IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.10.2016

CORAM

THE HONOURABLE MR.JUSTICE T.MATHIVANAN

Civil Revision Petition (PD) No.2442 of 2012
and
M.P.No. 1 of 2012

Muthusamy ... Petitioner / 6th defendant

..Vs..

Kumarasamy @ Periaponnan ... Respondent

Prayer: This Civil Revision Petition has been filed under Article 227 of Constitution of India, against the fair and final order dated 15.06.2012 and made in I.A.No.110 of 2012 in O.S.No.185 of 1998, on the file of the subordinate Judge, Gobichettipalayam.

For petitioner : Mr.A.K.Kumarasamy
For Respondent : Mr.N.Manokaran

O R D E R

The Fair and Decretal order, dated:15.06.2012 and made in application in I.A.No.110 of 2012 in O.S.No.185 of 1998 on the file of the subordinate Judge, Gobichettipalayam are under challenge in this Civil Revision

2. The Revision Petitioner who is the 6th defendant, whereas the respondent is the plaintiff in the suit.

2) The respondent seems to have been filed in the above suit as against the defendants which includes the revision petitioner herein/D6 and thereby sought the relief of partition.

3) This suit was contested by the first defendant in the suit. During the pendency of the suit, the revision petitioner had taken out an application in I.A.No.110 of 2012 under Section 35 of Stamp Act read with 121 of the Code of Civil Procedure for sending an unstamped and unregistered document of partition dated 05.06.1983 to the Revenue Divisional Officer for the collection of the stamp duty due on the document. This petition was resisted by the respondent/plaintiff by filing his counter statement.

4) After hearing both sides, the learned Trial Judge viz., the learned Subordinate Judge, Gobichettipalayam had proceeded to dismiss the petition on 15.06.2012.

5) Having been aggrieved by the impugned order, the revision petitioner being the sixth defendant stands before this Court with this revision.

6) Heard Mr.A.K.Kumarasamy, learned counsel appearing for the

revision petitioner and Mr.N.Manokaran, learned counsel appearing for the sole respondent.

7) In sofaras this revision is concerned, the following two crucial questions are arisen for the consideration of this Court.

a) Whether the application in I.A.No.110 of 2012 is maintainable?

b) Whether an unregistered and unstamped partition deed could be admitted in evidence?

8) As it is revealed from the records, the revision petitioner had already filed a petition in I.A.No.437 of 2011 to reopen the defendant's side so as to enable him to produce and mark unregistered and unstamped deed dated 05.06.1983 as a documentary evidence. This petition was partly allowed on 13.12.2011 and thereby the revision petitioner was permitted to reopen his side. However, the petition in respect of the marking of unstamped and unregistered partition deed dated 05.06.1983, was dismissed.

9) Admittedly, neither any revision nor any appeal was filed by the said order dated 13.12.2011.

10) It is pertinent to note here that the suit was filed in the year

1998 and it was decreed in favour of the respondent/plaintiff against which one of the defendants had preferred an appeal. While, allowing the appeal, the first Appellate Court had remitted the suit back to the Trial Court for fresh disposal.

11) It is to be noted that an application in I.A.No.437 of 2011 was already filed by the revision petitioner/6th defendant to receive the unregistered and unstamped partition deed dated 05.06.1983 and the same was dismissed on 13.12.2011.

12) Mr.A.K.Kumaraswamy, learned counsel appearing for the petitioner while advancing his argument has drawn the attention of this Court to the Provisions of Section 33 (1) Stamp Act, it is extracted as under:-

S.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 of 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 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 (5 of 1898);

(b) in the case of a Judge of 2a 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) the State Government may determine what offices shall be deemed to be public offices;and

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

13) With reference to Section 33 of the Indian Stamp Act, he has argued that the learned Trial Judge before whom the unregistered and unstamped partition deed dated 05.06.1983 was produced ought to have

impounded the same for being sent to the concerned Revenue Authority for the collection of unpaid stamp duty and penalty; instead the learned Trial Judge had gone wrong in dismissing the petition on the feeble ground that the document itself could not be received in evidence, as it was unregistered and unstamped. He has also argued that the finding of the learned Trial Judge that since the document which was sought to be received was earlier rejected it could not be impounded was absolutely wrong and not sustainable. He would further contend that the finding of learned Trial Judge that since the document was not produced along with the plaint, it could not be impounded, was also not sustainable and as such the impugned order was liable to be set aside.

14) In support of his arguments, he has reliance upon the following three decisions:-

(i) Government of Andhra Pradesh and Ors. V.Smt.P.Laxmi Devi, (AIR 2008 Supreme Court 1640)

(ii) SMS Tea Estates Pvt.Ltd Vs.Chandmari Tea Co.Pvt.Ltd in 2011 (4) CTC 574

(iii) Ram Rattan (dead) by legal representatives Vs.Bajrang Lal and others in AIR 1978 Supreme Court 1393.

(i) In the decisions first cited above, a Division Bench of the Apex Court, in paragraph Nos.15,16,17 held held as under:-

15) Section 33(1) of the Stamp Act states:

"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 of his functions, shall if it appears to him that such instrument is not duly stamped, impound the same".

16. A perusal of the said provision shows that when a document is produced (or comes in the performance of his functions) before a person who is authorized to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instrument is produced to impound the document if it is not duly stamped. The use of the word 'shall' in Section 33(1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In our opinion, the word 'shall' in Section 33(1) does not mean 'may' but means 'shall'. In other words, it is mandatory to

impound a document produced before him or which comes before him in the performance of his functions. Hence the view taken by the High Court that the document can be returned if the party *does not want to get it stamped is not correct.*

17.In our opinion, a registering officer under the Registration Act (in this case the Sub-Registrar) is certainly a person who is in charge of a public office. Section 33(3) applies only when there is some doubt whether a person holds a public office or not. In our opinion, there can be no doubt that a Sub-Registrar holds a public office. Hence, he cannot return such a document to the party once he finds that it is not properly stamped and he must impound it.

(ii) In the decision second cited supra, a Division Bench headed by Hon'ble Mr.Justice.R.V.Raveendran in paragraph No.11 has held as under:-

11.The Scheme for Appointment of Arbitrators by the Chief Justice of Guwahati High Court, 1996 requires an Application under Section 11 of the Act to be accompanied by the original Arbitration Agreement or a duly certified copy thereof. In fact, such a requirement is found in the Scheme/Rules of almost all the High Courts. If what is produced is a certified copy of the agreement/contract/instrument containing the arbitration clause, it should disclose the stamp duty that has been paid on the original. Section 33 casts a duty upon every Court, that is a person having by law authority to receive evidence (as also every Arbitrator who *is a person having by consent of parties, authority to receive evidence) before whom an unregistered instrument chargeable with duty is produced, to examine the instrument in order to ascertain whether it is duly stamped. If the Court comes to the conclusion that the instrument is not duly stamped, it has to impound the document and deal with it as per Section 38 of the Stamp Act. Therefore, when a Lease Deed of any other instrument is relied upon as contending the Arbitration Agreement, the Court should consider at the outset, whether an objection in that behalf is raised or not, whether the document is properly stamped. If it comes to the conclusion that it is not properly stamped, it should be impounded and dealt with in the manner specified in Section 38 of Stamp Act. The Court cannot act upon such a document or the arbitration clause therein. But if the deficit duty and penalty is paid in the manner set out in Section 35 or Section 40 of the Stamp Act, the document can be acted upon or admitted in evidence.*

(iii) In paragraph No.6 of the decision cited third supra, the Apex Court has held as under:-

6.When the document was rendered in evidence by the plaintiff while in *witness box, objection having been raised by the defendants that the document was inadmissible in evidence as it was not duly stamped and for* *want of registration, it was obligatory upon the learned trial Judge to apply his mind to the objection raised and to decide the objection in accordance with law. Tendency sometimes is to postpone the decision to avoid interruption in the process of recording evidence and, therefore, a very convenient device is resorted to, of marking the document in evidence subject to objection. This, however, would not mean that the objection as to admissibility on the ground that the instrument is not duly stamped is judicially decided; it is merely postponed. In such a situation at a later stage before the suit is finally disposed of it would none-the-less be obligatory upon the court to decide the objection. If after applying mind to the rival contentions the trial court admits a document in evidence, S.36 of the Stamp Act would come into play and such admission cannot be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. The Court, and of necessity it would be trial court before which the objection is taken about admissibility of document on the ground that it is not duly stamped, 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* *and before it is marked as an exhibit in the case and where a document has been inadvertently admitted without the court applying its mind as to the question of admissibility, the instrument could not be said to have been admitted in evidence with a view to attracting S.36 (see Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655). The endorsement made by the learned trial Judge that "objected, allowed subject to objection", clearly indicates that when the objection was raised it was not judicially determined and the document was merely tentatively marked and in such a situation S.36 would not be attracted".*

15) In so far as this case is concerned, it is to be noted that already a petition in I.A.No.437 of 2011 for the purpose of marking this document was filed and the prayer was rejected.

16) Admittedly, neither any revision nor any appeal was preferred against this order. Mr.N.Manohar, learned counsel appearing for the respondent, while, advancing his argument has therefore submitted that the earlier order dated 13.12.2011 and made in the Application in I.A.No.437 of 2011 had become filed and operate as as res-judicata. In sofaras the petition in I.A.No.110 of 2012 is concerned, the revision petitioner had sought the permission of this Court to receive the document viz., an unregistered and unstamped partition

deed dated 05.06.1983 as a documentary evidence. Since the said document was not stamped and duly registered, it was dismissed. As submitted by Mr.N.Manoharan, learned counsel appearing for the respondent, the earlier order dated 13.12.2011 would definitely operate as res-judicata in so far as the present petition in I.A.No.110 of 2012 is concerned.

17. In this connection, Mr.N.Manokaran, learned counsel appearing for the respondent has placed reliance upon the following three decisions:-

(1) Chhabil Das vs.Pappu (2006 (5) CTC 606)

(2) Chinnammal and others vs. Thangavel and another (2013(2) MWN (Civil) 27)

(3) Subraya M.N. v. Vittala M.N. and others (AIR 2016 Supreme Court 3236)

(i) In the decision first cited supra, while penning down the order the Hon'ble Mr.Justice S.B.Sinha in paragraph No.13 has observed as under:-

> *13. It is now well-known that the principle of res judicata also applies in different stages of the same proceedings. [See Bhanu Kumar Jain v.Archana Kumar & Anr., 2005 (1) CTC 368:2005(1) SCC 787 and Ishwar Dutt v.Land Acquisition Collector & Anr., 2005 (7) SCC 190]*

(ii) ***In the decision second cited supra****, this Court has*

observed that an unstamped and unregistered document cannot be received in evidence and that the defect in document cannot be cured by payment of penalty.

(iii) In the decision third cited supra in paragraph Nos.16 and 17, the Apex Court has observed as under:-

16.Under Section 17 of the Registration Act, the documents which purport or operate to create, declare, assign, limit or extinguish any right, title or interest of the value of one hundred rupees and upwards, are to be registered. Under Section 49 of the Registration Act no document required by Section 17 or by any provision of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting an immovable property. As provided by Section 49 of the Registration Act, any document, which is not registered as required under the law would be inadmissible in evidence and cannot therefore be produced and proved under Section 91 of the Evidence Act.

17.Even though recitals in the Ex.D22 is to the effect of relinquishment of right in items No.1 and 2, Ex.D22 could be taken as family arrangements/settlements. There is no provision of law requiring family settlements to be reduced to writing and registered, though when reduced to writing the question of registration may arise. Binding family arrangements dealing with *immovable property worth more than rupees hundred can be made orally and when so made, no question of registration arises. If however, it is reduced to the form of writing with the purpose that the terms should be evidenced by it, it required registration and without registration it is inadmissible; but the said family arrangement can be used as corroborative piece of evidence for showing or explaining the conduce of the parties. In the present case, Ex.D22 panchayat resolution reduced into writing, though not registered can be used as a piece of evidence explaining the settlement arrived at and the conduce of the parties in receiving the money from the defendant in lieu of relinquishing their interest in items No.1 and 2.*

18. In the light of the observations made by the Apex Court in **Chhabil Das (2006 (5) CTC 606)**, this Court also finds that the principle of res judicata will apply in different stages of same proceedings. On coming to the instant case, the earlier order, dated 13.12.2011, refusing to receive the unregistered and unstamped document dated 05.06.1983 was not challenged. On this sole ground, this Court, after following the observation made by the Apex Court finds that the petition in I.A.No.110 of 2012 is affected and barred by the principle of res judicata.

19. In the result, this revision petition is dismissed and the impugned order dated 15.06.2012 and made in application in I.A.No.110 of 2012 in the suit in O.S.No.185 of 1998 is confirmed. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is also closed.

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Index:Yes
Internet:Yes

To

The Subordinate Court, Gobichettipalayam

T.MATHIVANAN,J.,

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