IN THE COURT OF CIVIL JUDGE, MUNDGOD.

PRESENT

SRI. IRANAGOUDA K. KABBUR,
B.A., LL.B., (Hon's) LL.M.
Civil Judge, Mundgod.

O.S. No. 86/2012
Dated this the 25th day of October 2018.

PLAINTIFF: Sri.Rustum Sab Modinsab Nadaf,
A/a. 61 years, Occ: Agriculturist,
R/o. Ugginakeri, Tal. Mundgod.

(By Sri. V.P.Bhat/R.S.Patil.Advs.)

// Vs //

DEFENDANT : Sri. Ismail Shaikh Aliyas Shet
Moti, S/o. Modinbhaksh Moti,
A/a. 33 Yrs., Agriculturist,
R/o. Bammigatti Village,
Tal: Kalaghtagi.

(By Sri.A.R.H/M.S. Bijapur Advs.)

ORDER ON MEMO FILED BY THE DEFENDANT DATED 04-08-2018.

This suit is filed by the plaintiff against the defendant for the relief of Specific Performance of an Agreement of

Sale. When the matter was pending for defendant evidence, the defendant has filed the present memo for dismissing the I.A.No.VII as not pressed. The said I.A.No.VII pertains for consideration of document dated 2-6-2010 as secondary evidence. Initially the said application was allowed. However, now the matter is pending for reconsideration of the said application as per the direction of the Hon'ble High Court of Karnataka, Bench at Dharwad.

2. Per contra, the said memo was strongly objected by the counsel for the plaintiff and submitted that the memo filed by the defendant, for the dismissal of I.A.No.VII as not pressed is not permissible under law. As per the directions of the Hon'ble High Court of Karnataka, Bench at Dharwad, the said interim application is pending for reconsideration. The defendant knowing the consequences regarding the reconsideration of the application has filed the present memo. If the application is reconsidered as per the direction of the Hon'ble High Court of Karnataka, Bench at Dharwad

the document dated 2-6-2010 will be impounded and the defendant will be directed to pay the deficit stamp duty. Therefore submitted that the memo filed by the defendant is not maintainable. Hence, prays to reject the memo.

3. Heard the arguments and perused the materials available on record.

4. The following points that arise for consideration:

1. Whether the defendant has made sufficient grounds for the withdrawal of I.A.No.VII as not pressed?

2. What Order?

5. My findings on the above points are as follows:

Point No. 1 : In the **Negative**.

Point No. 2 : As per the final order for the following:

: R E A S O N S :

6. **Point No.1:** The plaintiff has filed the present suit against the defendant for the relief of specific performance of contract relating to the agreement of sale dated: 28-07-

2010 executed by the defendant in favour of the plaintiff. The defendant on appearance has filed the written statement and has denied the claim of the plaintiff and contended that, the defendant had never executed any agreement of sale in favour of the plaintiff. The defendant due to his family financial constraints was in need of money and had barrowed loan from plaintiff. The plaintiff while giving loan amount has fraudulently created the agreement of sale. The plaintiff making use of the said agreement has instituted a false suit, which is not tenable in the eyes of law. During the defendant evidence the counsel for defendant filed I.A.No.VII under Sec.65 of Evidence Act and sought permission for permitting to lead secondary evidence relating to document dated 02-06-2010.

7. This court after hearing, allowed the interim application No.VII filed under Sec.65 of the Evidence Act R/w. Sec.151 of Civil Procedure Code. The plaintiff being aggrieved by the said order approached the Hon'ble High

Court of Karnataka, Bench at Dharwad through Writ Petition No.111500/2017 clubbed with W.P.No.111501/2017 and W.P.No.111502/2017. The Writ Petitions filed by the plaintiff was allowed with a direction to reconsider the applications in question in accordance with Secs.34 and 35 and other relevant provisions of Karnataka Stamp Act and judgment of the Hon'ble Supreme Court.

8. When the matter was pending for reconsidering the application, the defendant has filed the present memo for withdrawal of I.A.No.VII. During the course of argument the counsel for the defendant submitted that Secs.33 and 34 of Stamp Act deals with the procedure to be followed when the person who seeks to produce the document in evidence, is not sufficiently stamped. Sec.34 comes into picture when insufficiently stamped document is sought to be admitted in evidence. Relying on the said section counsel for the defendant highlighted that Sec.34 of Stamp Act is applicable in a situation where the document is admitted in

evidence. In the present case, the said document is the photo copy of the original. The question regarding the admissibility of the said document is not clear. Therefore as the document is inadmissible in law the question of impounding and payment of stamp duty does not arise. Further, it is the discretion of the parties to withdraw any application as they think just and proper. Therefore, as the defendant is intending to not proceed with the I.A.No.VII. Further, there is no harm or injustice to the plaintiff in withdrawing the said application. Therefore, prayed to allow the memo.

9. On the other hand, the counsel for the plaintiff strongly objected the memo and submitted that the memo filed by the defendant is merit less and deserves to be dismissed with costs. The plaintiff being aggrieved by the order on I.A.No.VII pertaining to the permission to lead secondary evidence relating to the alleged loan agreement had approached the Hon'ble High Court of Karnataka,

Bench at Dharwad through W.P.Nos. 111500/2017 clubbed with W.P.No.111501/2017 and W.P.No.111502/2017. The Hon'ble High Court of Karnataka in the said order has set aside the order of this court with a direction to reconsider the I.A.No.VII. The defendant having the clear apprehension that the document will be impounded and he will be compelled to pay the deficit stamp duty as mentioned in the Karnataka Stamp Act. Therefore, the defendant with an intention to forgo the consequences has come up with the 'U' turn and filed the present application which is deserves to be dismissed with costs. The counsel for the plaintiff in support of his submission relied on the decision reported in ***2013 (1) KCCR 853 (D.B.) (Miss. Sandra Lesley Anna Bartels -Vs- Miss. P. Gunavathy,*** wherein it is held as under:-

> **" A. KARNATAKA STAMP ACT, 1957 – Section 33-Impounding an insufficiently stamped document-Impounding to be done the moment the insufficiently stamped instrument comes**

into the notice of the Court-Whether the same would be relied upon by party or not.”

10. Relying on the said decision the counsel for the plaintiff submitted that when the document which is insufficiently stamped produced before the court the document needs to be impounded immediately. The question as to whether the concerned parties relies it or not is not a question for consideration. Therefore, the defendant cannot withdraw the said document without testing it as per the provisions of Karnataka Stamp Act.

11. Based on the submission of both counsel and on scrutiny of the documents available before the court the primary questions for consideration in adjudicating the present memo are:-

Firstly, whether the defendant is empowered to withdraw the I.A.No.VII through the present memo. Secondly, whether the photo copy of a document dated 2-6-2010 can be impounded as per the provisions of the

Karnataka Stamp Act. For the consideration of the first question the conduct of the defendant is very much necessary. The primary submission of the defendant counsel is that it is his prerogative right to withdraw the I.A. and there is no bar in law in doing so. But initially, the defendant himself has filed the I.A.No.VII for permitting to lead the secondary evidence of the document as the original is in the custody of the plaintiff. In support of the said I.A., the counsel for the defendant submitted that the said document is very much necessary to set up his defence. Therefore, prayed to allow the I.A. After the direction was issued by the Hon'ble High Court of Karnataka for reconsideration of the I.A. there is no question for permitting to withdraw the said I.A. But in the present situation the crucial aspect as to the impounding of the document and payment of stamp duty is kept open and is pending for consideration. Therefore in a situation where the document is pending for question of impounding and payment of stamp duty there is no way out by which the defendant can withdraw the I.A. through memo. But as the said question is raised by the defendant counsel it is necessary to throw light on it. Therefore, the submission of the defendant counsel is not correct and does not survive for consideration. Secondly, the question as to the payment of stamp duty for the photo copy of a document is disputed by the defendant counsel. Basically, the said question arise for consideration when the I.A.No.VII is reconsidered for hearing. However, when the matter was pending for reconsideration of I.A.No.VII as per the direction of Hon'ble High Court of Karnataka the counsel for the defendant has filed the memo for the withdrawal of I.A.No.VII. Here the question is raised by the defendant counsel as to the validity of impounding the photo copy of a document as per the Karnataka Stamp Act. The counsel for the defendant during the course of argument submitted that as per the Sec. 34 of Karnataka Stamp Act those documents which are admitted in the evidence can be impounded. In the present case, the photo copy of the document is not a document which is admissible in evidence. As the document is inadmissible in evidence the question of impounding, payment of penalty and stamp duty does not arise. Further, it is important to mention that the parties to the proceedings can take different stands at different times but cannot take contradictory stands in the same case. A party cannot approbate and reprobate on same facts.

12. Further for clarification regarding the second question it is important to refer Karnataka Stamp Act, 1957. Sec.3 of the Karnataka Stamp Act 1957 deals with the Instruments chargeable with duty- Subject to the provisions of this Act and the exemptions contained in the Schedule property, the following instruments shall be chargeable with duty of the amount indicated in that schedule property as the proper duty therefore, respectively, that is to say.-

(a) every instrument mentioned in that schedule property which, not having been previously executed by any person, is executed in the territories of the State of Karnataka on or after the commencement of this Act, and

(b) every instrument mentioned in that schedule property which, not having been previously executed by any person, is executed out of the State of Karnataka on or after that day, relates to any property situate, or to any matter or thing done or to be done, in the territories of the State of Karnataka and is received in the territories of the State of Karnataka:

Provided that no duty shall be chargeable in respect of .-

(1) any instrument, executed by, or on behalf of, or in favour of, the (State Government) in cases where, but for this exemption, the (State Government) would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under (the Merchant Shipping Act, 1958).

13. Based on the above Section, it is clear that where no proper duty has been paid on the original of an instrument which is chargeable with an amount indicated in the Schedule as proper duty therefore, then a copy of such instrument whether the certified or not and whether a facsimile image or otherwise of the original shall be chargeable with duty of an amount which is indicated in Schedule property as proper duty for the original of such instrument, and all the provisions of this chapter and chapters IV, VI, VII and VIII of this Act shall *mutais mutandis* be applicable to such copy of the original.

14. Admittedly the document in question is a photo copy of the original. Therefore, the photo copy of the document is an eligible document for testing it for the purpose of impounding on the question of insufficient stamp duty as per the Karnataka Stamp Act 1957.

15. Further it is important to refer the decision of the Hon'ble High Court of Karnataka reported in **2015 (4) KAR LJ 282 (B.B.Ramachandre Gowda Vs. Smt. Kemppamma).** In the said decision the question as to the impounding of the photo copy of the original was raised and the Hon'ble High Court of Karnataka referring to the Section 3 of the Karnataka Stamp Act held that the photo copy of the original can be impounded.

16. In view of the above reasons and findings, the court is of the considered view that the memo filed by the defendant is not maintainable. Accordingly my findings on the above point is necessary in the '**Negative'**.

17. **Point No.2:-** For the following reasons, I proceed to pass the following :-

ORDER

The memo filed by the defendant dated 4-8-2018 for permitting the defendant to not to proceed with I.A.No.VII is hereby rejected.

(Dictated to the stenographer, transcribed and typed by her, corrected by me and then pronounced in the open court this the 25th day of October 2018)

(IRANAGOUDA K. KABBUR)
Civil Judge, Mundgod.