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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1211 OF 2020

Mr. Shabbir Ahmad S. Khan

....Petitioner

V/s.

Abdul Hameed Khan Matawan and another

.....Respondents

Mr. Shailendra Gangakhedkar i/b Mr. Kapil P. Shetye a/w Mr. Sarfaraz Khalife for the Petitioner

Mr. Piyush Shah a/w Mr. Dishang Shah a/w Mr. Karan Gandhi i/b Omkar Paranjape for Respondents

CORAM : NITIN W. SAMBRE, J.

DATE: FEBRUARY 8, 2021.

P.C.:

1] Heard Shri. Gangakhedkar, learned counsel for the Petitioner and Mr. Piyush Shah for Respondents.

2] This Petition is by the Plaintiff. Respondent claimed to be owner of plot survey no. 75 & 76 at Mumbra who entered into an agreement of sale with the Petitioner-Plaintiff on 23/01/2015. It is claimed that there are two agreements executed by the Respondent-Defendant in

favour of the Plaintiff.

3] Since the agreement was not honoured, suit being S.C.S. No. 517 of 2015 came to be initiated before the Civil Judge Senior Division, Thane for specific performance. It is claimed that before the issues were framed, Application for impounding was moved by Respondent-Defendant.

4] Agreement of sale dated 23/01/2015 and the Power of Attorney are ordered to be impounded at the time of recording of evidence of the Petitioner-Plaintiff vide order impugned dated 10/12/2019. As such, this Petition.

5] Submissions of Shri. Gangakhedkar are, under Proviso to Section 49, an unregistered document which is required to be registered under the Transfer of Property act or under the Registration Act affecting immovable property, may be received in evidence of a contract in Suit for specific performance or as evidence

of collateral transaction. Learned counsel would urge that Apex Court in the matter of **M/s. Z. Engineers Construction Pvt. Ltd. and another Vs. Bipin Bihari Behera and others [AIR 2020 SUPREME COURT 1140]** wherein it is observed provisions of Maharashtra Stamp Act can be invoked only when an objection regarding insufficient stamp duty was judicially raised.

6] According to him, during recording of oral evidence, Trial court can make a note of such objection and mark the document tentatively as an Exhibit, subject to an objection which can be decided at the time of final Judgment. According to him, the objection relates to the deficiency of stamp duty of a document, as such, should have been determined at the fag end of the hearing and not at this stage of the proceedings. Shri. Gangakhedkar would also draw support from the Judgment of the Apex Court in the matter of **Ameer Minhaj Vs. Dierdre Elizabeth (Wright) Issar and others [(2018) 7 Supreme Court Cases 639]** so as to claim that there is legal presumption as to properly stamped Power of Attorney and in case document is hit by the provisions of the Stamp Act or Transfer of

Property Act, can be decided by the Trial Court after adduction of oral and documentary evidence.

7] Learned counsel for the Respondent while supporting the order impugned would urge that considering the nature of document, recitals therein, the Court below was justified in passing the order impugned. According to learned counsel, since the possession is allegedly transferred, document needs to be properly stamped so as to receive it in evidence. As such, he has sought dismissal of the Petition.

8] Considered rival submissions.

9] Document under dispute was produced alongwith list at Exhibit 62 before the Trial Court. When the production of the said document was objected, this court in Writ Petition No. 8511 of 2019 gave liberty to the parties to seek impounding of a document if required in the facts and circumstances of the case.

10] It is not in dispute that document of which impounding was ordered vide impugned order is an unregistered document which is titled as Kharedikhat by which possession is allegedly transferred. Once the possession was transferred, it was necessary to compulsorily register the document under Section 17 of the Registration Act.

11] Insufficiently stamped document which is also not registered of which registration is mandatory cannot be received in evidence as is apparent from the provisions of Section 34 of the Bombay Stamp Act and Section 49 of the Registration Act. As far as the contention of Shri Gangakhedkar that in view of Judgment of the Apex Court in the matter of **M/s. Z. Engineers Construction Pvt. Ltd. and Ameer Minhaj** [Cited supra] that the documents should have been accepted subject to an objection, as statutory presumption in favour of the petitioner that the document is duly stamped, and the acceptability of the document in evidence for inappropriate stamping can be gone into at the stage of final hearing is concerned, same is liable to be

rejected for the reason that by virtue of the document titled as Kharedikhat, possession is claimed to have been transferred as reflected in the recitals therein.

12] In the aforesaid background, it is apparent that the petitioner is a party to the said document. Case of the petitioner is for specific performance is founded on the said document only to which Petitioner and Respondent are parties. In such an eventuality, claim of the petitioner that it should have been accepted in evidence subject to objection, cannot be permitted particularly when the fact remains that document is neither registered nor properly stamped.

13] As far as the contention that the said issue can be gone into at the stage of final hearing of the suit is concerned, this court is required to be sensitive to the fact that in the matter of **Bipin Shantilal Panchal Vs. State of Gujarat and Another [AIR 2001 SCC 1158]** wherein the Apex court has clarified that if the objection relates to the deficiency of the stamp duty of a document, court is duty bound to decide the objection before proceeding further and for all

other objections procedure suggested as is relied on by Shri Gangakhedkar can be accepted or relied upon.

14] This court while dealing with the claim in an earlier Writ Petition as is referred above has taken note of the observations made by the apex court in the matter of **Avinash Kumar Chauhan Vs. Vijay Krishna Mishra [Civil Appeal No. 7350 of 2008]** that there is no prohibition under section 49 of the Registration Act to receive an unregistered document in evidence for collateral purpose. However the document needs to be duly stamped or should comply with the requirement of Section 35 of the Stamp Act. It is also provided for the consequences that if the document is not duly stamped or is not in compliance with Section 35 of the Stamp Act, same cannot be received in evidence even for collateral purpose unless it is duly stamped or duty or penalty are paid.

15] In the case in hand there are two documents Viz. Power of Attorney and agreement of sale. No doubt, said document if so pleaded by the petitioner can be received in evidence only for

collateral purpose but when it is noticed that the case of the petitioner is founded on aforesaid two documents, in my opinion, the contention of the Petitioner that he is protected under the Judgment of **Ameer Minhaj** [Cited supra] cannot be accepted.

16] In the aforesaid background, no case for interference is made out. Petition as such fails stands dismissed.

[NITIN W. SAMBRE, J.]