

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 13563 OF 2017

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| 1. Nilkanth s/o. Shridhar Thorbole
Age. 60 years, Occ. Agri.,
R/o. Gojwada, Tq. Washi,
Dist. Osmanabad. | .. | Petitioners
[original
defendants] |
| 2. Shrihari s/o. Nilkanth Thorbole
Age. 32 years, Occ. Agri.,
R/o. Gojwada, Tq. Washi,
Dist. Osmanabad.
Through GPA
Nilkanth s/o. Shridhar Thorbole
Age. 60 years, Occ. Agri.,
R/o. Gojwada, Tq. Washi,
Dist. Osmanabad. | | |

Versus

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| 1. Hanumant s/o. Baburao Magar
Age. 32 years, Occ. Agri.,
R/o. Gojwada, Tq. Washi,
Dist. Osmanabad. | .. | Respondents
[No.1 ori.
plaintiff,
Nos.2 & 3
original
defendants] |
| 2. Balaji s/o. Aanta Kore,
Age. 30 years, Occ. Agri.,
R/o. Indapur, Tq. Washi,
Dist. Osmanabad. | | |
| 3. Sham s/o. Ananta Kore
Age. 25 years, Occ. Agri.,
R/o. Indapur, Occ. Washi,
Dist. Osmanabad. | | |

Mr. K.R. Doke, Advocate for the petitioners.
Mr. B.V. Thombre, Advocate for respondent No.1.

CORAM : N.J.JAMADAR, J.
RESERVED ON : 04.03.2021
PRONOUNCED ON : 16.03.2021

J U D G M E N T :-

01. Rule. Rule made returnable forthwith and with the consent of learned Counsel for the parties, heard finally at the stage of admission.

02. Can a document, which in original is not admissible, be permitted to be proved by allowing a party to adduce its secondary evidence?

03. The aforesaid question crops up for consideration in the backdrop of the following facts:-

a] The respondent No.1 instituted a suit for declaration and perpetual injunction with the averments that the father of Balaji and Sham, respondent nos.2 and 3 – original defendant Nos.3 and 4, had executed a sale-deed in favour of plaintiff's father – Baburao, on a

stamp paper of Rs.20/- denomination, which was purchased by defendant No.2 – Shrihari, the petitioner No.2 herein, on 2nd May, 1992 and thereby alienated an area admeasuring 66 x 40 ft, out of land bearing Gat No.219 situated at Mouje Gojwada, Tal. Washi, Dist. Osmanabad [suit property]. The possession of the suit property was delivered under the said sale-deed on the day of its execution. The suit property was mutated in the name of the plaintiff's father vide Mutation Entry No.745. Likewise, the name of the plaintiff's father was included in the assessment list of the village panchayat.

b] The plaintiff has since been in continuous and peaceful possession of the suit property. On 30th April, 2012, the defendant Nos.1 and 2 – petitioners herein, at the instigation of defendant Nos.3 and 4 caused obstruction to the possession of the plaintiff over the suit property. Hence, the suit for declaration of title and perpetual injunction.

c] The defendants resisted the suit. After the commencement of trial, the plaintiff preferred an application seeking permission to lead secondary evidence [Exh.11]. It was asserted that the original instrument where-under the suit property came to be transferred was tendered in the Office of Talathi for mutating the name of father of the plaintiff. Said instrument is not since forthcoming. Hence, as the original instrument is lost, the plaintiff be permitted to lead a photostat copy thereof by way of secondary evidence.

d] The defendant Nos.1 and 2 resisted the application. Apart from controverting the allegations of loss of original instrument, it was categorically contended that in the alleged sale-deed, consideration of Rs.11,000/- is shown. However, the said instrument was not registered, as mandated by the provisions contained in Section 17 of the Indian Registration Act, 1908. Since the original document itself could not have been admitted in evidence, there is no question of permitting

the plaintiff to lead secondary evidence thereof.

e] The learned Civil Judge, after hearing the submissions on behalf of the plaintiff and defendant Nos. 1 and 2, was persuaded to allow the application to lead secondary evidence. The learned Judge was of the view that both the conditions, namely, the existence of the original document and its loss were made out and, therefore, to advance cause of justice, it was necessary to allow the plaintiff to lead secondary evidence in the form of photostat copy of the document allegedly executed by the father of defendant Nos.3 and 4 in favour of the father of the plaintiff. Being aggrieved, the defendant Nos. 1 and 2 have invoked the writ jurisdiction of this Court.

04. I have heard Mr.Doke, learned Counsel for the petitioners and Mr.Thombre, learned Counsel for respondent No.1 at some length.

05. Mr. Doke would urge that the learned Civil Judge fell into an error in allowing the respondent No.1-plaintiff to lead secondary evidence of a document, which in original could not have been admitted in evidence. Indisputably, the alleged sale-deed is not registered. Thus, the bar contained in Section 49 (c) of the Indian Evidence Act, 1908 applied with full force and precluded the Court from receiving the unregistered sale-deed as an evidence of any transaction affecting the suit property.

06. Secondly, the instrument was not duly stamped. In view of the provisions contained in Section 34 of the Maharashtra Stamp Act, 1958, an inadequately stamped instrument is inadmissible in evidence, unless the requisite stamp duty is paid thereon. The learned Civil Judge did not advert to the aforesaid mandatory provisions, which explicitly preclude the Court from admitting in evidence an unregistered instrument, when the document is compulsorily registerable, and an inadequately stamped instrument. When the original

itself would not be admissible for want of registration and inadequate stamp duty, a copy thereof could not have been admitted by way of secondary evidence, urged Mr. Doke.

07. In order to lend support to aforesaid submissions, Mr. Doke placed reliance on the judgment of the Supreme Court in the case of J.Yashoda Vs. K. Shobha Rani (2007) 5 SCC 730, Gurmukh Ram Madan Vs. Bhagwan Das Madan, 1998 AIR SC 2776 and Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao, AIR 1971 SC 1070. It was further urged that the learned Civil Judge committed a manifest error in banking upon a judgment of this Court in the case of Bank of Baroda, Bombay Vs. Shree Moti Industries, Bombay and Ors., 2009(1) Mh.L.J.282, for the controversy raised in the instant case did not arise for consideration before this Court in the case of Bank of Baroda (supra).

08. Per contra, Mr.Thombre, learned Counsel for

respondent No.1 submitted that since the impugned order has been passed to advance cause of substantive justice, by providing an opportunity to the plaintiff to lead secondary evidence of the sale-deed on which the plaintiff's case rests, no interference is warranted at the hands of this Court in exercise of the writ jurisdiction. As a second limb of the submission, Mr. Thombre would urge that, in view of proviso to Section 49 of the Registration Act, an unregistered instrument can be received as evidence of a collateral transaction between the parties which is not required to be effected by a registered instrument. Thus, the learned Judge did not commit any error in allowing the respondent No.1-plaintiff to lead secondary evidence, as the question of plaintiff having been put in possession under the said instrument arises for consideration.

09. To begin with, it is imperative to note that there is no quarrel over the fact that the instrument, under which the plaintiff claims to have acquired title

over the suit property has not been registered. It is incontrovertible that the consideration therein is shown at Rs.11,000/-. Nor is it in contest that the instrument (copy of which was sought to be tendered in evidence by way of secondary evidence) was scribed on a stamp paper of Rs.20/- denomination. Thus, bar contained in Section 49(c) of the Registration Act and section 34 of the Maharashtra Stamp Act, 1958 came into operation. Evidently, for want of registration and failure to pay adequate stamp duty, the said sale-deed could not have been admitted in evidence, even if tendered in original.

10. In the backdrop of the aforesaid facts, the submissions on behalf of the parties are required to be appreciated. On first principles, the secondary evidence must be of a document which is admissible in evidence. Primary question would be of admissibility of the document in evidence. If the question of admissibility is decided in favour of a party, who tenders it, then the question of mode of proof would crop up.

11. In the case of J.Yashoda Vs.K.Shobarani (Supra), after adverting to the provisions contained in Section 63 and Section 65 of the Indian Evidence Act, the Supreme Court enunciated the principles in following words :-

"7. Secondary evidence, as a general rule is admissible only in the absence of primary evidence. If the original itself is found to be inadmissible through failure of the party, who files it to prove it to be valid, the same party is not entitled to introduce secondary evidence of its contents.

8. Essentially, secondary evidence is an evidence which may be given in the absence of that better evidence which law requires to be given first, when a proper explanation of its absence is given. The definition in Section 63 is exhaustive as the Section declares that secondary evidence "means and includes" and then follow the five kinds of secondary evidence. "

[emphasis supplied]

12. In the case of Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao, AIR 1971 SC 1070, in the context of the provisions contained in Section 35 of the Indian Stamp Act, the Supreme Court expounded the legal position in clear and explicit terms that Section 35 of the said Act deals with original instrument and not copies and thus Section 36 of the said Act cannot be so interpreted as to

allow secondary evidence of an instrument to have its benefit. The observations in para Nos.14 and 15 are instructive. They read as under :-

"14. If Section 35 only deals with original instruments and not copies Section 36 cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit. The words "an instrument" in Section 36 must have the same meaning as that in Section 35. The legislature only relented from the strict provisions of Section 35 in cases where the original instrument was admitted in evidence without objection at the initial stage of a suit or proceeding. In other words, although the objection is based on the insufficiency of the stamp affixed to the document, a party who has a right to object to the reception of it must do so when the document is first tendered. Once the time for raising objection to the admission of the, documentary evidence is passed, no objection based on the same ground can be raised at a later stage. But this in no way extends the applicability of Section 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped.

15. The above is our view on the question of admissibility of secondary evidence of a document which is unstamped or insufficiently stamped, as if the matter were res-integra. It may be noted however that the course of decisions in India in the Indian High Courts, barring one or two exceptions, have consistently taken the same view."

13. The learned Civil Judge, it seems, was not alive to the position that the peremptory requirement for admitting secondary evidence of an instrument is that the instrument in original ought not have the taint of

inadmissibility under any law. The absolute bar envisaged by the provisions contained in Section 49 of the Registration Act, 1908 [save the exceptions carved out by the proviso] and Section 34 of the Maharashtra Stamp Act, 1958 against the admissibility of the instrument till the defect subsists on account of non-registration and inadequate stamp duty, as the case may be, was not given the consideration it deserves. Instead, the learned Civil Judge posed unto himself an incorrect question as to whether the case for admissibility of the secondary evidence was made out, on general premises.

14. Undoubtedly, a conjoint reading of the provisions contained in Section 63 and 65 of the Evidence Act spells out the conditions, which must be satisfied before permission to lead secondary evidence can be granted, namely, evidence of existence of original document, the circumstances which bring the case within any of the clauses of Section 65, and the secondary evidence sought to be tendered being of the type referred

to in Section 63 of the Indian Evidence Act, 1872. The fulfilment of these requirements, however, cannot empower a party to lead secondary evidence, when primary evidence itself is inadmissible.

15. There is substance in the submission on behalf of the petitioner that the learned Civil Judge misconstrued the ratio in the case of Bank of Baroda (supra), wherein it was, inter alia, observed as under :-

"27. xxxxxxxx To sum up, when anybody wants to lead secondary evidence, two things are required to be proved; there must be evidence of the existence of the original documents, and there must be evidence of their loss."

16. It seems the learned Civil Judge lost sight of the immediately succeeding paragraph of the aforesaid judgment, wherein the Court observed in clear and explicit terms that "The secondary evidence of the contents of document is inadmissible until non-production of the original is first accounted for, so as to bring it within one or other category of cases provided for in section 65 of the Indian Evidence Act."

17. In the case at hand, the respondent No.1/ plaintiff had to surmount a substantive challenge on the ground of inadmissibility of the original instrument. This could not have been met by simply accounting for non-production of the original.

18. Mr.Thombre, learned Counsel for respondent No.1/ plaintiff attempted to wriggle out of the situation by forcefully advancing a submission that the bar under section 49(c) to the inadmissibility of the sale-deed did not preclude the plaintiff from tendering the sale-deed in evidence for the collateral purpose of establishing longstanding possession of the plaintiff over the suit property.

19. The submission appears alluring at the first blush. However, it does not stand legal scrutiny. In the case at hand, the alleged sale-deed executed by the predecessor in title of defendant Nos.3 and 4 constitutes

the substratum of the plaintiff's case on the basis of which the principal relief of declaration of title is sought.

20. Even if the aforesaid submission is countenanced, the respondent/plaintiff cannot wriggle out of the situation as the bar under section 34 of the Bombay Stamp Act, 1958 operates with full force and the instrument cannot be admitted in evidence even for the collateral purpose.

21. A profitable reference in this context can be made to the judgment of the Supreme Court in the case of Garware Wall Ropes Limited Vs. Coastal Marine Constructions and Engineering Limited, (2019) 9 SCC 209, wherein the distinction between the bar to the inadmissibility of the instrument under the Registration Act, 1908 and the Indian Stamp Act, 1899 was expounded. In the said case, in the backdrop of the challenge to an inadequately stamped instrument, which contained an

arbitration clause, following observations were made:-

"18. It will be noticed from the aforesaid judgment that where an arbitration clause is contained in an agreement or conveyance, different consequences ensue depending on whether the agreement or conveyance is unregistered or unstamped. xxxxxxxx

19. xxxxxxxxxx The independent existence that could be given for certain limited purposes, on a harmonious reading of the Registration Act, 1908 and the 1996 Act has been referred to by Raveendran, J. in SMS Tea Estates when it comes to an unregistered agreement or conveyance. However, the Stamp Act, containing no such provision as is contained in Section 49 of the Registration Act, 1908, has been held by the said judgment to apply to the agreement or conveyance as a whole, which would include the arbitration clause contained therein. xxxxxxxx"

22. The upshot of the aforesaid consideration is that the learned Civil Judge could not have allowed the respondent No.1/plaintiff to lead secondary evidence of an instrument which in itself was inadmissible. The petition, therefore, deserves to be allowed.

23. Hence following order :-

The petition stands allowed.

The impugned order dated 21st September, 2017 stands quashed and set aside.

The application preferred by respondent

No.1/plaintiff [Exh.99] to lead secondary evidence stands rejected.

In the circumstances, there shall be no order as to costs.

Rule made absolute in aforesaid terms.

[N . J . JAMADAR , J .]