

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1194 OF 2022

1. Kanchan Bajrang Powar
2. Nitin Bajrang Powar
3. Vipin Bajrang Powar
4. Shilpa Bajrang Pawar ...Petitioners

Versus

1. Aappa Dagdu Powar (deceased) through
LRs.

1A. Bebi Appa Powar
1B. Gajanan Appa Powar
1C. Amar Appa Powar
1D. Swati Lakhani Vadar
2. Valubai Dagdu Pawar
3. Raju Bhimrav Chikhalikar
4. Gangabai Balu Chikhalikar ...Respondents

Mr. Sandeep Koregave, a/w Pallavi Karanjkar, for the
Petitioners.

Mr. Chetan Patil, for Respondents.

CORAM: N. J. JAMADAR, J.

DATED: 12th MARCH, 2025

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the consent of the learned Counsel for the parties, heard finally.

2. This petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of the order dated 14th August, 2019 passed by the learned Civil Judge, Kolhapur, whereby an application (Exhibit-25) preferred by the petitioners

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and defendant Nos.3 and 4 seeking permission to adduce secondary evidence of purported Partition Deed dated 6th January, 1992, came to be rejected.

3. The background facts leading to this petition can be stated in brief as under:

3.1 Respondent Nos.1 to 4 instituted a suit for recovery of possession of the suit premises, which Late Dagdu Powar, the predecessor-in-title of the plaintiffs, had purchased. The plaintiffs asserted that Baburao Powar, the brother of Late Dagdu and the predecessor-in-title of defendant Nos.1 to 4, had no premises to reside. Therefore, Late Dagdu had gratuitously permitted Late Baburao to occupy suit property 1B. Baburao passed away in the year 1998. Bajrang, the son of Baburao and husband of defendant No.1 and father of defendant Nos.2 to 4 passed away in the year 2012. The defendants declined to hand over the possession of the suit property 1B, despite the demand made since the year 2014. Hence, the suit.

3.2 The defendants appeared and contested the suit. It was contended that the suit property was purchased out of the joint family funds and for the joint family of Appa Powar, the father of Dagdu and Baburao. In the year 1992 there was a partition of the joint family property under a Deed of Partition dated 6th

January, 1992 between Valubai, the wife of Dagdu, plaintiff No.2, and Bajrang, the predecessor-in-title of the defendants.

3.3 The defendants filed an application to lead secondary evidence of the said deed of partition contending that the original deed of partition was in the custody of the plaintiffs. An application for production of the said original deed of partition was filed under Order XI Rule 14 of the Code of Civil Procedure, 1908 ("the Code"). A notice was also addressed to the plaintiffs to produce the original deed of partition. The plaintiffs have denied the custody of the original deed of partition. Therefore, for a just and effectual adjudication of the dispute between the parties it was necessary to permit the defendants to tender a photostat copy of the said Deed of Partition by way of secondary evidence.

3.4 By an order dated 28th June, 2017, the learned Civil Judge had granted permission to adduce secondary evidence.

3.5 The plaintiff filed an application (Exhibit-29) seeking review of the said order as there was an error apparent on the face of the record in as much as the purported partition deed was unregistered and scribed on an insufficiently stamped paper. Therefore, the partition deed was not admissible in evidence. By an order dated 15th November, 2018, the learned

Civil Judge allowed the said application for review and the application seeking permission to lead the secondary evidence (Exhibit-25) was posted for a fresh consideration.

3.6 By the impugned order, the learned Civil Judge rejected the said application opining that the aspect of the admissibility of the original document was required to be examined before permitting a party to lead its secondary evidence. Since the purported partition deed was not admissible in evidence for being both unregistered and insufficiently stamped, the permission to lead its secondary evidence cannot be granted.

4. Being aggrieved, the defendants have invoked the writ jurisdiction of this Court.

5. I have heard Mr. Koregave, the learned Counsel for the petitioners and Mr. Patil, the learned Counsel for the respondents.

6. Mr. Koregave, the learned Counsel for the petitioners, submitted that the trial court committed a manifest error in law in determining the aspect of legality and validity of the partition deed at the stage of consideration of admissibility of its secondary evidence. Since the plaintiffs categorically stated that they were not in custody of the original partition deed,

secondary evidence thereof became legally admissible. The defendants were even not required to file an application to lead secondary evidence. As a part of their deposition itself, the defendants could have led the secondary evidence. To this end, Mr. Koregave placed reliance on a judgment of a learned Single Judge of this Court in the case of ***Karthik Gangadhar Bhat vs. Nirmala Namdeo Wagh and another***¹.

7. It was further submitted that the question of veracity and legality of the document of which secondary evidence was sought to be adduced, can only be examined after the parties adduced the evidence. An application for permission to adduce secondary evidence could not have been rejected on the ground of legality and validity of the original document. In order to buttress this submission, Mr. Koregave placed a strong reliance on the decisions of the Supreme Court in the cases of ***Nawab Singh vs. Inderjit Kaur***², ***Ameer Minhaj vs. Dierdre Elizabeth (Wright) Issar and others***³.

8. Per contra, Mr. Patil, the learned Counsel for the respondents, supported the impugned order. It was submitted that the learned Civil Judge has correctly applied the governing

1 2018(1) Mh.L.J. 726.

2 (1999) 4 Supreme Court Cases 413.

3 (2018) 7 Supreme Court Cases 639.

principles and the impugned order does not warrant interference in exercise of the supervisory jurisdiction. Mr. Patil would urge that while considering the question of grant of permission to adduce secondary evidence of a document, the Court is enjoined to consider whether the original document itself, had it been produced, would have been admissible in evidence. If there is bar to the admissibility of the original document itself, the Court cannot permit secondary evidence of such an inadmissible document.

9. Mr. Patil would urge that in the facts of the case at hand, the objection is not only on the count that the purported partition deed is not registered but also that it is scribed on an insufficiently stamped paper. In the latter case, it is well settled that a copy of an insufficiently stamped instrument cannot be impounded so that the deficit stamp-duty and penalty, if any, thereon can be paid and the defect cured. Resultantly, such copy of an insufficiently stamped instrument cannot at all be permitted to be tendered in evidence. Mr. Patil placed reliance on a decision of the Supreme Court in the case of ***Hariom Agrawal vs. Prakash Chand Malviya***⁴, wherein it was enunciated that a copy of instrument cannot be validated by impounding

4 (2007) 8 Supreme Court Cases 514.

and cannot be admitted as a secondary evidence under the Stamp Act, 1899.

10. Mr. Patil also placed reliance on a decision of the Supreme Court in the case of *Vijay vs. Union of India and others*⁵, wherein after advertng to the previous pronouncements the principles which govern the grant of permission to adduce secondary evidence were culled out and the bar to the admissibility of a copy of an instrument which is not admissible in evidence for want of requisite stamp-duty, was reiterated.

11. At the outset, it is necessary to note the nature of the purported partition deed. From a bare perusal of the partition deed, it becomes evident that it purports to effect the partition of the properties by the force of the said instrument. There are specific recitals to the effect that thenceforth the parties shall use and occupy the properties allotted thereunder. The partition deed, thus, does not appear to be a memorandum of previous partition which has taken in the past. On the contrary, the purported partition deed appears to effect the partition *in praesenti*.

12. In the aforesaid view of the matter as the rights in the properties were sought to be created and extinguished under

5 2023 SCC OnLine SC 1585.

the very purported partition deed, the necessity of its registration under Section 17 of the Indian Registration Act, 1908 can hardly be contested. It could not also be disputed that the purported partition deed is scribed on a stamp paper of Rs.100/- denomination only. Incontrovertibly, the stamp-duty on the deed of partition as envisaged by Article 46 of the Schedule I of Maharashtra Stamp Act, 1958 has not been paid. As the purported partition deed was insufficiently stamped, the bar to its admissibility under Section 34 of the Maharashtra Stamp Act, 1958 came into play. An instrument which is insufficiently stamped cannot at all be admitted in evidence, until the deficit stamp-duty and penalty, if any, is paid.

13. At this juncture, it is necessary to note that there is a subtle yet significant difference in a document which is unregistered and the one which is not sufficiently stamped. If the document is unregistered in view of the proviso contained in Section 49 of the Indian Registration Act, 1908, the document may still be received as evidence of any collateral transaction not required to be effected by a registered instrument. On the contrary, if a document is not or insufficiently stamped, such document cannot be admitted in evidence for any purpose. It implies that till the defect is cured by paying deficit stamp-duty

and penalty, if any, the document cannot at all be looked into by the Court.

14. Keeping this distinction in view, the rival submissions canvassed across the bar deserve to be appreciated. The thrust of the submissions of Mr. Koregave was that the veracity, legality and validity of the purported partition deed could not have been gone into at the stage of the consideration of admissibility of secondary evidence. Those questions, according to Mr. Koregave, could be legitimately examined after the parties adduce evidence. The trial court could not have thus foreclosed the opportunity to lead evidence.

15. In the case of *Nawab Singh* (supra) on which reliance was placed by Mr. Koregave, the trial court had rejected the permission to lead secondary evidence on the premise that the copy of the rent note sought to be produced by the appellant was of doubtful veracity. In that context, the Supreme Court observed that, the trial court was not justified in forming that opinion without affording the appellant an opportunity of adducing secondary evidence. Since the appellant had alleged that the original rent note was in possession of the respondent, the case was covered by clause (a) of Section 65 of the Indian Evidence Act, 1872.

16. In the case of *Ameer Minhaj* (supra), a Three-Judge Bench of the Supreme Court, considered the aspect of admissibility of unregistered instruments and allegedly insufficiently stamped Power of Attorney and observed that, the genuineness and validity and binding nature of the document or the fact that it is hit by the provisions of the Transfer of Property Act, 1882 or the Stamp Act, 1899, as the case may be, will have to be adjudicated at the appropriate stage after the parties adduced oral and the documentary evidence.

17. The aforesaid decisions, in my considered view, do not govern the controversy at hand. The core issue that arises for consideration in this petition is whether a party can be permitted to adduce secondary evidence of a document, which is in itself inadmissible on account of statutory bar?

18. On a plain construct, in the facts of the case, the requirements to adduce secondary evidence can be said to have been fulfilled. The defendants asserted in the written statement that there was a partition deed. The plaintiffs were in the custody of the said partition deed. The plaintiffs were called upon to produce the said partition deed by giving notice as envisaged by Section 66 of the Indian Evidence Act and by filing an application under Order XI Rule 14. The plaintiffs denied the

custody of the documents. However, the question is of the admissibility of a copy of the document, which itself is inadmissible in evidence.

19. Under Section 34 of the Maharashtra Stamp Act, if a document chargeable with duty is not so stamped, such document shall not be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, unless such document is duly stamped. Resultantly, an unstamped or insufficiently stamped instrument cannot be acted upon until payment of duty and penalty, if any, thereon. Section 33 of the Maharashtra Stamp Act, thus, contains provisions for impounding of insufficiently stamped instrument. However, what can be impounded is the original instrument and not a copy thereof.

20. In the case of ***Hariom Agrawal*** (supra) the Supreme Court has ruled in no uncertain terms that a plain reading of Sections 33, 35 and 2(14) of the Stamp Act, 1899 indicates that an instrument which is not duly stamped can be impounded and when the required fee and penalty has been paid for such instrument, it can be taken in evidence under Section 35 of the Stamp Act. Sections 33 or 35 are not concerned with any copy of the instrument and party can only be allowed to rely on the

document, which is an instrument within the meaning of Section 2(14). There is no scope for the inclusion of the copy of the document for the purposes of the Stamp Act. Law is now no doubt well settled that copy of the instrument cannot be validated by impounding and this cannot be admitted as secondary evidence under the Stamp Act, 1899.

21. In the case of *Jupudi Desava Rao vs. Pulavarthi Venkata Subbarao and others*⁶ the Supreme Court was confronted with the following question:

Whether reception of secondary evidence of a written agreement to grant a lease is barred by the provisions of Sections 35 and 36 of the Indian Stamp Act.

And answered it as under:

"12. The Indian Evidence Act, however, does not purport to deal with the admissibility of documents in evidence which require to be stamped under the provisions of the Indian Stamp Act. The Stamp Act which is now in force is an Act of 1899 but it had a fore-runner in a statute of 1879. Chapter IV of the Stamp Act deals with instruments not duly stamped.

13. 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

6 1971(1) Supreme Court Cases 545.

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 25 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 the inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.

14. 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."

(emphasis supplied)

22. The aforesaid pronouncement was followed by the Supreme Court, in the case of *Vijay* (supra). On the aspect of the admissibility of a copy of a document, by way of a secondary

evidence, when the original itself is not admissible in evidence, the Supreme Court observed as under:

“37. We may now consider Section 35 of the Stamp Act which forbids the letting of secondary evidence in proof of its contents. The section excludes both the original instrument and secondary evidence of its contents if it needs to be stamped or sufficiently stamped. This bar as to the admissibility of documents is absolute. Where a document cannot be received in evidence on the ground that it is not duly stamped, the secondary evidence thereof is equally inadmissible in evidence.

38. In relation to secondary evidence of unstamped/insufficiently stamped documents, the position has been succinctly explained by this Court in *Jupudi Kesava Rao* (supra) wherein it dealt with an issue, i.e., whether reception of secondary evidence of a written agreement to grant a lease is barred by the provisions of Sections 35 and 36 of the Stamp Act and answered it in affirmative.

.....

40. Thus, if a document that is required to be stamped is not sufficiently stamped, then the position of law is well settled that a copy of such document as secondary evidence cannot be adduced. The present facts, however, differ.”

(emphasis supplied)

23. The legal position which thus emerges is that a copy of a document cannot be construed as an instrument for the purpose of the Stamp Act. Secondary evidence either by way of oral evidence of the contents of unstamped document or copy of it covered by Section 63 of the Evidence Act would not fall within the ambit of the term “instrument” so as to cure the defect of deficiency in payment of stamp-duty. Allowing such evidence to be let in, when the original itself is not admissible, would amount to the document being acted upon by the person having, by law or consent, authority to receive evidence. Thus,

if the original document is itself not admissible for want of or insufficient stamp-duty, secondary evidence thereof is equally inadmissible.

24. In view of the aforesaid exposition of law, reverting to the facts of the case, it is necessary to note that, the permission to adduce secondary evidence of the purported partition deed was declined on both the grounds i.e. the document is unregistered as well as insufficiently stamped. Even if the submission of Mr. Koregave that, the legality and validity of the unregistered partition deed and its evidentiary value could be considered at the trial is taken at par, yet, the said submission does not advance the cause of the defendants as the purported partition deed is also insufficiently stamped. Resultantly, the purported partition deed cannot at all be taken into account by the Court. Since a copy of the purported partition deed cannot be impounded, the avenue of curing the defect and removing the taint of invalidity by paying the deficit stamp-duty and penalty is also not available.

25. The upshot of the aforesaid consideration is that a copy of the document which is insufficiently stamped cannot be permitted to be tendered in evidence by way of secondary evidence. Thus, there is no infirmity in the impugned order.

26. Hence, the following order:

: O R D E R :

- (i) The petition stands dismissed.
- (ii) Rule discharged.

No costs.

[N. J. JAMADAR, J.]