2025:BHC-AUG:26021

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.10251 OF 2024

Shafiyabegum w/o Shahanawaz Qureshi,
Age 66 years, Occ. Business,
R/o Milap Gadighar, Shiwaji Chowk,
Ambajogai, Tq. Ambajogai,
Dist. Beed ...Petitioner

Versus

1. Manisha w/o Ravindra Modi,
Age 53 years, Occu. Agriculture and Household,
R/o Modi Nagar, Ambajogai
Tq. Ambajogai, Dist. Beed

2. Ravindra s/o Banshilal Modi
Age 63 years, Occu. Business.
R/o Modi Nagar, Ambajogai,
Tq. Ambajogai, Dist. Beed ...Respondents

…

Mr. G. G. Kadam, for the petitioner.
Mr. N. B. Khandare i/b. A. D. Gade for Respondent Nos.1 and 2.

…

CORAM : ROHIT W. JOSHI, J.

RESERVED ON : 24.07.2025
PRONOUNCED ON : 12.09.2025

JUDGMENT :-

1. The petitioners are defendants in Regular Civil Suit No. 77 of 2012 filed against them by the present respondents which is pending on the file of the learned Civil Judge, Senior Division, Ambajogai

Dist. Beed. The said Suit is pertaining to an immovable property occupied by the petitioners. The respondents have filed the suit seeking declaration that the petitioners are not licensees of respondent no.1 and the agreement of leave and license has come to an end and further that the agreement dated **03.10.1972 (07.10.1972)** is canceled as non est and for decree for removal of temporary structure erected by the petitioners over the suit property and delivery of physical possession thereof.

2. The plaintiffs filed on record photostat copy of a document of leave and license dated 15.10.1972. It is their contention that the original document dated 15.10.1972 was lost and a photostat copies thereof was available with them. The plaintiffs had filed an application seeking permission to lead secondary evidence with respect to the said document dated 15.10.1972 vide Exhibit-44. The learned Trial Court rejected the said application for permission to lead secondary evidence vide order dated 27.07.2017. Amongst other grounds, the application is also rejected on the ground that the agreement of leave and license dated 15.10.1972 is not adequately stamped and since it is a photostat copy, it cannot be impounded. The learned Trial Court has placed reliance on judgments of the Hon'ble Supreme Court of India in the matters of ***Hariom Agrawal***

Vs. Prakash Chand Malviya** - **(2007) 8 SCC 514 and ***Smt. J. Yashoda Vs. Smt. K. Shobha Rani - AIR 2007 (SCW) 2713*** respectively. The defendants have challenged the said order dated 27.07.2017 by filing a petition before this Court being Writ Petition No.2481 of 2018. The said petition was disposed of as withdrawn vide order dated 02.01.2020.

3. Thereafter, the plaintiffs filed another application vide Exhibit-162 *inter alia* praying for impounding the photostat copy of the agreement of leave and license dated 15.10.1972. The defendants opposed the said application by filing reply dated 17.02.2022. After hearing rival submissions, the learned Trial Court by placing reliance on the judgment of the Hon'ble Supreme Court in the matter of ***M. Chandra Vs. M. Thangamuthu (2010) 9 SCC (Online) 712*** has held that the plaintiffs were entitled to lead secondary evidence with respect to the said document and for that purpose impounding of the document was necessary. The learned Trial Court has also observed that it is duty of the Court to impound the document which is not adequately stamped. The application was accordingly allowed. This order dated 03.08.024 is subject matter of challenge in the present petition.

4. The learned Advocate for the petitioners/defendants contends

that the previous application filed vide Exhibit-44 seeking permission to lead secondary evidence with respect to agreement of leave and license dated 15.10.1972 was rejected by the learned Trial Court on several grounds including on the ground that the document was not adequately stamped and that photostat copy of the document could not be impounded. He contends that the petition preferred against the said order was unconditionally withdrawn and as such the plaintiffs were precluded from filing the application for impounding of the document. He therefore contends that the application for impounding documents filed by the plaintiffs is not maintainable and was liable to be rejected on this count alone. As regards merits of the order, the learned Advocate places reliance on judgments of the Hon'ble Supreme Court in the following matters:-

- ***(i)*** ***Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao and Ors.***[1]
- ***(ii)*** ***Hariom Agrawal V. Prakash Chand Malviya***[2]
- ***(iii)*** ***Gayabai Hemlal Jadhav Vs. Hiraman & Ors.***[3]
- ***(iv)*** ***Pradeep Shyamrao Kakirwar and Ors. Vs. Seema Arun Mankar and Ors.***[4]
- ***(v)*** ***Kanchan Bajrang Powar and Ors. Vs. Aappa Dagdu***

1 AIR 1971 SC 1070
2 AIR 2008 SC 166
3 2011(4) Mh.L.J 798
4 2021(1) MhLj 322

Powar and Ors.[5]

(vi) Jyoti Rajendra Notawale Vs. Ankit Ganesh Agrawal[6]

5. Per contra, the learned Senior Advocate for the respondents/plaintiffs submits that the previous application was filed seeking permission to lead secondary evidence. He contends that the question of impounding of the document did not fall for consideration directly and substantially during the course of hearing of the said application. He therefore contends that principle of resjudicata will not be applicable and therefore the subsequent application filed for impounding of the document was maintainable. As regards merits of the matter, the learned Senior Advocate contends that Section 3 of the Maharashtra Stamp Act, 1958 (hereinafter referred to as ***"MS Act"***) came to be amended vide Maharashtra Act No.21 of 1998 w.e.f. 01.05.1998, whereby a proviso is added to Section 3 of the MS Act. Referring to the said proviso, the learned Senior Advocate contends that stamp duty is also payable on a copy of an instrument if adequate stamp duty is not paid on the original instrument. The contention of the learned Senior Advocate is that in view of the said proviso to Section 3

5 2025(2) bom CR 465

6 Manu/MH/3330/2025

which is the charging Section, payment of stamp duty is permissible even on a photostat copy and therefore impounding of photostat copy will also be permissible. The learned Senior Advocate also places reliance on clause (e) to the proviso appended to Section 34 of the MS Act. In furtherance of his submission. As regards the judgments of the Hon'ble Supreme Court in the matter of ***Jupudi Kesava Rao (supra)*** and ***Hariom Agrawal (supra)***, the learned Senior Advocate contends that the said judgments are dealing with provisions of Indian Stamp Act, 1958 (hereinafter referred to as "**IS Act"**) and Madhya Pradesh Stamp Act, both of which do not have a provision for payment of stamp duty on copies of instrument. As regards other judgments of this Court the contention of the learned Senior Advocate is that all the judgments on which the learned Advocate for petitioners has placed reliance do not take into consideration proviso to Section 3 of the Stamp Act.

6. The term 'instrument' is defined under Section 2(l) of the MS Act, which reads as under:-

> *"2(l) "instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended,*
> *extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt;"*

7. The definition of term ‘instrument’ under the IS Act as defined under Section 2(14), reads as under :-

> *“2.(14) Instrument – ‘Instrument’ includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded;”*

8. The main part of both the definitions is identically worded. The term ‘instrument’ is defined as document by which right or liability is created or purported to be created, transferred, limited, extended, extinguished or recorded. Thus the term, ‘instrument’, means a document by which any right or liability is created etc. All judicial pronouncements dealing with the definition of the term ‘instrument’ under the IS Act as also MS Act unequivocally state that a photostat copy of the instrument does not create, transfer, limit, extend, extinguish or records any right or liability by itself and therefore a copy of the original instrument does not fall within the definition of the term ‘instrument’ as defined under the IS Act as also under the MS Act. It must also be stated that Stamp Act of other states also define the term, ‘instrument’ in almost the same words and judicial pronouncements with respect to the said definitions also unequivocally lay down that copy of instrument cannot be treated as an instrument.

9. Section 33 of the MS Act and IS Act provide for examination and impounding of instruments which are not adequately stamped. The provisions are *pari materia* and bear close resemblance. The provisions provide for impounding of instrument. Judicial pronouncements unanimously state that since copy of an instrument is not an instrument, the same cannot be impounded under Section 33 of the IS Act as also MS Act.

10. Section 34 of the MS Act and Section 35 of the IS Act provide that no instrument chargeable with stamp duty shall be admitted in evidence for any purpose unless such instrument is duly stamped. Section 34 of the MS Act and Section 35 of the IS Act have a proviso which provides that the defect with respect to non payment or definition in stamp duty can be made up by making payment of the stamp duty along with penalty prescribed under the said Acts. Both these provisions however, speak about the instrument itself which as stated above will not include copy of the instrument.

11. In this context, it is necessary to refer to judgments relied upon by the learned Advocate for the petitioner in the matter of ***Jupudi Kesava Rao (supra)***. The question before Hon'ble Supreme Court was with respect to secondary evidence of a written agreement which was not adequately stamped. The original of the

agreement was not available and the copy was sought to be proved in evidence by making up for deficiency of stamping duty and payment of penalty. A contention was raised that in view of Section 65 of the Evidence Act it was permissible to lead secondary evidence with respect to a document which was not found or lost or destroyed etc. It was therefore contended that the deficiency in stamp duty should be permitted to be made up so as to enable the party to lead secondary evidence with respect to the document. In this context, the Hon'ble Supreme Court observed in paragraph 12 and 13 of the said judgment as under:-

> *"12. 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 it 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 be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (a) is only applicable 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. Section 35 is not concerned with any copy of an instrument and a party can only be allowed to rely on a document which is an instrument for the purpose of Section 35. 'Instrument' is defined in Section 2(14) as including every document by which any right or liability is, or purports to be created, transferred, limited extended, extinguished or recorded. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.*
>
> *13. 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."*

12. Similar view is taken in the matter of ***Hariom Agrawal (supra)*** dealing with *pari materia* provisions of the Madhya Pradesh Stamp Act. Section 48 B of the Madhya Pradesh Stamp Act provides that when deficiency of stamp duty payable on an instrument is noticed on perusal of copy of the instrument the Collector should order production of the original instrument from the person having custody of the original instrument in order to satisfy himself as regards adequacy of the stamp duty paid thereon. The provision further states that if the original instrument is not produced then the Collector shall proceed with presumption that the original document was not adequately stamped and proceed to take steps for recovery of stamp duty. In view of the said provision a contention was raised before the Hon'ble Supreme Court that copy of an instrument could be impounded under the provisions of the Madya Pradesh Stamp

Act. The said contention came to be rejected holding that the said provision only enables the Collector to recover deficit stamp duty payable on the instrument and not to impound a copy of the instrument. Paragraph 15 of the said judgement deals with the said contention. Paragraph 15 of the judgment is reproduced hereinbelow for ready reference :-

> *"15. On a plain reading of Section 48-B, we do not find that the submission of the learned Counsel for the appellant that by virtue of this provision the Collector has been authorized to impound even copy of the instrument, is correct. Under this Section where the deficiency of stamp duty is noticed from the copy of any instrument, the Collector may call for the original document for inspection, and on failure to produce the original instrument could presume that proper stamp duty was not paid on the original instrument and, thus, recover the same from the person concerned. Section 48-B does not relate to the instrument, i.e., the original document to be presented before any person who is authorized to receive the document in evidence to be impounded on inadequacy of stamp duty found. The Section uses the phraseology where the deficiency of stamp duty is noticed from a copy of any instrument. Therefore, when the deficiency of stamp duty from a copy of the instrument is noticed by the Collector, the Collector is authorised to act under this Section. On deficiency of stamp duty being noticed from the copy of the instrument, the Collector would order production of original instrument from a person in possession or in custody of the original instrument. Production is required by the Collector for the purpose of satisfying himself whether adequate stamp duty had been paid on the original instrument or not. In the notice given to person in possession or in custody of original instrument, the Collector shall provide for time within which the original document is required to be produced before him. If, in spite of the notice, the original is not produced before the Collector, the Collector would draw a presumption that original document is not duly stamped and thereafter may proceed in the manner provided in Chapter IV. By virtue of proviso, the step for recovery of adequate stamp duty on the original instrument on insufficiency of the stamp duty paid being noticed from the copy of the instrument, can only be taken within five years from the date of execution of such instrument. The words the Collector may proceed in the manner provided in this Chapter has reference to Section 48 of the Act. Under this Section, all duties, penalties and other sums required to be paid under Chapter IV, which includes stamp duty, would*

> *be recovered by the Collector by distress and sale of the movable property of the person who has been called upon to pay the adequate stamp duty or he can implement the method of recovery of arrears of land revenue for the dues of stamp duty. By virtue of proviso to Section 48-B, the Collector s power to adjudicate upon the adequacy of stamp duty on the original instrument on the basis of copy of the instrument is restricted to the period of five years from the date of execution of the original instrument. This Section only authorizes the Collector to recover the adequate stamp duty which has been avoided at the time of execution of the original instrument. This Section does not authorize the Collector to impound the copy of the instrument."*

13. The other judgments of this Court relied upon by the learned Counsel for the petitioners lay down the same proposition dealing with provisions of the MS Act. All these judgments state that photocopy of an instrument cannot be impounded and also that deficit stamp duty and penalty cannot be paid on a photocopy of an instrument in order to lead secondary evidence with respect to the same. It must, however, be stated that none of these judgments deal with proviso to Section 3 which is introduced vide Maharashtra Act No.21/1998 w.e.f. 01.05.1995. As also clause (e) in proviso to Section 34 of the MS Act.

14. At this stage, it will be appropriate to refer to a Division Bench judgment of this Court in the matter of ***Indian Hume Pipe Co. Ltd. And Another Vs. State of Maharashtra and Anr. - 2018 SCC Online Bombay 452***. The said judgment principally deals with Sections 7 and 19 of the MS Act, which are reproduced herein below for ready

reference.

> ***7.*** *(1) Notwithstanding anything contained in section 4 or 6 or in any other enactment, unless it is proved that the duty chargeable under this Act has been paid,—*
>
> *(a) on the principal or original instrument, as the case may be, or*
>
> *(b) in accordance with the provisions of this section, the duty chargeable on an instrument of sale, mortgage or settlement, other than a principal instrument or on a counterpart, duplicate or copy of any instrument shall, if the principal or original instrument would, when received in this State have been chargeable under this Act with a higher rate of duty, be the duty with which the principal or original instrument would have been chargeable under section 19.*
>
> *(2) Notwithstanding anything contained in any enactment for the time being in force, no instrument, counterpart, duplicate or copy chargeable with duty under this section shall be received in evidence unless the duty chargeable under this section has been paid thereof :*
>
> *Provided that any Court before which any such instrument, duplicate or copy is produced may permit the duty chargeable under this section to be paid thereon and may then receive it in evidence.*
>
> *[(3) The provisions of this Act and the rules made thereunder, in so far as they relate to the recovery of duties chargeable on instruments under section 3 shall, so far as may be, apply to the recovery of duties chargeable on a counterpart, duplicate or a copy of an instrument under sub-section (1).]*
>
> ***19****. Where any instrument of the nature described in any article in Schedule I and relating to any property situate or to any matter or thing done or to be done in this State is executed out of the State and subsequently [such instrument or a copy of the instrument is] received in the State,—*
>
> *(a) the amount of duty chargeable on such instrument 5[or a copy of the instrument] shall be the amount of duty chargeable under Schedule I on a document of the like description executed in this State less the amount of duty, if any already paid under any law in force in India excluding the State of Jammu and Kashmir on such instrument when it was executed ;*
>
> *(b) and in addition to the stamps, if any, already affixed thereto such instrument [or a copy of the instrument] shall be stamped with the stamps necessary for the payment of the duty*

> *chargeable on it under clause (a) of this section in the same manner and at the same time and by the same persons as though such instrument [or a copy of the instrument] were an instrument received in this State for the first time at the time when it became chargeable with the higher duty, and*
>
> *(c) the provisions contained in clause (b) of the proviso to sub- section (3) of section 32 shall apply to such instrument [or a copy of such instrument] as if such were an instrument executed or first executed out of this State and first received in this State when it became chargeable to the higher duty aforesaid, but the provisions contained in clause (a) of the said proviso shall not apply thereto.*

15. The question before the Court was as to whether stamp duty could be paid on the photo copy of the instrument. In this backdrop, this Court has observed that Section 7 of the Act which is a charging Section provides for levy of Stamp duty of a copy of an instrument as well. Although Section 3 of the Act did not directly fall for consideration of the Division Bench certain observations are made with respect to Section 3 of the MS Act which read as under :-

> *"14. … Section 3 which we have quoted above specifically states that subject to the provisions of the said Act and the exemptions contained in Schedule – I, the instruments set out in clauses (a) and (b) are chargeable with duty of the amounts indicated in Schedule I as the proper duty therefor respectively. It is true that Section 3, at the relevant time, did not refer to a copy of an instrument and it referred to only an instrument. It is also true that at the relevant time, the proviso to Section 3 which deals with the copies of the instruments was not on the statute book."*

16. The said Division Bench Judgment is further considered by a learned Single Judge in the matter of ***Pigments & Allieds Vs. Carboline (India) Pvt. Ltd. And Another*** reported in **2022 SCC online**

Bombay 10441. The said judgment arises out of the proceeding under Section 11 of the Arbitration and Conciliation Act. The original arbitration agreement was not available. Copy of the said document was, therefore, filed. The agreement was executed at Chennai. The stamp duty paid on the agreement was less then the stamp duty prescribed under the relevant Article in Schedule I appended to the M.S. Act. In this context, the provisions of Sections 7 and 19 of the MS Act fell for consideration. While dealing with the matter certain observations have been made with respect to Section 3 of the MS Act which are as under:-

> *"24. Section 2(l) defines coinstrument. When we take into consideration the current agreement, the fact that the photocopy could not have been treated to be an instrument for the purposes of impounding is the view taken by our court in the case of Pradeep Shyamrao Kakirwar Vs. Dr. Seema Arun Mankar and Ors. 2020 SCC OnLine Bom 799 . As far as liability of duty on the instrument is concerned, one finds from Section 3 that every instrument mentioned in Schedule-I of the Act, which is not previously executed by any person and is executed in the State on and after the commencement of the Act, shall be chargeable with duty, as set out in Schedule-I.*
>
> *25. Section 3(b) deals with the situation where an instrument is executed out of the State relating to any matter or thing to be done in the State and is received in Maharashtra. The proviso clarifies that a copy, whether true copy or not, including a facsimile image of the original instrument, on which duty is chargeable under the provisions of this section, shall also be chargeable with full stamp duty, as set out in Schedule-I, if proper duty is not paid on such original instrument."*

17. The judgment in the matter of **Pigments & Allieds** by referring to the judgment of the Hon'ble Supreme Court in the matter of **Hindustan Steel Ltd. vs. Dilip Construction Company,** reported in **(1969) 1 SCC 597,** holds that Section 7 of the Stamp Act is a part of fiscal statute enacted to secure revenue for the State and that it is not enacted to arm a litigant with a weapon of technicality to defeat the case of his opponent. It is held that the provisions of the Stamp Act are predominantly enacted to protect the interest of revenue and once the deficit in stamp duty is made good in accordance with law, the claim of party based on such instrument should not be defeated on the ground of initial defect with respect to non-payment or payment of deficit stamp duty.

18. It appears from reading of first proviso to Section 3 of the Act that in case adequate stamp duty is not paid on the original instrument the copy thereof will be chargeable under Section 3 of the MS Act with full stamp duty as indicated in Schedule-I. The charging Section therefore provides for payment of stamp duty of copy of the instrument as well. In this sense the scheme of the MS Act different from the IA Act which does not provide for payment of Stamp Duty on copy of the instrument. It will also be appropriate to refer to clause (e) of proviso to Section 34. Clause (a) of the proviso

states that an instrument not adequately stamped can be admitted in evidence on payment of the deficit stamp duty payable on such instrument along with penalty at the rage of 2% of the deficit stamp duty for every month form the date of execution of the instrument. Clause (e) provides that a copy of an instrument shall also be admissible in evidence if stamp duty and penalty as specified under clause (a) is paid. Clause (e) does not state that the deficit stamp duty and penalty should be paid on the original instrument itself to make the copy admissible. Clause (e) has been brought on the statute book w.e.f 10.12.1985 by virtue of Maharashtra Act 27/1985. It therefore appears that deficit stamp duty and penalty can be paid on a copy of an instrument to make the document admissible in evidence. It will be pertinent to state that clause (e) is included in the statute despite existence of clause (a) to the proviso which provides for payment of deficit stamp duty and penalty on the original document. It also goes without saying that the proviso does not state that copy of the document will be admissible in evidence upon making payment of the deficit stamp duty and penalty on the original.

19. Let us consider the position with respect to admissibility of a copy of an instrument duly stamped in the absence of clause (e) of

the proviso to Section 34. Deficit stamp duty on an instrument could be paid in view of clause (a) of proviso to Section 34 and after such payment, if instrument was lost, destroyed etc. In such case secondary evidence with respect to such instrument could be led as per Section 65 of the Indian Evidence Act. It appears that the provision is incorporated to permit payment of deficit stamp duty along with penalty even on a copy of an instrument.

20. Proviso to Section 3 when read in conjunction with clause (e) of the proviso to Section 34 gives an impression that under the scheme of MS Act payment of deficit stamp duty and penalty of a copy of instrument is also permissible and on such payment of deficit stamp duty and penalty a photocopy of the instrument will also be admissible in evidence.

21. As stated above, the application for permission to lead secondary evidence was rejected by the learned Trial Court on several grounds including on the ground that the document was not adequately stamped and impounding of photocopy of the document was not permissible.

22. It is not in dispute that petition challenging the said order was withdrawn unconditionally. The application for impounding the photocopy was filed thereafter. The learned Trial Court has allowed

the application recording reasons which are at variance and rather completely contradictory to the reasons recorded while rejecting the earlier application seeking permission to lead secondary evidence. In view of the above, in the considered opinion of this Court objection raised by the learned Advocate for the petitioners that subsequent application was not maintainable is justified and deserves to be upheld. In view of the above, the impugned order is not sustainable and deserves to be quashed.

23. Writ Petition is allowed as under :-

i. Order dated 03.08.2024 below Exhibit-162 in Regular Civil Suit No.77 of 2012 passed by learned Civil Judge Senior Division, Ambajogai, Dist. Beed is quashed and set aside.

ii. Application at Exhibit 162 is rejected.

[ROHIT W. JOSHI, J.]