

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

WRIT PETITION NO. 8312 OF 2015

**SURESH NANAPPA MANCHERIYAL
VERSUS
MOHD. ADIL KHAN MOHD. AKHIL KHAN AND ANOTHER**

...
Advocate for Petitioner : Mr. Ashutosh S. Kulkarni
Advocate for Respondents : Mr. M. J. Murkute
...

CORAM : NITIN B. SURYAWANSHI, J.

DATE : 29th JUNE, 2022

PER COURT :

1. The petitioner is aggrieved by the order passed by the learned 5th Joint Civil Judge, Junior Division, Aurangabad, below Exhibit-62 in Rent Suit No.482/2011.

2. The petitioner/plaintiff by the said application sought leave to lead secondary evidence of agreement to sale dated 02-05-2005, allegedly executed by the defendant in favour of the plaintiff. It is the contention of the petitioner/plaintiff that the defendant alongwith others set the office of plaintiff on fire due to which original agreement to sale alongwith other documents and articles kept in the office were destroyed by fire. He has lodged FIR against the defendant. He, therefore, by filing this application sought permission to lead secondary evidence of part of the said agreement to sale.

3. The defendants resisted the application on various grounds including that agreement to sale is insufficiently stamped and photostate copy of the same is not an instrument and, therefore, may not be impounded. Hence, no permission to lead secondary evidence be granted.

4. The trial Court after hearing the parties rejected the said application by relying on *Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao [AIR 1971 SC 1070]*, *Gayabai Hemlal Jadhav Vs. Hiranman s/o Rama Chavan and Another* and *Jaysingh Vs. Sambhaji [2013(3) Mh.L.J. 433]*. The trial court has recorded a finding that perusal of the copy of agreement to sale depicts that amount of consideration is paid and possession is departed, it is therefore, a conveyance deed and requisite stamp duty has to be paid thereon. Admittedly, agreement to sale is insufficiently stamped, hence, in view of case laws cited before it, reception of secondary evidence is barred.

5. In *Gayabai Hemlal Jadhav* (supra) this Court has held that, photocopy of the document is not an instrument within the meaning of Section 2(14) of the Stamp Act, 1899 or Section 2(1) of the Bombay Stamp Act, 1958 and the provisions of impounding any instrument chargeable with duty cannot be made applicable in respect of copy of the document.

6. In **Jaysingh** (supra) this Court has held that, in a suit for specific performance of agreements to a conveyance attracting stamp duty, determining factor has to be the document itself claimed in the suit. A document in nature of conveyance, where the vendor agreed to hand over possession of land in question, in the agreement to sell as and when called upon by vendee, prior to sale deed being executed, the agreement is required to be stamped on the basis that it was a conveyance.

7. In **Jupudi Kesava Rao** (supra) the Hon'ble Apex Court has held :-

"The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of the section which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for, allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would have the effect of the document being "acted upon" by the person having by law or authority to receive evidence. Proviso (a) is applicable only when the original instrument is actually before the court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly, secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfill the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the

instrument itself. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act. If Section 35 only deals with original instruments and not copies, Section 36 cannot be so interpreted so 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 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."

8. In the light of the above ratio, the trial Court has rightly rejected the application filed by the petitioner, by a reasoned order. No fault can be found with the order impugned in the present petition. No case is made out for interference in the extraordinary writ jurisdiction. Writ petition is, therefore, dismissed.

(NITIN B. SURYAWANSHI, J.)