NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WP227 No. 398 of 2015

Om Prakash Nishad S/o Ramdhani Nishad Aged About 43 Years R/o Gangoripar, Tahsil Gurur, District Balod, (Chhattisgarh)

---- Petitioner

Versus

1. Pawan Kumar S/o Late Dev Singh Aged About 25 Years R/o Village Gangoripar, Post Sinturgahan, Tahsil Gurur, District Balod, (Chhattisgarh)

2. Duleshwar Kumar S/o Late Dev Singh Aged About 22 Years R/o Village Gangoripar, Post Sinturgahan, Tahsil Gurur, District Balod, (Chhattisgarh)

3. Manoj Kumar S/o Late Dev Singh Aged About 20 Years R/o Village Gangoripar, Post Sinturgahan, Tahsil Gurur, District Balod, (Chhattisgarh)

4. Kushbu S/o Late Dev Singh Aged About 18 Years R/o Village Gangoripar, Post Sinturgahan, Tahsil Gurur, District Balod, (Chhattisgarh)

5. Smt. Kaushaliya Bai W/o Late Dev Singh, Aged About 48 Years R/o Village Gangoripar, Post Sinturgahan, Tahsil Gurur, District Balod, (Chhattisgarh)

---- Respondents

For Petitioners : Shri Avinash Chand Sahu, Advocate.
For Respondents : Shri B.P. Singh, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

23/11/2016

(1) The trial Court, by its impugned order dated 01.04.2015, rejected the petitioner/plaintiff's application filed under Section 35 of the Indian Stamp Act, 1899 (for short 'Act of 1899') finding no

merit, against which this writ petition under Article 227 of the Constitution of India has been preferred by the petitioner questioning that order.

(2) Mr. Avinash Chand Sahu, learned counsel appearing for the petitioner would submit that since the agreement to sell dated 12.06.2010 executed by defendant No. 1 in favour of plaintiff is not duly stamped and, therefore, the petitioner moved an application under Section 35 of the Act of 1899, which has been rejected on the ground which is not only perverse but contrary to the records and, therefore, the impugned order be set aside and the writ petition be allowed.

(3) Per contra, Shri B.P. Sinlgh, counsel for the respondents supported the order impugned.

(4) I have heard learned counsel appearing for the parties and perused the order impugned with utmost circumspection.

(5) At this stage, it would be appropriate to notice Section 35 of the Act, 1899, which states as under :-

> "**35. Instrument not duly stamped inadmissible in evidence, etc. -** No instrument chargeable with duty shall 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, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that-

(a) any such instrument [shall] be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of any instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped."

"**36. Admission of instrument where not to be questioned.-** 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.

37. Admission of improperly stamped instruments.- The State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

38. Instruments impounded how dealt with.-(1) Where the person impounding an instrument under Section 33 has by law or consent of parties authority to receive evidence an admits such instrument in evidence upon payment of a penalty as provided by Section 35 or of duty as provided by Section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

(2) In every other case, the person so impounding an instrument shall sent it in original to the Collector.

39. Collector's power to refund penalty paid under Section 38, sub-section (1).- (1) When a copy of an instrument is sent to the Collector under Section 38, sub-section (1), he may, if he thinks fit refund any portion of the penalty in excess of five rupees which has been paid in respect of such instrument.

(2) When such instrument has been impounded only because it has been written in contravention of Section 13 or Section 14, the Collector may refund the whole penalty so paid.

40. **Collector's power to stamp instruments impounded**.- (1) When the Collector impounds any instrument under Section 33, or receives any instrument sent to him under Section 38; sub-section (2), not being an instrument chargeable [with a duty not exceeding ten naye paise] only or a bill or exchange or promissory note, he shall adopt the following procedure :-

(a) if he is of opinion that such instrument is duly stamped, or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped , or that it is not so chargeable, as the case may be;

(b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or fails short of five rupees;

Provided that, when such instrument has been impounded only because it has been written in contravention of Section 13 or Section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this section.

2. Every certificate under clause (a) of sub-section (1), shall, for the purposes of this Act, be conclusive evidence of the matters stated therein.

3. Where an instrument has been sent to the Collector under Section 38, sub-section (2), the Collector shall, when he has dealt with it as provided by this section, return it to the impounding officer.”

(6) A careful perusal of the scheme of the Act would show that

where the instrument is chargeable to duty is tendered in the Court, the Court is duty bound to impound the same, if it is of the opinion that the document is not duly stamped. The Court under Section 35 of the Act has the power to admit the document in question on payment of duty with which the instrument is chargeable or amount required to make up such deficiency together with penalty, limits of which are prescribed in the section. There is no other course open to the Court, once it is found that instrument tendered in evidence is not duly stamped. However, if the instrument has been impounded under Section 33 of the Act, but has not been admitted in evidence, on payment of penalty and duty the Court has to send the document to the Collector under Section 38(2) of the Act and the Collector is required to deal with the document in the manner prescribed under section 40 of the Act.

(7) The Full Bench of Madhya Pradesh High Court in **Nathuram Arjun v. Siyasharan Harprasad**[1]**,** has held that the instrument can be sent to the Collector under Section 38(2) of the Act only when it is impounded under Section 33 of the Act, but has not been admitted in evidence on payment of penalty and or duty with the aid of Section 35 of the Act.

(8) The Supreme Court in **Petiti Subba Rao v. Anumala s. Narendra**[2] has held that where the penalty fails to pay the penalty suggested by the Court the document impounded has to be sent

1 AIR 1970 MP 79
2 (2002) 10 SCC 427

to the Collector for the purposes of taking further steps in respect of document as provided in Section 40 of the Act.

(9) It appears from the perusal of the record that the trial Court has not considered the application of the petitioner in its proper perspective and particularly in light of Sections 35 to Section 40 of the Indian Stamp Act. The document in question is yet to be tender in evidence. If the petitioner tender in documents the trial Court shall deal with the document and in view of law laid down by the Supreme Court in **Petiti Subba Rao** (supra) as well as Full Bench of this Court in **Nathuram Arjun** (supra).

(10) Accordingly, the writ petition is allowed. Impugned order dated 01.4.2015 (Annexure P-1) is set aside.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-