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IN THE HIGH COURT OF JUDICATURE OF BOMBAY BENCH AT AURANGABAD

SECOND APPEAL NO.303 OF 1991

Vasant Shankar Mane APPELLANT
Age-55 years, Occ-Medical Practitioner,
R/o Shrirampur, Taluka-Shrirampur
District-Ahmednagar

VERSUS

Waman Vitthal Chindhe RESPONDENTS
(Since Deceased) Through L.Rs.

i. Ajay Waman Chindhe,
Age-Major, Occ – Agriculture & Business
R/o Mali Chinchore, Taluka-Newasa
District – Ahmednagar

ii. Mohan Waman Chindhe,
Age-Major, Occ – Agriculture & Business
R/o Mali Chinchore, Taluka-Newasa
District – Ahmednagar

iii. Manisha Waman Chindhe,
Age-Major, Occ – Agriculture & Business
R/o Mali Chinchore, Taluka-Newasa
District – Ahmednagar

iv. Sushila Waman Chindhe,
Age-Major, Occ –Household
R/o Mali Chinchore, Taluka-Newasa
District – Ahmednagar

v. Vaishali Sudhakar Dhenge **DISMISSED**
Age-Major, Occ –Household
R/o Gondhawani, Taluka-Shrirampur
District – Ahmednagar

vi. Charulata Madhukar Dhenge **DISMISSED**
Age-Major, Occ –Household
R/o Mali Chinchore, Taluka-Newasa
District – Ahmednagar

....
Mr. A. H. Kasliwal, Advocate for the appellant
Mr. S. D. Kotkar, Advocate for respondents No.i to iv
....

[CORAM : N. W. SAMBRE, J.]

RESERVED ON : 15th JANUARY, 2015

PRONOUNCED ON : 30th JANUARY, 2015

JUDGMENT :

1. Present appellant, original plaintiff, claimed to be medical practitioner, filed Regular Civil Suit No. 190 of 1980 in the court of learned 2nd Joint Civil Judge, Junior division, Shrirampur against the respondent – defendant for recovery of amount.

2. It is claimed by the appellant that in view of relationship between the plaintiff and the defendant, in the year 1977, as the defendant was in need of money, an amount of Rs.10,000/- was advanced by the plaintiff to the defendant on 1st April, 1977, in exchange the defendant executed a document, agreeing to repay said amount, within a period of one year.

3. Upon demand, as the defendant failed to repay said amount to the plaintiff, which has prompted the plaintiff to file the claim. The claim was objected by the respondent – defendant, by filing written statement Exhibit-15. The defendant

setup a case that he has never accepted an amount of Rs.16,000/- from the plaintiff. It was further urged by the defendant that being family doctor, the defendant had blind faith in the plaintiff. According to him, the plaintiff had asked him to bring stamp paper and got agreement executed by misrepresentation and undue influence. A point of limitation was also raised by the defendant.

4. It is further claimed by the defendant that the transaction of sale of land in between him and wife of plaintiff had taken place, as he has taken Rs.1000/- from the wife of the plaintiff as earnest money, as said transaction was not completed by the plaintiff and his wife, said amount of Rs.1000/- remained to be paid to the plaintiff and his wife. According to him the said agreement was got executed under the pretext of honouring a medial bill of Rs.1000/-.

5. Having regard to the pleadings of the parties, learned trial court framed issue at Exhibit-17, which read thus

> *"5. In view of the pleadings of the parties to the suit necessary issues are framed at Exhibit-17. They are as under for my consideration*

Issues

(1) Does Plaintiff prove that he paid Rs.16,000 to the Defendant on 1st June 1977 and Defendant executed one document to the effect in his favour.

(2) Does Plaintiff proves that the Defendant avoided to repay, the same amount within stipulated period of one year?

(3) Is plaintiff entitled for further interest on the suit amount, if yes, at what rate?

(4) Does Defendant Proves that the Plaintiff has fraudulently and under certain influence got executed the alleged documents from him?

(5) Whether the suit claim is time barred?

(6) Whether the Plaintiff has paid proper Court fees?

(7) What order and decree?

(8) Does Defendant prove that the document dated 1st April, 1977 is executed without consideration?

6. My findings on the above issues are as under:-

My findings

(1) Yes.

(2) Yes.

(3) No.

(4) No.

(5) No.

(6) Yes.

(7) As per final order.

(8) No.

6. Learned trial court decreed the suit by its judgment and order dated 14th October, 1985, which was subject matter of challenge before the District Judge, Ahmednagar in Regular Civil Appeal No. 35 of 1986, at the behest of the defendant. Decision of the trial court of decreeing the suit of the plaintiff and direction to the defendant to pay Rs.16,000/- to the plaintiff, came to be reversed by order dated 17th March, 1990, in the appeal preferred by the defendant, upon considerations therein, as such present second appeal.

7. Shri. Kasliwal, learned counsel for the appellant, while questioning the legality and validity of the judgment of the lower appellate court, contended that the lower appellate court has

proceeded on altogether wrong premise, as according to him, the agreement Exhibit-24 was sufficiently stamped during the conduct of the trial. For said purpose he seeks to rely upon the record and proceedings and submits that the observations made in paragraph No. 14 of the judgment of the lower appellate court are incorrect.

8. Above referred contentions raised by the appellant are not disputed by learned counsel for the respondents. He submits that the document, during conduct of the trial, was duly processed in accordance with provisions of Indian Stamps Act, more particularly section 36 and the said issue, as is considered by the lower appellate court is required to be concluded in favour of present appellant. However, according to him, the claim in question is not tenable in view of the fact that the amount in question i.e. Rs.1000/- was accepted by him towards earnest money for sale of his property. He submits that sale of the property in question, since was not materialized, there was no question of refunding of amount of Rs.16,000/- and according to him, the decree of the lower appellate court is liable to be maintainable.

9. Having considered the rival contentions of the parties, it is

required to be noted that the learned trial court, while dealing with the claim, quo the plaintiff advancing Rs.16,000/- to the defendant on 1st April, 1977 and execution and acknowledgment to that effect by the defendant, has answered said issue in affirmative. Other relevant issues, as regards non repayment of the same by the defendant, alleged execution of fraudulent document and execution of document dated 1st April, 1977 without consideration is concerned, learned trial court has observed that in the cross examination of the plaintiff it is brought on record that there was monetary dealing between the plaintiff and the defendant and suggestion put to the plaintiff in his cross examination was denied by the plaintiff. Learned trial court considered the evidence of Kondiram Bankar, who was examined at Exhibit-42, so as to establish the fact that the plaintiff has advanced Rs.16,000/- to the defendant in his presence and the defendant has written document Exhibit-37 in his own handwriting. Learned trial court, as such, having considered evidence of plaintiff and that of the defendant at Exhibit-44, has reached to a conclusion that Exhibit-37 clearly depicts that the plaintiff has advanced an amount of Rs.16,000/- to the defendant. Learned trial court has also dealt with the issue of limitation and has given finding that the suit was within limitation and as such, decreed the suit.

10. The lower appellate court though has proceeded to reverse the decree by recording finding that the agreement Exhibit-37 was not a registered document, however in view of submissions of learned counsel for both the sides, it clearly emerges that the document was duly processed under section 36 of the Indian Stamps Act and as such, was rightly exhibited and accepted in the evidence. Once said document is proved, fact remains that said amount was duly advanced by the plaintiff to the defendant. As such, finding recorded by the lower appellate court to the extent that document Exhibit-37 was not duly stamped and as such, it is open for the defendant to raise challenge to said Exhibit-37 in my opinion, are liable to be upset. The other findings recorded by the learned lower appellate court that even the other piece of evidence in this case cannot be considered, is concerned, said findings are also based on the fact that document Exhibit-37 was not properly stamped in accordance with provisions of Indian Stamps Act, which is an incorrect position.

11. So far as case of the defendant that the plaintiff was his family doctor and he has entered into an agreement of sale of

his land with the wife of the plaintiff and as such has executed document in question is concerned, in my opinion, said contention was rightly disbelieved by the learned trial court, as it was clearly established that Exhibit-37 was written by present respondent in his own handwriting and was duly proved upon examination of Kondiram Bankar at Exhibit-42.

12. Claim of present respondent-defendant that the amount was outstanding towards medical expenses which the present respondent – defendant owe to the plaintiff is concerned, the defendant has tried to mix up said issue. Once Exhibit-37 is proved and the findings thereto is recorded, the only recourse that was left was to decree the suit.

13. In the light of above observations, Shri. Kasliwal, learned counsel for the appellant has rightly placed reliance upon judgment of Apex Court in the matter of ***"Shyamal Kumar Roy V. Sushil Kumar Agarwal" 2007 AIR (SC) 637***, particularly paragraphs No. 15, 16 and 21, so also in the matter of ***"Javer Chand and Others V. Pukhraj Surana" reported in AIR 1961 SC 1655***. Paragraph No. 4 of said judgment reads thus-

> *"4. On these pleadings, a number of issues were joined between the parties, but the only relevant issue was issue No. 2 in these terms:-*

> *"Whether the two hundis, the basis of the suit, being unstamped, were inadmissible in evidence? (OD*)"*
>
> *(*which perhaps are meant to indicate that the onus was on the defendant in respect of this issue).*

It appears that the defendant led evidence first, in view of the fact that the onus lay on him. He was examined as D.W.5, and in his examination-in-chief he stated,

> *"I did not receive any gold towards, these hundis I asked them to return the hundis, but 'they did not return them., I had drawn the two hundis marked Ex. P.' I and Ex. P. 2. They are written in Roopchand's hand. I did not receive any notice to honour these hundis."*

His other witnesses, D.Ws. 1, 2 and 4 were examined and cross-examined with reference to the terms of the hundis and as to who the author of the hundis was. All along during the course of the recording of the evidence on behalf of the parties, these hundis have been referred to as Ex. P. I. and Ex. P. 2. The conclusion of the learned Trial Judge on issue No. 2 was in these terms:-

> *"Therefore, in this case the plaintiff having paid the penalty, the two documents in suit having been exhibited and numbered under the signatures of the presiding officer of court and the same having thus*

> *been introduced in evidence and also referred to and read in evidence by the defendant's learned counsel, the provisions of sec. 36 of the Stamp Act, which are mandatory, at once come into play and the disputed documents cannot be rejected and excluded from evidence and they shall accordingly properly form part of evidence on record. Issue No. 2 is thus decided against the defendant."*

The suit was accordingly decreed with costs, as stated above. On appeal by the defendant to the High Court, the High Court also found that the hundis were marked as Exs. P. 1 and P. 2, with the endorsement "Admitted in evidence" and signed by the Judge. The High Court also noticed the fact that when the hundis were executed in December, 1946, the Marwar Stamp Act of 1914 was in force and ss. 9 and 11 of the Marwar Stamp Act, 1914, authorised the Court to realise the full stamp duty and penalty in case of unstamped instruments produced in evidence. Section 9 further provided that on the payment of proper stamp duty, and the required penalty, if any, the document shall be admissible in evidence. It was also noticed that when the suit was filed in January, 1949, stamp duty and penalty were paid in respect of the hundis, acting upon the law, namely, the Marwar Stamp Act, 1914. The High Court also pointed out that the' documents appear to have been Admitted in evidence because the Trial court lost sight of the fact that in 1947 a new Stamp Act had come into force in the former State of Marwar, amending the Marwar Stamp Act of 1914. The *"new law was, in terms, similar to the Indian Stamp Act. The High Court further pointed out that after the coming into effect of the Marwar Stamp Act, 1947 the hundis in this case could not be admitted in evidence, in view of the provisions of s. 35, proviso (a) of the Act, even on payment of duty and penalty. With reference to the provisions of s. 36 of the Stamp Act., the High Court held that the plaintiffs could not take advantage of the provisions of that section because, in its opinion, the admission of the two hundis 'was a pure mistake'. Relying upon a previous decision of the Rajasthan High Court in Ratan Lal v. Dan Das (1), ILR (1953) Raj 833: (AIR 1954 Raj 173), the High Court held that as the admission of the documents was pure mistake, the High Court, on appeal, could go behind the orders of the Trial Court and correct the mistake made by that Court. In our opinion, the High Court misdirected itself, in its view of the provisions of s. 36 of the Stamp Act. Section 36 is in these terms:-*

> *"Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."*

That section is categorical in its terms that when a document has once been admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument *had not been duly stamped. The only exception recognised by the section is the class of cases contemplated by s. 61, which is not material to the present controversy. Section 36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it has not been stamped, or has not been properly stamped, it has to be decided then and there when the document is tendered in evidence. Once the Court, rightly or wrongly, decides to admit the document in evidence, so far as the parties are concerned, the matter is closed. Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court 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. The record in this case discloses the fact that the hundis were marked as Exs. P. 1 and P. 2 and bore the endorsement 'admitted in evidence' under the signature of the Court. It is not, therefore, one of those cases where a document has been inadvertently admitted, without the Court applying its mind to the question of its admissibility. Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, s. 36 of the Stamp Act 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."*

14. In view of above, the judgment and decree delivered by learned District Judge, Ahmednagar in Regular Civil Appeal No. 35 of 1986 dated 17th March, 1990 is hereby set aside and the judgment passed by learned 2nd Joint Civil Judge, Shrirampur dated 14th October, 1985 in Regular Civil Suit No. 190 of 1980 stands restored. Second appeal, as such, stands allowed in above terms.

[N. W. SAMBRE, J.]

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