

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

WRIT PETITION NO. 7361 OF 2019

Ganeshrao S/o Baburao Deshmukh
@ Ganeshrao Himmatrao Deshmukh and another
vs.
Sau. Suvarna Sudhirrao Deshmukh and others

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Mr. A. R. Deshpande, Advocate for petitioners.
Mr. S.A.Choudhari, Advocate for respondent Nos.1, 4 & 5

CORAM : MANISH PITALE J.

DATE : 22/07/2022

The defendant Nos.1 and 2 are before this Court by way of this writ petition, challenging order dated 03/10/2019, passed by the Court of 2nd Joint Civil Judge, Senior Division, Akola, whereby an objection at Exh.145 filed by the respondent No.2 (defendant No.3) has been partly allowed, as a consequence of which only one document i.e. an Adoption Deed is permitted to be exhibited in the pending proceeding before the Court below.

2. The respondent No.1 has filed a suit for partition and separate possession, as also for setting aside alienation. In the said proceeding four

documents were sought to be placed on record – an Adoption Deed, a registered Will Deed, an unregistered Gift Deed and an unregistered Partition Deed. When the said documents were sought to be placed on record and it was to be considered whether they could be exhibited, the aforesaid objection at Exh.145 was preferred by the respondent No.2 i.e. the original defendant No.3. The tenor of the objection was that since the Gift Deed and the Partition Deed were unregistered, they could not be exhibited as they were not admissible documents and exhibiting Will Deed was also opposed by the said respondents. The objections raised by the said respondents were accepted by the Court below and apart from holding that the Gift Deed and Partition Deed cannot be exhibited being unregistered documents, even the Will Deed was not permitted to be exhibited, on the ground that the Will Deed would have to be proved as per the Evidence Act. Consequently, only the Adoption Deed was exhibited.

3. Aggrieved by the impugned order, the petitioners filed the present writ petition, wherein notice was issued and interim stay of the proceedings was granted. The contesting respondents appeared through counsel.

4. Mr.A.R.Deshpande, learned counsel appearing for the petitioners submitted that the Court below committed an error in failing to appreciate the position of law as regards documents being marked as exhibits, particularly the position of law clarified in the full bench judgment of this Court in the case of *Hemendra Rasiklal Ghia vs. Subodh Mody, (2008) 6 Mah.L.J. 886(FB)*, wherein documents have been classified in three categories and the position of law as regards the documents in each category being exhibited and the stage at which the objection can be raised, has been dealt with and clarified.

5. According to the learned counsel for the petitioners, the documents not permitted to be exhibited by the Court below, fall in the third category as identified in the aforesaid full bench judgment of this Court and in such a scenario the documents could certainly have been marked as exhibits with the clarification that merely because exhibit numbers have been put, it would not *ipso facto* mean that the documents were to be treated as admissible documents and the objection regarding admissibility could be considered at the stage of final hearing of the proceeding.

6. On the other hand, Mr.Choudhari, learned counsel appearing for the contesting respondents submitted that the Gift Deed and the Partition Deed are admittedly unregistered documents, which has a specific meaning in terms of admissibility and that the objection was raised on behalf of the respondent No.2 to show that the documents being exhibited ought not to lead to a situation where unregistered documents are taken on record and held to be admissible during the course of the proceedings in the pending suit.

7. It was submitted that this Court had considered the aforesaid question in the case of ***Satish Janardhan Bhusari vs. Ramesh s/o. Rambhau Bidkar and others, 2020(1) ALL MR 593*** and in that case, it was held that the trial Court had erred in marking certain documents as exhibits. On this basis, it was submitted that this Court may not interfere with the impugned order.

8. Having heard the learned counsel for the rival parties in the backdrop of the material on record, this Court is of the opinion that the correctness or otherwise of the impugned order can be decided by first examining as to in which category the documents in question would fall, by applying the

position of law laid down by the full bench of this Court in the case of *Hemendra Rasiklal Ghia vs. Subhod Mody* (supra).

9. A perusal of the relevant portion of the judgment shows that it has been categorically laid down by this Court in the aforesaid full bench judgment, in the context of classification of documentary evidence and adjudication thereon, as follows :-

“Classification of Documentary Evidence vis-a-vis

Adjudication thereon :

77. The admissibility of the document in evidence may be broadly classified into three classes - (i) that objection to the document which is sought to be proved is itself insufficiently stamped and the objection relates to deficiency of stamp duty of the document; (ii) where the objection does not dispute admissibility of document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient; and (iii) the objection that the document which is sought to be proved is ab initio inadmissible in evidence.

*78. In the first case, the Court, before which the objection is taken about admissibility of document on the ground that it is not duly stamped, 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 as held by the Constitution Bench in *Zaver Chand v. Pukhraj Surana*(supra). Once a document has*

been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, section 36 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. Similar view is expressed by the Supreme Court in the case of Bipin Shantilal Panchal (supra); wherein it is made clear that if the objection relates to deficiency of stamp duty of a document, the Court has to decide the objection before proceeding further.

79. *In the case of Ram Ratan v. Bajarang Lal (supra) the Apex Court reiterating the above view has observed that the Court, as of necessity it would be trial Court, before which the objection is taken about admissibility of document on the ground that it is not duly stamped, 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. So the objection relating to deficiency of duty cannot be raised or decided at the later stage of the suit. It has to be decided there and then unless taken on record subject to objection so as to avoid the rigour of section 36 of the Stamp Act.*

80. *In the second category of the case, the objection should be taken when the evidence is tendered. Once the document has been admitted in evidence and marked as an exhibit, the objection that it should not be admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of*

the document as an exhibit. This proposition is rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would enable the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object become fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons; firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility there and then; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence.

81. *If the objection to the proof of document is not decided and the document is taken on record giving tentative exhibit, then the right of the cross-examiner is seriously prejudiced. Once the document is used in cross-examination, then the document gets proved and can be read in evidence as held by the Supreme Court in the case of Ram Janki Devi vs. M/s.Juggilal Kamlatpat, 1971 (1) SCC 477. If the cross-examiner decides not to cross-examine based on unexhibited document and, ultimately, at the fag end of the trial, the document is held to be admissible and proved,*

then, the cross-examiner as a rule of fair play would be entitled to further opportunity to cross-examine based on that document resulting in delayed trial defeating the very object and purpose of the amendment to the Civil Procedure Code.

82. *In the third case merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded. It is available to be raised even at later stage or even in appeal or revision. There is no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in affidavit filed by in examination-in-chief or while recording oral evidence. For example in case of unregistered sale-deed or gift-deed or lease-deed requiring registration, no evidence of the terms thereof can be given. On the ground of public policy, evidence derived from unpublished official records of the State cannot be given except with the permission of the head of the department concerned as laid down under section 123 of the Evidence Act. Such a document, therefore, can be tentatively exhibited and the decision thereon can be postponed till the suit reaches the stage of judgment. However such objection has also to be decided before the judgment is delivered. The objection to the admissibility of such evidence can always be taken at any stage of the suit.*

83. *Thus, we hold and rule that ordinarily an objection to the admissibility of the document in first and second categories of cases (excluding third type of case) has to be taken before the document is exhibited which, necessarily, postulates decision on the objection then and there. In other words, whether document is admissible or inadmissible is matter which should always be ruled upon at the time*

when the document is being proved or put in or the question asked to the witness. Such practice and procedure is fair to both parties.”

10. In the present case, it is undisputed that the three documents that were not permitted to be exhibited were an unregistered Gift Deed, unregistered Partition Deed and a registered Will Deed. By the very nature of the said documents, applying the above quoted position of law, it becomes clear that the unregistered Gift Deed and Partition Deed fall in the third category. This is specifically recorded in paragraph 82 of the above quoted portion of the judgment of the full bench of this Court. Therefore, the Court below ought to have taken to the recourse to the procedure prescribed in paragraph 82 of the above quoted judgment, insofar as unregistered Gift Deed and Partition Deed were concerned. Insofar as registered Will Deed is concerned, in the first place registration of a Will Deed is not mandatory and secondly, witness to the said Will is proposing to exhibit the document in the proceedings before the Court below. In this situation, the apprehension expressed in the impugned order that the Will Deed will have to be proved as per the Evidence Act is also taken care of and therefore, the

Will Deed ought to have been exhibited, subject to proof in accordance with procedure known to law.

11. In view of the above, this Court is convinced that the impugned order deserves to be interfered with, in terms of the position of law clarified by the full bench judgment of this Court.

12. The three documents that is the unregistered Gift Deed, unregistered Partition Deed and the registered Will Deed be marked as exhibits.

13. It is made clear that marking of the said documents as exhibits does not mean that they have to be treated as admissible and the question of admissibility of the said documents will have to be dealt with in accordance with law as indicated in the said full bench judgment.

14. It is further made clear that the proof of the aforesaid three documents permitted to be marked as exhibits, will have to be undertaken before the Court below in accordance with law.

15. The Writ Petition stands allowed in above terms.