

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.04.2016

Delivered on:11.05.2016

C O R A M

THE HONOURABLE MR.JUSTICE P.R.SHIVAKUMAR

C.R.P.(PD) Nos.1776 of 2014

&

M.P.No.1 of 2014

1.P.Venkatesan
2.Ramachandran
3.Savithri
4.Radhakrishnan
5.Muthukrishnan
6.Jayachandran
7.Dhanalakshmi

..Petitioners

Vs.

1.V.Gajendran
2.V.Kamala Kannan
3.Alan Daniel
4.Gurubaran
5.Stalin Arokyaraj

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order in I.A.No.323 of 2014 in O.S.No.185 of 2010 on the file of the Subordinate Court, Poonamallee dated 10.04.2014.

For Petitioner : Mr.V.Raghavachari

For Respondents : Mr.P.R.Thiruneelakandan
for R1 and R2
Mr.N.K.Sriram for R3
Mr.R.Subramanian for R4

ORDER

The defendants 1 to 7 in O.S.No.185 of 2010 pending on the file of the Sub Court, Poonamallee are the petitioners in the present revision. The suit was filed by the respondents 1 and 2 against the revision petitioners and respondents 3 to 5 for partition and separate possession claiming 2/9th share in the suit properties, for a permanent injunction restraining the revision petitioners [defendants 1 to 7] from putting up any construction in the suit properties and for a declaration of a number of documents to be sham and nominal and not binding on the respondents 1 and 2/ plaintiffs. The suit is resisted by the revision petitioners herein, who are defendants 1 to 7.

2. During the course of trial, the defendants examined the 1st defendant as D.W.1. Through him, 34 documents were sought to be marked as exhibits on their side. Out of 34 documents, the learned trial Judge had objection regarding three documents for being marked through the 1st defendant, who figured as D.W.1 and hence, the remaining 31 documents alone were marked as Exs.B1 to B31 on the side of the contesting defendants. The unmarked documents, which

were found in Serial Nos.10, 25 and 26 of the list annexed to the proof affidavit of DW1 are: 1) Deed of Undertaking dated 18.08.2004 allegedly executed by Santhakumari and Ramesh in favour of the fourth defendant Radhakrishnan; 2) Promissory Notes and unfilled cheques issued by the second plaintiff in favour of several persons, which were obtained on discharging the debts due to those persons; and 3) a rental agreement dated 21.02.2002 between the second plaintiff and the owner of the building in which he was running a milk booth.

3. Pursuant to the refusal of the trial Court to mark those documents through DW1, respondents 1 and 2/plaintiffs filed an application in I.A.No.27 of 2014 under Order XIII Rule 7 (2) of C.P.C. to return those unmarked documents. At the same time, the revision petitioners chose to file I.A.No.28 of 2014 under Order VIII Rule [1-A][3] of C.P.C. for receiving the above said documents. The learned trial Judge, after hearing both sides, by orders dated 01.02.2014, dismissed I.A.No.27 of 2014 filed by the respondents 1 and 2 herein/plaintiffs and allowed I.A.No.28 of 2014 filed by the revision petitioners/defendants 1 to 7.

4. As against the dismissal of I.A.No.27 of 2014, the respondents 1 and 2/plaintiffs did not file any revision. In the order

passed in I.A.No.28 of 2014, the learned trial Judge held that the objections to the marking of the documents could be raised at the time when the documents would be sought to be marked and that in an application to receive the documents after condoning the delay in producing the documents under Order VIII Rule [1-A][3] of C.P.C, the question of admissibility or otherwise could not be canvassed. The said order was also not challenged.

5. Thereafter, the 4th petitioner/4th defendant was sought to be examined as D.W.2 and his proof affidavit came to be filed on 08.01.2014. In the said proof affidavit, the 4th defendant has referred to the above said documents as documents to be marked through him. At that point of time, respondents 1 and 2 herein/plaintiffs filed a memo to the effect that D.W.2 could not be examined without eschewing the evidence of D.W.1 on the premise that D.W.1 was examined as a witness, not only on his behalf, but also on behalf of respondents 2 to 7/defendants 2 to 7 and that without eschewing his evidence, the other defendants could not be allowed to enter the witness box and lead evidence. Such a memo came to be filed on 10.01.2014.

6. A subsequent memo dated 19.03.2014 also came to be filed by the respondent 1 and 2/plaintiffs asking the court to decide

the admissibility, relevancy and proof of the above said documents, before marking the same as exhibits in the suit. Again the respondents 1 and 2 herein/plaintiffs chose to file another application under Section 151 of C.P.C as I.A.No.323 of 2014 asking the Court to decide the admissibility and relevancy of the documents found mentioned in Sl.Nos.10, 25 and 26 in the list annexed to the proof affidavit of D.W.1, which also figured in the proof affidavit of D.W.2. The said application was resisted by the revision petitioners by filing a counter contending that the documents referred to in the petition were very much admissible and there was no impediment for marking those documents.

7. The learned trial Judge, after hearing both sides, passed the impugned order to the following effect:

"Sl.No.1 [documents shown in Sl.No.10 in the proof affidavit of D.W.1] is impounded to R.D.O. for collection of stamp duty penalty. As far as the Sl.No.3 is concerned, [referring to Sl.No.26 in the proof affidavit of D.W.1] the respondents/ defendants are directed to produce the original for collection of stamp duty penalty. As far as the bunch of documents in Sl.No.25 [in the proof affidavit of D.W.1] is concerned, the four cheques and promissory notes with incomplete particulars are rejected and the office is directed to calculate stamp duty penalty with respect to the remaining documents as observed in the order."

8. Aggrieved by the said order, the present Civil Revision Petition has been filed by the revision petitioners/defendants 1 to 7.

9. The arguments advanced by Mr.V.Raghavachari, learned counsel for the petitioners and the arguments advanced by Mr.R.Subramanian, learned counsel for the 4th respondent, who supports the case of the revision petitioners and the arguments advanced by Mr.P.R.Thiruneelakandan, learned counsel for the respondents 1 and 2/plaintiffs were heard. The certified copy of the impugned order and copies of the connected papers produced in the form of typed sets of papers are also perused.

10. As many as 34 documents were sought to be marked as exhibits on the side of the contesting defendants through the 1st defendant, who figured as D.W.1. Out of the 34 documents, 31 documents alone were marked as Exs. B1 to B31. The remaining three documents were not marked. Reasons for not marking those documents were not assigned. Thinking that those documents were not marked as the Court was of the view that they could not be proved through D.W.1, the revision petitioners/defendants 1 to 7 chose to file a petition in I.A.No.28 of 2014 for receiving the said documents after condoning the delay in producing the same as they

were not produced along with the written statements. The respondents 1 and 2/plaintiffs 1 and 2 chose to file an application in I.A.No.27 of 2014 asking the Court to return those three documents to the defendants. The application filed by the plaintiffs was dismissed, whereas the application filed by the contesting defendants, who are the revision petitioners, was allowed holding that the objection regarding the admissibility of the documents could be raised only at the time of attempted marking of the documents as exhibits on the side of the defendants.

11. The respondents 1 and 2 herein/plaintiffs in the suit made every attempt to prevent the said documents being produced into Court and marked as exhibits on the side of the contesting defendants. The first attempt made by them was by filing an application to return those documents. The second attempt was made by filing a memo to the effect that no other party witness on the side of the revision petitioners/ defendants 1 to 7 could be permitted to be examined without eschewing the evidence of 1st defendant, who figured as D.W.1, on the premise that he had deposed not only on his behalf, but on behalf of defendants 2 to 7. No order came to be passed in the memo. Thereafter, the respondents 1 and 2/plaintiffs 1 and 2 chose to file another memo assigning reasons in support of their prayer for rejection of those documents and praying

for rendering a decision regarding admissibility, relevancy and proof of the said documents. No order was passed in that memo also. Subsequently, respondents 1 and 2/plaintiffs filed I.A.No.323 of 2014 inviting a decision regarding the admissibility and relevancy of the documents referred above. Of course, by the time the said petition came to be filed, an attempt was made by the revision petitioners/defendants 1 to 7 to mark those documents as exhibits on their side. Since the attempts made by the respondents 1 and 2 by filing a couple of memos did not evoke a response by an order, the filing of the said application to decide the admissibility of the above mentioned documents cannot be found fault with. However, the learned trial Judge, without properly considering the scope of the prayer, seems to have passed an order as indicated supra. If at all, a document is found to be unstamped or insufficiently stamped and it is necessary to collect stamp duty and penalty to make the document admissible, the Court could have collected the deficit fee and penalty, if any, and marked the document and then referred the document to the authority under the Stamp Act to decide the correctness or otherwise of the stamp duty and penalty collected. Or else, the Court could have referred the document to the Sub-Collector after impounding the same.

12. Section 31 of the Indian Stamp Act, 1899 deals with the adjudication as to proper stamp duty payable on an instrument. The section reads as follows;

"31. Adjudication as to proper stamp.-(1) *When any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of such amount (not exceeding five rupees and [not less than fifty naye paise] as the Collector may in each case direct, the Collector shall determine the duty (if any) with which, in his judgment the instrument is chargeable.*

(2) For this purpose the Collector may require to be furnished with an abstract of the instrument, and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein, and may refuse to proceed upon any such application until such abstract and evidence have been furnished accordingly:

Provided that- (a) no evidence furnished in pursuance of this section shall be used against any person in any civil proceeding, except in an enquiry as to the duty with which the instrument to which it relates is chargeable; and (b) every person by whom any such evidence is furnished, shall, on payment of the full duty with which the instrument to which it relates, is chargeable, be relieved from any penalty which he may have incurred under this

Act by reason of the omission to state truly in such instrument any of the facts or circumstances aforesaid."

According to the said section when any instrument either after execution or before execution, whether previously stamped or not, is brought to the Collector by a person seeking opinion of the Collector as to the duty, if any, with which such instrument is chargeable and pays the fee fixed for seeking such opinion, the Collector may determine the stamp duty if any with which the instrument is chargeable. It is not a case in which the concerned documents were brought to the Collector under Section 31 of the Indian Stamp Act for determining the stamp duty with which the instruments are chargeable.

13. Section 33 of the Indian Stamp Act, 1899 deals with the impounding of the instruments not duly stamped. It reads as follows:

"33. Examination and impounding of instruments

(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance in his functions shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine

every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in ³[India] when such instrument was executed or first executed:

PROVIDED that-

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a criminal court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898:

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt,-

(a) ²⁷[the ⁶[State Government]] may determine what offices shall be deemed to be public offices; and

(b) ²⁷[the ⁶[State Government]] may determine who shall be deemed to be persons in charge of public offices.

14. Section 35 of the Stamp Act deals with the admissibility of the documents not duly stamped. It reads as follows:

"35. Instruments 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 not being an instrument chargeable [with a duty not exceeding ten naye paise] only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an 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;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(e) nothing herein contained shall prevent the admission of any instrument in any court when such instrument has been executed by or on behalf of the government or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act

15. Though the opening paragraph of Section 35 says that no instrument chargeable with stamp duty shall be admitted in evidence or acted upon, unless such instrument is duly stamped, proviso (a) enables the receipt of any such instrument, not being an instrument chargeable with a duty not exceeding 25 paise only or a bill of exchange or promissory note, by providing that such document may be admitted in evidence on payment of the stamp duty or the deficit stamp duty together with penalty as stipulated in the Section. Hence, any document chargeable with stamp duty, not being a bill of exchange or promissory note, can be admitted in evidence provided the stamp duty or the deficit stamp duty and the stamp duty penalty are paid. A conjoint reading of Sections 33 and 35 will make it clear that a Court before which any instrument chargeable with stamp duty is produced shall impound the document, if it is not duly stamped. However, proviso (a) to Section 35 enables the Court to collect the stamp duty or the deficit stamp duty, as the case may be, together with penalty and admit the documents in evidence.

16. The learned trial Judge in the impugned order dated

10.04.2014 made in I.A.No.323 of 2014 in O.S.No.185 of 2010 seems to have passed an order impounding the deed of undertaking dated 18.08.2004 executed by the legal heirs of Seshachalam in favour of the fourth defendant for being referred to the Revenue Divisional Officer for collection of stamp duty and stamp duty penalty. Though the rental agreement referred to in Serial No.3 of the Application I.A.No.28 of 2014 had not been produced and only a xerox copy of the same had been produced, the learned trial Judge chose to direct the revision petitioners herein/defendants 1 to 7 to produce the original for being impounded for collection of stamp duty and penalty. A bunch of documents mentioned in Serial No.2 of the said application contained cheques and promissory notes. The learned trial Judge in tune with Section 35 of the Indian Stamp Act held that no question of collection of stamp duty or stamp duty penalty would arise in respect of promissory notes. However, regarding the cheques produced in the bunch, the learned trial Judge, chose to reject them as they were found to be incomplete in particulars.

17. The grievance of the revision petitioners/defendants 1 to 7 is mainly regarding the directions issued in respect of the documents shown in SI.No.2 and 3 of I.A.No.28 of 2014. So far as the third document, namely the rental agreement is concerned, it is the contention of the learned counsel for the revision petitioners that,

when the original document has not been brought to the Court, the Court cannot exercise its power of impounding under Section 33 of the Indian Stamp Act or marking the document after collecting the stamp duty / deficit stamp duty with stamp duty penalty; that the copy could have been rejected and that the procedure adopted by the trial in directing the revision petitioners/defendants 1 to 7 to produce the original for being impounded for collection of stamp duty and penalty is unknown to law.

18. It is an established principle that if the original document itself is inadmissible in evidence for want of payment of stamp duty and xerox copy if it cannot be admitted. It was held so in ***Jansi Rani Vs. G.Loganathan*** reported in ***(2007) 4 MLJ 485***. As rightly contended by the learned counsel for the revision petitioners, the court below could have either admitted or rejected the Document No.3 mentioned in I.A.No.28 of 2014 and that only in case of such admission, the question of collection of stamp duty and penalty would arise. The trial Court seems to have exceeded its jurisdiction by directing the production of the original of the third document for the purpose of impounding and collection of stamp duty and penalty. Hence, that part of the order of the trial Court has got to be interfered with.

19. So far as the first document, namely the Deed of Undertaking dated 18.08.2004 is concerned, the order of the Court below impounding the same and referring the same to the Revenue Divisional Officer for collection of stamp duty and stamp duty penalty cannot be found fault with. However, the observation made by the learned trial Judge regarding the incomplete cheques found in the bunch of documents produced as Item No.2 in I.A.No.28 of 2014 and rejecting them, shows non-application of mind on the part of the learned trial Judge regarding the purpose for which the same was sought to be produced. It is the case of the revision petitioners/defendants that the second respondent /second plaintiff had availed loan from third parties handing over unfilled promissory notes and blank cheques; that the fourth defendant discharged those loans and got back those incomplete promissory notes and unfilled cheques; that only for the purpose of proving such payment made by the fourth defendant, those incomplete promissory notes and unfilled cheques were sought to be produced. The learned trial Judge seems to have misunderstood the purpose for which the said documents came to be produced and it was of the view that a claim was sought to be made based on the incomplete Negotiable Instruments, namely incomplete cheques. It is pertinent to note that the suit has not been filed for recovery of money on the negotiable instruments, namely incomplete cheques. On the other hand, they have been produced to

show that they had been issued as incomplete documents to third parties by the second plaintiff and the fourth defendant discharged the debts due to those third parties and got back those blank promissory notes and incomplete cheques. Therefore, that part of the order of the trial Court rejecting the cheques found in the bunch of documents shown as second item of documents in I.A.No.28 of 2014 can be construed as a totally erroneous order, evidencing improper exercise of jurisdiction resulting in a perverse finding and miscarriage of justice. Therefore, this Court comes to the conclusion that the said part of the impugned order of the trial Court dated 10.04.2014 relating to Documents shown in SI.Nos. 2 and 3 in I.A.No.323 of 2014 is bound to be interfered and set aside.

20. So far as the document found in Serial No.3 is concerned, despite the fact that the order of the trial Court is set aside, as and when the original rental agreement is produced, the trial Court may proceed with the impounding of the same for collection of stamp duty and stamp duty penalty. So far as the promissory notes found in SI.No.2 in I.A.No.323 of 2014 are concerned, the learned trial Judge has rightly held that they do not attract stamp duty or stamp duty penalty. On the other hand, though the learned trial Judge is very much aware of the fact that the cheques found therein did not attract stamp duty or stamp duty penalty, without properly advertng to the

purpose for which the same were sought to be produced, the learned trial Judge, chose to reject those cheques. The said part of the order is also not sustainable. So far as the document dated 18.04.2004 termed as Deed of Undertaking is concerned, the order of the trial Court has got to be sustained.

21. Before parting with the case, this Court wants to make a record of its finding that the plaintiffs in the suit were allowed to cause hurdle to the progress of the case by filing a series of memos and a number of applications seeking rejection of the documents produced by the defendants and requiring a decision to be rendered regarding the admissibility of the documents produced on the side of the defendants. The question of admissibility can be canvassed at the time of marking of the documents. If the Court comes to the conclusion that the documents are inadmissible, it will refuse to mark them, in which event, without an application, an order assigning reasons, if requested by the party, can be passed. In case of doubt regarding relevancy, the Court can also adopt the procedure of marking it subject to objection and relegate the decision regarding its admissibility and relevancy to be decided at the time of disposal of the suit. Unnecessary prolongation of the case has been permitted by the Court below, which shall be seen from the fact that the plaintiffs have even gone to the extent of filing a memo dated 10.01.2014 seeking

return of the proof affidavit of DW2, the fourth defendant, contending that DW1 had already deposed on behalf of all the defendants 1 to 7 and that hence without eschewing his evidence, no other person among the defendants 1 to 7 be permitted to be examined as a witness on their side. Such absurd claim came to be made and the Court below also received the memo and kept it on file without rejecting the same at the threshold.

22. For all the reasons stated above, this Court comes to the conclusion that the order of the trial Court dated 10.04.2014 made in I.A.No.323 of 2014 in O.S.No.185 of 2010 can be partly sustained insofar as it relates to the impounding of the Deed of Undertaking dated 18.08.2004 for collection of stamp duty and stamp duty penalty and that in respect of the rest of the documents its order deserves to be interfered with and set aside.

In the result, the Civil Revision Petition is partly allowed. The order of the trial Court dated 10.04.2014 made in I.A.No.323 of 2014 in O.S.No.185 of 2010 shall stand confirmed partly i.e., in respect of the impounding of the Deed of Undertaking dated 18.08.2004 alone. The order of the trial Court is set aside in respect of unfilled cheques found in the bunch of document shown in Serial No.2 and the rental agreement (copy) shown in Serial No.3 of the said interlocutory

application I.A.No.323 of 2014. However, it is made clear that in respect of the rental agreement, it shall be open to the trial Court to decide the question of impounding and collection of stamp duty and stamp duty penalty as and when the original shall be produced. No costs. Consequently, the connected miscellaneous petition is closed.

11.05.2016

Index :Yes/No
Internet : yes
gpa

To

The Subordinate Court
Poonamallee

P.R.SHIVAKUMAR,J.

gpa

C.R.P.(PD) Nos.1776 of 2014 &
M.P.No.1 of 2014

Dated : 11.052016