp due to which the documents were marked as exhibits. He, therefore, submits that since at the stage of admission of the documents no objection was taken to their exhibition on the ground of insufficiency of stamp, as required under Section 34 of the Maharashtra Stamp Act, in light of mandate of Section 35 of the Maharashtra Stamp Act such an objection could not have been raised at any later stage. He places reliance upon the following judgments :-

(1) AIR 1961 SC 1655 [Javer Chand and Ors. Vs Pukhraj Surana]

(2) 2001 (4) Bom C.R. 114 [Wolstenholme International Ltd. Vs Twin Stars Industrial Corporation & others]

(3) AIR 2003 BOMBAY 192 [Naginbhai P. Desai Vs Taraben A. Sheth]

(4) 2014 (4) Bom.C.R. 877 [Mahendra Mahadeo Deshbratar & ors . Vs Kailash Bhauraoji Chandankhede]

(5) 2015 (3) Bom. C.R. 653 [Rajiv Laxminarayan Jaju Vs Gopal Motilal Baheti & ors.]

(6) 2016 (5) ABR 552 [Sham Pundlalik Dhumatkar Vs Smt. Pushpa Mohanlal Talreja & others]

7. Sections 34 and 35 of the Maharashtra Stamp Act read as under :-

*"**34. Instruments not duly stamped inadmissible in evidence, etc.***

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.

Provided that, -

(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of, -

(i) the duty with which the same is chargeable, or in the case of an instrument

insufficiently stamped, the amount required to make up such duty, and

(ii) a penalty at the rate of 2 per cent of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument :

Provided that, in no case, the amount of the penalty shall exceed four times the deficient portion of the stamp duty.

(b) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp; the contract or agreement shall be deemed to be duly stamped ;

(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 or Part D of Chapter X of the Code of Criminal Procedure 1973.

(d) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.

(e) nothing herein contained shall prevent the admission of a copy of any instrument or of an oral admission of the contents of any instrument, if the stamp duty or a deficient portion of the stamp duty and penalty as specified in clause (a) is paid.

35. Admission of instrument where not to be questioned

Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 58, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

8. The expression "**admitted in evidence**" as occurring in Section 34 of the Maharashtra Stamp Act necessarily refer to the stage at which the document is being sought to be put in evidence or tendered in evidence, with the object of getting it exhibited so as to enable the Court to read the same in evidence, after the proof of the same has been tendered. Any objection as to the admissibility of the document on account of it being insufficiently stamped, has necessarily to be taken by the Counsel, at the stage before the document is marked as an exhibit. Once the document is

marked as an exhibit, there is no provision in law to de-exhibit the same on any count whatsoever, in absence of which, it would not be permissible for the Court to reverse the action of having exhibited the document. Insofar as the plea regarding insufficiently stamped document this is further supported by the language of Section 35 of the Maharashtra Stamp Act, which creates an embargo or prohibition, in raising any question as to the inadmissibility of the document on account of it being insufficiently stamped "**at any stage of the same suit or proceeding**". The language of Section 35 of the Maharashtra Stamp Act is, therefore, express and implicit, inasmuch as once the document is admitted in evidence, either without any objection or objection having been raised and rejected, the same cannot be called in question at any subsequent stage of the suit.

9. This is more so, for the reason that once it is brought to the notice of the Trial Court that the document was insufficiently stamped, the provisions of Section 33 of the Maharashtra Stamp Act step in and it becomes, obligatory upon the Court to impound the same and send it to the Collector of Stamps for determining the true market value and assessing the proper stamp duty and penalty chargeable payable thereupon. This however is subject to the provisions of Section 32A of the Maharashtra Stamp Act

which would include the statutory mandate as contained in Section 32A (3) of the Maharashtra Stamp Act, which reads as under :-

> *“**Section 32A. Instrument of conveyance, etc. undervalued how to be dealt with***
>
> *(1) ....*
>
> *(2) ....*
>
> *(3) If any person referred to in section 33, before whom any such instrument is produced or comes in the performance of his functions, <u>has reason to believe</u> that the market value of the immovable property which is the subject matter of such instrument has not been truly setforth therein, he may, after performing his function in respect of such instrument, refer the instrument alongwith a true copy of such instrument to the Collector of the District for determination of the true market value of such property and the proper duty payable on the instrument.*
>
> *Provided that if the person, before whom any such instrument is produced or comes in performance of his functions, is an officer appointed as the Collector under clause (f) of section 2, and he has <u>reason to believe</u> that the market value of the immovable property which is*

the subject matter of such instrument has not been truly set-forth therein, he shall, for the purpose of assessing the stamp duty, determine the true market value of such property in the manner laid down in the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995."

10. The expression '**reason to believe**' as occurring in Section 32A (3) of the Maharashtra Stamp Act and '**if it appears to him**', as occurring in Section 33 (1) of the Maharashtra Stamp Act would mean an objection being raised before the Court as to insufficiency of stamp, upon which, the duty as cast upon such authority, would ensue, and not otherwise. This is fortified from the language of Sections 34 and 35 of the Maharashtra Stamp Act the conjoint effect of which is that in case such objection is not raised the admission of the document in evidence shall not be questioned at any stage of the same suit or proceeding, in light of the mandate of Section 3 of the Maharashtra Stamp Act.

11. The contention therefore that it is the duty of the Court before which an insufficiently stamped document comes or tendered in evidence, in absence of any objection being raised by the other side, to examine such document

as to sufficiency of stamp and in case it finds that it is insufficiently stamped, to impound the same, is clearly erroneous. It is neither the function nor the duty of the Court to examine each and every document, which is filed in proceedings before it, so as to determine whether such document is sufficiently or insufficiently stamped. It is only when a document is sought to be admitted in evidence or an application is filed raising such a plea, that the Court would be called upon to decide the objection/plea and not otherwise. It is for the litigant or his Counsel to be alert to raise a plea as to insufficiency of stamps on a document, either by way of an application or by objecting to the same when it is being admitted in evidence and any failure would attract the rigour of Section 35 of the Maharashtra Stamp Act and such litigant will then be precluded from raising such question at the subsequent stages of the suit.

12. ***Ram Rattan*** (Supra) relied upon by the learned counsel for the appellant was a case in which, when the document was tendered in evidence, by the plaintiff while in the witness box, an objection was raised that it was not duly stamped, whereupon the document was exhibited, subject to objection. When at the stage of arguments, it was contended that the document was inadmissible in evidence, the Trial Court therein rejected the contention taking recourse to Section 36 of the Indian Stamp Act (which is in

pari materia with Section 35 of the Maharashtra Stamp Act). It is in light of this background that the Hon'ble Apex Court held that when an objection as to admissibility of a document is taken, that it is not sufficiently stamped, that the Court has to judicially determine the objection as soon as the document is tendered in evidence and before it is marked as an exhibit. ***Ram Rattan*** (Supra) therefore, is of no assistance to the learned Counsel for the appellant, as in the instant case no objection of whatsoever nature was raised when the documents were tendered in evidence of P.W.2 and marked as exhibits.

13. In ***Indrakant Shah*** (Supra) also, the objection as to the admissibility of the document was raised when the documents were sought to be admitted in evidence and the issue as to decision on their admissibility was postponed for consideration at the stage of final hearing, in which background the learned Court held that the question as to admissibility ought to be decided when the same is raised and not postponed for consideration at a later stage. ***Conwood Agencies Pvt. Ltd.*** (Supra) is also on the same lines as ***Indrakant Shah*** (Supra). These judgments are therefore of no assistance to the argument as is being canvassed by the learned counsel for the petitioner.

14. In ***Shri Gruha Nirman Sahakari Sanstha Ltd.*** (Supra), the issue was totally different, in as much as the agreement of sale, the specific performance of which was sought, was found to be insufficiently stamped and unregistered, due to which an application for impounding the document was filed, upon rejection of which, in Writ Petition No.5337 of 2009, the application for impounding was allowed and document sent to the Collector of Stamps, who by an order dated 30/07/2011, assessed stamp duty and penalty by his order dated 30/07/2011, which was challenged in appeal before the appellate authority under Section 53(1)(A) of the Maharashtra Stamp Act, which was pending for adjudication. When the document was sent for impounding the matter was at the stage of recording of evidence of the plaintiff and after the order was passed by the Collector of Stamps, the Trial Court took up the matter for recording further evidence at which stage an application came to be filed on 31/01/2012 for calling back the document from the office of the Collector of Stamps for being tendered in evidence, which application having been rejected by the Trial Court holding that the said document had not been impounded as yet and hence, it could not be called, this order of rejection was challenged in the writ petition. Thus, this was a case, in which the objection regarding admissibility of the said document was already decided and it was already held that the said document was

insufficiently stamped and was required to be impounded which has to be tendered in evidence. This case also does not assist the learned Counsel for the appellant.

15. As against the above, the judgment of the Hon'ble Apex Court in the case of ***Javer Chand and Ors. Vs Pukhraj Surana,*** reported in ***AIR 1961 SC 1655***, relied upon by Shri P.K. Mishra, learned Counsel for the respondent nos. 1 (a to e) and 2 holds thus :-

> *"Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped it has to be decided then and there when the document is tendered in evidence. Once the Court rightly or wrongly, decides to admit the document in evidence so far as the parties are concerned the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case.*

<u>Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, S.36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the Trial Court itself or to a Court of appeal or revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction.</u>"

16. The above dictum, would categorically demonstrate, that it is always before the document is marked as an exhibit during the course of evidence, that the objection as to admissibility has to be taken. It is therefore, held by the Hon'ble Apex Court, that parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in the evidence by the Court. This is so for the reason that Section 36 of the Stamp Act in the present case (Section 35 of the Maharashtra Stamp Act), creates an embargo upon the power of the Trial Court or Higher

Courts to go into behind such an order/action exhibiting the document.

17. The matter, also has to be viewed in light of dictum of the Hon'ble Apex Court, as pronounced in the case of ***Hindustan Steel Ltd. Vs M/s. Dilip Construction Co.***, reported in ***AIR 1969 SC 1238*** **[considered in Wolstenholme (Supra)]** holding thus:-

> *"The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments; it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue."*

This would clearly indicate that if the party has any objection as to the admissibility on account of insufficiency of stamp, and the same is not raised at the appropriate time, and the document is allowed to be exhibited, it would be impermissible for him to revert the clock back at a later point of time by raising any contrary contentions.

18. ***Naginbhai P. Desai Vs Taraben A. Sheth***, reported in ***AIR 2003 Bombay 192***, relied by the learned Counsel for the respondent nos.1 (a to e) and 2 holds that

where an objection as to the admissibility of the document on account of insufficiency of the stamp was raised and was decided by the Trial Court when the document was tendered in evidence, and that decision became final, it cannot be reopened in appeal, is not of much assistance to the learned Counsel for the respondent nos.1 (a to e) and 2, as in the instant case the issue regarding insufficiency of stamp was not raised and therefore, the Trial Court had no occasion to decide the same.

19. ***Mahendra Mahadeo Deshbratar & ors. Vs Kailash Bhauraoji Chandankhede***, reported in ***2014 (4) Bom. C.R. 877*** and ***Rajiv Laxminarayan Jaju Vs Gopal Motilal Baheti & ors.***, reported in ***2015(3) Bom.C.R. 653*** as well as ***Sham Pundlalik Dhumatkar Vs Smt. Pushpa Mohanlal Talreja & others***, reported in ***2016 (5) ABR 552*** reiterates the dictum in ***Javer Chand*** (Supra)

20. It would thus, be apparent that the law is well settled in this regard, that any objection regarding the document being insufficiently stamped or for that matter as to the admissibility of the same has to be taken at the time when the same is sought to be tendered/admitted in evidence and on failure to do so, once document is marked as an exhibit, Section 35 of the Maharashtra Stamp Act, creates an embargo to question such decision, at a later

stage of the suit, or in higher Courts. This is more so, as neither the Code of Civil Procedure, nor the Evidence Act contains any provision for de-exhibiting any document. Thus, in absence of any statutory mandate in the Code of Civil Procedure or the Evidence Act to the contrary, the statutory prohibition as contained in Section 35 of the Maharashtra Stamp Ac has to prevail and a party is clearly precluded from calling into question the exhibition of a document on account of it being insufficiently stamped, at a later stage of the same suit or in higher Courts.

21. In the instant case, the record demonstrates that the learned Counsel for the defendants, in spite of being aware of the nature of the plea as raised in defence that the documents were insufficiently stamped, did not choose to raise any objection as to their inadmissibility on that count at the time, the documents were being sought to be exhibited in the evidence of P.W.2, the witness to the agreements, who was clearly competent in law to prove the same. At the time of marking the documents as exhibits, no objection of whatsoever nature was raised by the Counsel for the defendants. In fact, the cross-examination of P.W.2 demonstrates that document/agreement to sale, marked as exhibit 49, was extensively referred to in cross-examination of P.W.2. Thus, the defendants are precluded from raising this issue, at any stage, consequent to the documents

having been exhibited.

22. That being the position, in my opinion, the Courts below were correct in holding that such an objection, cannot be permitted to be raised at later stage. In that light of the matter, there is no substantial question of law involved. No other plea has been raised or addressed. The second appeal is, therefore, without any merits and is dismissed. There shall be no order as to costs.

JUDGE

Wadkar, P.S. &
J. Pethe, P.A.