

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SATISH
RAMCHANDRA
SANGAR

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INTERIM APPLICATION NO.12099 OF 2024
IN
WRIT PETITION NO.9740 OF 2024

1. **Ram Vasant Kotak**
Age : 66 Years, Occupation : Business,
Residing at : Daddyseth Bungalow,
Siri Road, Chiranjilal Loyalka Marg,
Malabar Hill, Mumbai : 400006.
2. **Mrs.Blossom Ram Kotak**
Age : 59 Years, Occupation : Household,
Residing at : Dadysett Bungalow,
Siri Road, Chiranjilal Loyalka Marg,
Malabar Hill, Mumbai : 400006.
3. **Mrs.Dakshaben Bharatkumar Vaghasiya**
Age : 55 Years, Occupation : Household,
Residing at : 166/175, Lalit Kunj, DLH
Ornet, Flat No.301, 3rd Floor, 11th Road,
Laxmi Co-operative Housing Society, ...Applicants
Khar (West), Mumbai : 400052. (Respondent Nos.4,5, 6 /
Orig. Defendant Nos.2, 3, 4)

In the matter between:-

Mrs.Punita Dilip Shah

Senior Citizen, Indian Inhabitant,
Aged : 64 Years, Occupation : Housewife,
Residing at : 122, 6th Cross, RMV Extension
Bangalore : 560080, Through the Constituted ...Petitioner
Attorney Mr. Gole. (Orig. Defendant No.7)

Versus

1. **State of Maharashtra**
Through : Government Pleader,

High Court, Bombay.

2. **Kamla Avalon Ventures Pvt. Ltd.**

A Company incorporated under the Indian Companies Act, 1956, having its Office address at : Kamla Spaces, 3rd Floor, Unit 318, Mumbai : 400054. Through its Director and Authorized Representative : Mr.Uttam Bhurmal Jain, Age : 59, Occupation : Business, Office No.318, Kamla Spaces, S V Road, Santacruz (West), Mumbai : 400054.

...Respondent
(Orig. Plaintiff)

3. **Mrs.Nirmala Vasant Kotak**

Age : 95 Years, Occupation : Household, Residing at : Dadysett Bungalow, Siri Road, Chiranjilal Loyalka Marg, Malabar Hill, Mumbai : 400006.

4. **Mr.Ram Vasant Kotak**

Age : 75 Years, Occupation : Business, Residing at : Dadysett Bungalow, Siri Road, Chiranjilal Loyalka Marg, Malabar Hill, Mumbai : 400006.

5. **Mrs.Blossom Ram Kotak**

Age : 59 Years, Occupation : Household, Residing at : Dadysett Bungalow, Siri Road, Chiranjilal Loyalka Marg, Malabar Hill, Mumbai : 400006.

6. **Mrs.Dakshaben Bharatkumar Vaghasiya**

Age : 55 Years, Occupation : Household, Residing at : 166/175, Lalit Kunj, DLH Ornet, Flat No.301, 3rd Floor, 11th Road, Laxmi Co-operative Housing Society, Khar (West), Mumbai : 400 052.

7. **Mrs.Kashiben Kanubhai Vaghasiya (Deceased)**

Residing at : 166/175, Lalit Kunj, DLH Ornet, Flat No.301, 3rd Floor, 11th Road, Laxmi Co-operative Housing Society,

- Khar (West), Mumbai : 400052.
8. **Mrs.Vinita Unmesh Kantawala**
Maiden Name : Vinita Vasant Kotak,
Age : 68 Years, Occupation : Household,
Residing at : 4A, Shanaz Building, 90,
Nepean Sea Road, Mumbai : 400007.
9. **Mrs.Durrat Raj Kotak**
Age : 69 Years, Occupation : Business,
Residing at : Dadysett Bungalow,
Siri Road, Chiranjilal Loyalka Marg,
Malabar Hill, Mumbai : 400006.
10. **Mr.Sahil Raj Kotak**
Age : 42 Years, Occupation : Business,
Residing at : Dadysett Bungalow,
Siri Road, Chiranjilal Loyalka Marg,
Malabar Hill, Mumbai : 400006. **...Respondents
(Orig. Defendants)**
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**ALONG WITH
INTERIM APPLICATION (ST) NO.23822 OF 2024
IN
WRIT PETITION NO.5809 OF 2015**

Ram Vasant Kotak
Age : 66 Years, Occupation : Business,
Residing at : 203, Elphinstone House, **...Applicant**
17, Murzban Road, Mumbai : 400001. **(Orig. Respondent No.2)**

In the matter between:-

Kamla Avalon Ventures Pvt. Ltd.
A Company incorporated under the
Indian Companies Act, 1956, having
its Office at : Kamla Spaces, 3rd Floor,
Unit 318, Mumbai : 400054. **...Petitioner**

Versus

1. **Mrs.Nirmala Vasant Kotak**
Residing at : 203, Elphinstone House,
17, Murzban Road, Mumbai : 400001.
2. **Ram Vasant Kotak**
Age : 66 Years, Occupation : Business,
Residing at : 203, Elphinstone House,
17, Murzban Road, Mumbai : 400001.

...Respondents

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Mr.Mayur Khandeparkar a/w Mr.Aniruddha Lad and Mr.Biju Joseph i/b. KLT Law Associates:-	Advocates for Petitioner in Writ Petition No.9740 of 2024.
Mr.Bhavesh Parmar a/w Mr.Aman Jhawar, Ms.Reshma Nair, Ms.Ratnarani Roy i/b. Mr.Aman Jhawar:-	Advocates for Respondent No.2 in Writ Petition No.5809 of 2015 and for Respondent Nos.4,5,6 in Writ Petition No.9740 of 2024 and for Applicant in Interim Application (ST) No.23822 of 2024.
Mr.Aseem Naphade i/b. SSP Legal:-	Advocate for Respondents in Interim Application (ST) No.23822 of 2024 and for Petitioner in Writ Petition No.5809 of 2015.
Mr.Sunil R. More:-	Advocate for Respondent No.1 in Writ Petition No.5809 of 2015.

***********CORAM : S. M. MODAK, J.****DATE : 15th OCTOBER 2024****ORAL JUDGMENT :-**

1. There are two Writ Petitions on board which are connected one.

One is Writ Petition No.5809 of 2015 and second is Writ Petition No.9740 of 2024. There is an Interim Application bearing No.12099 of 2024 filed by Respondent Nos.4, 5 and 6. (As per the Writ Petition No.9740 of 2024) for granting them leave to proceed with the hearing of Application at Exhibit-150 filed before the trial Court. By that Application, there is a request to set aside the continuation of the status-quo till disposal of the Suit passed on 15th February 2020. This Interim Application is filed because this Court has stayed the hearing of the Suit vide order dated 12th June 2024. These Respondents are Defendant Nos.2, 3 and 4 in the Special Civil Suit No.528 of 2022.

2. That is why, learned Advocate Shri.Parmar for the Applicants in Interim Application pressed for urgent hearing of his Interim Application or hearing both these two Writ Petitions. Learned Advocate Shri.Parmar for the Applicant is ready. Learned Advocate Shri.Khandeparkar for the Petitioner is also ready. Learned Advocate Shri.Naphade appears for the Petitioner – Plaintiff in the First Writ Petition. Though, his Advocate on record has not informed him about today's listing, he is kind enough to assist the Court by arguing both the Writ Petitions.

3. Accordingly, I have heard learned Advocate Shri.Khandeparkar

in Second Petition, learned Advocate Shri.Naphade in First Writ Petition, learned Advocate Shri.Parmar for Respondent Nos.4,5 and 6 and learned Advocate for Respondent No.1 as per the First Petition. It is true that an outcome of the Second Petition is depending upon an outcome of the earlier Petition.

4. In the **First Petition**, the Petitioner – Plaintiff has challenged the order passed by the learned District Judge on 18th April 2015 in an Application filed under Section 9 of the Arbitration and Conciliation Act, 1996¹ for **grant of interim reliefs**. In that Application, there were only two Opponents. They are Mrs.Nirmala Vasant Kotak who is Defendant No.1 and Mr.Ram Vasant Kotak who is Defendant No.2. This Arbitration Application was filed on the basis of the **Memorandum of Understanding**² dated 11th April 2012. The contents of the MoU are as follows:-

- (a) The **present Plaintiff** is described as a **purchaser** and the **Defendant Nirmala** is described as **seller** or the vendor. Whereas, **Defendant Ram Kotak** is described as **Guarantor**.
- (b) The vendor Nirmala has agreed to sell a piece of land for consideration of Rs.4,00,00,000/- (Rupees Four Crore). It is to be paid in installments (Clause 2).
- (c) Clause 2(d) mentions about handing over a vacant and

¹ Henceforth referred to “Act of 1996”

² Hereinafter, “MoU” for short

peaceful possession to the purchaser. It seems that it was subject to obtaining a permission and subject to payment of balance consideration of Rs.2,00,00,000/- (Rupees Two Crore). [Clause 2(d)].

- (d) Clause 6 mentions about termination of the agreement at the option of the purchaser and in that event, the seller has agreed to refund the amount to the purchaser and the Defendant Ram Kotak has given a guarantee. (Learned Advocate Shri.Khandeparkar has insisted upon reading of this agreement for knowing the correct nature of the document titled as MoU).

5. Learned District Judge as per the impugned order dated 18th April 2015 has impounded the MoU for the purpose of insufficiency of the stamp paper. According to Mr.Naphade, the MoU is on stamp paper of Rs.100/- (Rupees Hundred) and there is no insufficiency of stamp paper. He has commented about the reasons given by the learned District Judge. On the basis of clauses of the MoU, learned District Judge opined that the MoU is in fact, a conveyance and it attracts a stamp duty as per the meaning of Article 25 of the Bombay Stamp Act, 1958. Learned District Judge has considered the terms of MoU which talks about payment of balance consideration of Rs.2,00,00,000/- (Rupees Two Crore) on execution of Deed of Conveyance. [wrongly typed as Rs.2,00,000/- (Rupees Two Lakh)].

Writ Petition No.5809 of 2015

Submissions on behalf of the Respondents

6. Learned Advocate Shri.Parmar made following submissions:-

(a) Kamala Avalon Ventures Pvt. Ltd., is described as a purchaser in the MoU dated 11th April 2012 whereas, this Company came into existence on 13th April 2012. He invited my attention to the search report on Page No.46.

(b) He deprecated the conduct of the Plaintiff in following manner:-

(i) That, Application under Section 9 was filed wherein order of impounding is passed. Then, there was an Application filed under Section 11 of 1996 Act for the purpose of appointment of an Arbitrator. That Application was dismissed on 23rd November 2017 for non-prosecution and on this background, the Suit before the Court of Civil Judge Senior Division – Vadgaon Maval is filed. His contention is, when the Plaintiff has already filed the Suit, there are not entitled to challenge the order of impounding by filing this Writ Petition.

(ii) Once, an order is passed in an Application under Section 9 of 1996 Act, the Writ Petition is not maintainable and remedy is under Section 37 of the said Act.

7. Learned Advocate for Respondent No.1 made following

submissions:-

- (a) In the MoU on Page No.21, names of the Directors are not mentioned and names of the witnesses are also not mentioned.
- (b) As per Section 10 of the Contract Act, a person should be present to sign the agreement when company is a party.

8. Though, the client of learned Advocate Shri.Khandeparkar is not a party in the First Petition, by way of assistance to the Court, he has drawn my attention to the observations in case of *Universals Enterprises, Mumbai v/s. Deluxe Laboratories Pvt. Ltd., Mumbai*³. Learned Single Judge has refused to pass any order on ad-interim Application because issue of stamp duty need to be adjudicated. Appeal was preferred under Section 37 of the said Act and it was entertained. According to Mr.Khandeparkar, this Writ Petition No.5809 of 2015 was dismissed initially and then it is restored. Whereas, Mr.Naphade submitted that the facts of *Universals Enterprises* case are different. The order which was challenged by way of an Appeal is nothing but the decision of the Court in not taking a decision on Section 9 Application. In set of those facts, Appeal was held maintainable. According to Mr.Naphade, in the First Petition, the

3 2016 SCC OnLine Bom 3963

order of impounding is challenged and Writ Petition is maintainable. Secondly, he submitted that though this Writ Petition was dismissed, this Writ Petition was filed in the year 2015. So, let this Court to decide it on merits instead of maintainability.

9. According to Mr.Naphade, the issue of insufficiency of the stamp duty cannot be inquired into a proceeding initiated under Section 9 of 1996 Act. To buttress his submission, he relied upon the observations in case of *Saifee Developers Pvt. Ltd. v/s. M/s. Shanklesha Constructions & Ors.*,⁴ and more specifically, Para No.10. He also relied upon the observations in Seven Judges Bench Judgment by Hon'ble Supreme Court in case of *IN RE : INTERPLAY BETWEEN ARBITRATION AGREEMENTS UNDER THE ARBITRATION AND CONCILIATION ACT 1996 AND THE INDIAN STAMP ACT 1899*⁵ and more specifically, the conclusions in Para Nos.2 to 4 (a), (c) and (d).

10. By way of reply, learned Advocate Shri.Parmar submitted that the observations in *Saifee Developers Pvt. Ltd.* (supra), are not applicable because learned Single Judge of this Court was dealing with the issue as to whether the interim reliefs can be granted or not under Section 9 of 1996 Act, when the agreement is insufficiently stamped. According to

4 Commercial Arbitration Petition (L) No.627 of 2019 : 15th July 2019 : Bombay High Court

5 Curative Petition (C) No.44 of 2023 in Review Petition (C) No.704 of 2021 in Civil Appeal No.1599 of 2020 : December 13, 2023 (2023 INSC 1066)

him, the issue of impounding and the issue of granting interim reliefs, both are considered. Whereas, it is the contention of Mr.Naphade that the Seven Judges Bench Judgment have also held that the insufficiency of stamp does not make an agreement void or void ab initio or unenforceable and the purport of that observation in Para No.24 are such condition does not prevent the District Court from considering the reliefs even under Section 9 of the 1996 Act.

About Writ Petition No.9740 of 2024

11. This Writ Petition is filed by the Defendant No.9 challenging the order passed by the trial Court thereby rejecting the Application for de-exhibiting the MoU dated 11th April 2012. Initially, the trial Court has exhibited it. The Defendant No.9 was very much available at the time of exhibiting it. Subsequently, he filed an Application for de-exhibiting the MoU. Predominantly, for the reason that this MoU was impounded by learned District Judge – Pune on 18th April 2015 and the Plaintiff has concealed this fact from the trial Court and they never came with a case about payment of deficit stamp duty. The trial Court has refused to de-exhibit that MoU. Against the said order, Second Writ Petition is filed. This Court has stayed the impugned order on 12th June 2024.

12. Mr.Khandeparkar made following submissions:-

- (a) The bar of admissibility of MoU is applicable not only in an Arbitration Application but it is also applicable in any other proceeding. It is for the reason, the bar is as to the document. He relied upon the provisions of Sections 33, 34 of the Maharashtra Stamp Act.
- (b) He also relied upon the observations in Full Bench Judgment in case of *Hemendra Rasiklal Ghia v/s. Subodh Mody*⁶ and particularly, the observations in Para Nos.71 to 76.
- (c) According to him, this is not a document which is void or void ab initio but this is a document which is inadmissible in evidence for want of payment of deficit stamp duty.
- (d) According to Mr.Khandeparkar, the MoU is liable to stamp duty as per the provisions of Article 5(h) (iv) (b) of the First Schedule of Maharashtra Stamp Act. He made this submission on the basis of a guarantee clause in that MoU.
- (e) He also relied upon the provisions of Section 6 of the said Act. According to him, when there is an issue whether the instrument falls under two or more descriptions, then it is liable to stamp duty of a higher rate.

13. Mr.Naphade made following submissions:-

- (a) The document is impounded not in a Suit but in an Arbitration Application and Defendant No.9 was not party to that proceeding.

⁶ 2008 (6) Mh.L.J. 886

- (b) Once, the document is exhibited in the presence of Defendant No.9, subsequently, it cannot be de-exhibited. He relied upon the provisions of Section 35 of the Maharashtra Stamp Act.

Consideration

14. As said above, the outcome of the Second Petition is depending upon the outcome of the First Petition. It is true that when the learned District Judge has passed the impugned order on 18th April 2015, he has neither granted nor refused the interim relief. He dealt with the objection about deficit stamp duty on MoU. When the provisions of **Section 37 of 1996 Act** are read, there are specific orders against whom, there is an Appeal. It specifically mentions, the Appeal will not lie against other orders. I am not accepting the objection about maintainability of the First Petition. Considering the nature of the impugned order, it can't be said that it is specifically provided under Section 37 of 1996 Act.

15. At the same time, I am accepting the submission of Mr.Naphade that the Court dealing with Section 9 Application, cannot go into the issue of insufficiency of stamp duty. Learned Single Judge in case of ***Saifee Developers Pvt. Ltd.*** (supra), has passed certain ad-interim orders. There was an objection taken for not granting reliefs on account

of insufficiency of stamp duty. It is recorded in Para No.8. Learned Single Judge on the basis of Full Bench Judgment in case of ***Gautam Landscapes Pvt. Ltd. v/s. Shailesh S. Shah and Anr.***⁷ has opined in favour of granting ad-interim / interim reliefs even though there is an objection about insufficiency of stamp duty. (Para No.10). Even, Seven Judges Bench ruled:-

“An objection about stamping does not fall for determination under Section 8 or 11 of 1996 Act. Such objection fall within the ambit of Arbitral Tribunal”.

Even, it is observed:-

“186. The purpose of vesting courts with certain powers under Sections 8 and 11 of the Arbitration Act is to facilitate and enable arbitration as well as to ensure that parties comply with arbitration agreements. The disputes which have arisen between them remain the domain of the arbitral tribunal (subject to the scope of its jurisdiction as defined by the arbitration clause). The exercise of the jurisdiction of the courts of the country over the substantive dispute between the parties is only possible at two stages:

- a. If an application for interim measures is filed under Section 9 of the Arbitration Act; or*
- b. If the award is challenged under Section 34.*

Issues which concern the payment of stamp-duty fall within

⁷ (2019) 3 Mah.L.J. 231

the remit of the arbitral tribunal. The discussion in the preceding segments also make it evident that courts are not required to deal with the issue of stamping at the stage of granting interim measures under Section 9.”

16. So, I held that issue of stamping is outside the scope for an inquiry under Section 9 of 1996 Act. Learned District Judge committed wrong.

17. There are certain objections taken about when did the Plaintiff Company came into existence and about certain lacunae of the MoU including the execution clause. This Court is only deciding the correctness of the order of impounding. Those objections are not relevant for deciding this Writ Petition. I am rejecting them.

True nature of MoU

18. Now, the issue arises, what is the true nature of the MoU. It is very well true that the land is not transferred by way of sale as per that MoU. It is very well true that the possession was not handed over at the time of execution of MoU. Mr.Naphade is right in his submission that if there is an agreement to sell the land, it does not create any right, title and interest as contemplated under Section 54 of the Transfer of Property Act. **So, the issue is, whether the learned District Judge has rightly impounded it.** If, we read the meaning of conveyance

as per **Article 25** of the First Schedule on the basis of market value of the property, a stamp duty is leviable. Section 2 (g) says about which documents are included within the meaning of conveyance. The property needs to be transferred or it should vest and it is not otherwise provided, is a conveyance. Merely because MoU talks about payment of Rs.2,00,00,000/- (Rupees Two Crore) at the time of possession, that event is going to take place in future. For the above reasons, it can't be considered as a conveyance. **That observation in Para No.10 of the impugned order is not correct.**

19. Even, I am not impressed by the argument of learned Advocate Shri.Khandeparkar that on the basis of guarantee clause, a document is to be chargeable as per Article 5(h)(A)(iv) of Schedule I. It is for the simple reason that a guarantee clause will come into picture only when a seller fails to refund the amount to the purchaser. This is a future event. The nature of document can't be decided on the basis of such future event. Mr.Naphade is right that *dominus* test is applicable.

20. The Petitioner–Plaintiff has affixed a stamp of Rs.100/- (Rupees Hundred). For the above reasons, learned District Judge committed an error in directing impounding of the MoU. **That order needs to be set aside.**

21. The impugned order is dated 18th April 2015. The Suit is filed in the year 2017. So, at that time, the Petitioner was justified in challenging the order. It is also true in view of filing of Suit also containing prayers for interim reliefs, the Petitioner may not be interested in prosecution that Application. However, for the reasons recorded hereinabove, the Writ Petition needs to be allowed in terms of prayer clause (a) of the Petition.

22. Now, it needs to be seen, what will be the effect of this order on Second Petition. If, the order of impounding goes away, then objection taken by Defendant No.9 of de-exhibiting the MoU needs to be seen. Once, I have held that order of impounding is improper, I am not going into the issue about the effect of Section 35 of the Maharashtra Stamp Act. I am not going into the issue, whether it can be said to be *void*, *void ab initio* or inadmissible in evidence.

23. Still, Mr.Khandeparkar has a submission to make. According to him, still, it needs to be seen, whether the Plaintiff has satisfied the requirements of proving of the document. According to him, the issue needs to be decided by the trial Court. I am accepting that submission. The Petitioner–Defendant No.9 is granted liberty to file an Application for de-exhibiting the MoU on the grounds other than

impounding of the said MoU. It includes not containing the necessary particulars in the Affidavit of Examination-in-Chief or not producing the original MoU. Same liberty is granted to other Defendants also.

24. Even, the Plaintiff is at liberty to produce the original MoU because it is submitted that it was impounded by the District Court as per the said order and they are not having the same. All these contentions are kept open.

25. With these observations, the Writ Petition No.9740 of 2024 is disposed of. An ad-interim relief staying the Suit stands vacated. The Interim Application No.12099 of 2024 filed by Respondent Nos.4, 5, 6 has become infructuous. They are at liberty to pursue their Application for vacating the status-quo before the trial Court.

∴ ORDER ∴

- (i) First **Writ Petition No.5809 of 2015** is allowed in terms of prayer clause (a).
- (ii) The order dated 18th April 2015 passed by the learned District Judge – 4, Pune in Misc. Application No.885 of 2014 impounding the Memorandum of Understanding dated 11th April 2012 is quashed and set aside.
- (iii) Consequently, the ad-interim relief staying the proceedings in Special Civil Suit No.528 of 2022 till determination of the present Petition, granted by this Court vide order dated

12th June 2024 is vacated.

- (iv) In view of the above, the Interim Application No.12099 of 2024 filed by the Respondent Nos.4,5,6 has become infructuous. It is disposed of accordingly.
- (v) They are at liberty to pursue their Application for vacating the status-quo before the trial Court.
- (vi) The Plaintiff is at liberty to produce the original MoU before the trial Court.
- (vii) In view of above, First **Writ Petition bearing No.5809** of 2015 is disposed of.
- (viii) The Petitioner – Mrs.Punita Dilip Shah (Original Defendant No.9) is granted liberty to file an Application for de-exhibiting the MoU on the grounds other than impounding of the said MoU. It includes:-
 - (a) not containing the necessary particulars in the Affidavit of Examination-in-Chief or not producing the original MoU.
- (ix) The same liberty is granted to other Defendants also.
- (x) In view of above, Interim Application (ST) No.23822 of 2024 does not survive. It is disposed of accordingly.
- (xi) Second **Writ Petition No.9740 of 2024** is disposed of.

[S. M. MODAK, J.]