**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

**CR-5269-2015**
**Date of Decision: 18.02.2016**

Dilawar Singh

... Petitioner(s)

Versus

Amandeep Singh

... Respondent(s)

**CORAM: HON'BLE MR. JUSTICE PARAMJEET SINGH DHALIWAL**

1) Whether Reporters of the local papers may be allowed to see the judgment ?. **YES**
2) To be referred to the Reporters or not ?. **YES**
3) Whether the judgment should be reported in the Digest ? **YES**

Present: Mr. Bikramjit Singh, Advocate, for the petitioner.

Mr. Anil Chawla, Advocate, for the respondent.

***Paramjeet Singh Dhaliwal, J.***

Instant revision petition has been filed for setting aside the order dated 05.08.2015 passed by learned Additional Civil Judge (Sr. Divn.), Khadoor Sahib whereby the petitioner-plaintiff has been directed to make the deficiency of stamp fee good as per the new amendment in the Indian Stamp Act, 1899 (for brevity, 'Stamp Act').

In brief, the facts relevant for disposal of this revision are to the effect that the petitioner-plaintiff filed a suit for specific performance on the basis of agreement to sell dated 19.10.2010 in respect of land measuring 16 kanals 09 marlas situated in the revenue estate of village Goindwal Sahib or in the alternative for recovery of ₹22,00,000/- and suit for permanent injunction restraining the defendant from dispossessing the plaintiff from his peaceful possession. When the suit was in progress, it transpired that agreement to sell dated 19.10.2010 has been written on stamp paper of ₹300/- whereas as per amended schedule of the Stamp Act w.e.f. 03.09.2009, an agreement to sell is required to be executed on a stamp paper of ₹2000/-. For that purpose, the plaintiff moved an application under Section 35 of the Stamp Act, 1877 that he is ready to pay the deficient stamp duty and also the penalty as per the provisions of the Stamp Act so that the same may be admitted in evidence. The defendant filed reply to the said application with the averments that possession of the suit land has been delivered by respondent-defendant (vendor) to the petitioner-plaintiff, therefore, the agreement to sell has become conveyance deed. It should be stamped like a conveyance deed and the stamp duty is required to be affixed on the total consideration of ₹38,24,625/-.

After considering the pleadings and arguments of learned counsel for the parties, the trial court came to the conclusion that agreement to sell has been reduced in writing and possession has been given to the purchaser, therefore, the stamp duty will be paid like the conveyance deed as per the amended provisions and reliance has been placed upon ***Avinash Kumar Chauhan Vs. Vijay krishna Mishra*** 2009 (1) RCR (Civil). Hence, this revision.

I have heard learned counsel for the parties and perused the record.

Learned counsel for the petitioner contends that agreement to sell was not required to be registered as no possession was delivered. He has shown the vernacular of the agreement to sell dated 19.10.2010. The agreement has been executed on a stamp paper of ₹300/- whereas as per the amended provisions of the Stamp Act, it was required to be executed on a stamp paper of ₹2000/-, as such there is a deficiency of stamp paper of ₹1700/-. He further contends that he is ready to pay the penalty as per Section 35 of the Stamp Act. He further contends that if possession of the property is not delivered, agreement to sell is not required to be registered.

Per contra, learned counsel for the respondent vehemently opposes the contentions of learned counsel for the petitioner and contends that the agreement to sell was required to be registered as the possession of the property has been delivered to the petitioner. The agreement to sell is compulsorily registrable and full stamp fee is required to be paid.

I have given my anxious thoughts in consideration to the contentions raised by learned counsel for the parties and perused the record.

When recital of delivery of possession is not there, the agreement to sell is not compulsorily registrable under Section 17(1A) of the Registration Act, 1908 (for brevity, 'Registration Act'), and thus does not come within the mischief of proviso to Section 49 of the Registration Act as much as the provisions of Section 53A of the Transfer of Property Act are not attracted. The agreement to sell itself does not create any right, title or interest in the immovable property, and was thus not compulsorily registrable as per Clause (v) of Section 17(2) of Registration Act. Based on this premise, Article 23A of Schedule 1A as well as Sections 33 and 35 of Stamp Act are not applicable. In ***Sukhwinder Kaur Vs. Amarjit Singh and others*** AIR 2012 P&H 97, this Court has considered the issue with regard to the registration of agreement to sell and held as under:

> *"9. Now the question arises as to whether the provision of Section 53-A of the TPA has any applicability on the facts of the present case. The answer is in the negative for the reasons that in the case in hand, the plaintiff is seeking possession of the property by way of specific performance of the agreement to sell. He is not seeking protection of his possession on the basis of agreement to sell. A person seeking protection of his possession on the basis of unregistered agreement is a different situation and where a person seeks possession of the property by way of specific performance of the agreement which is unregistered is a different eventuality. In the latter class of cases, the agreement to sell is not required to be registered as it does not fall within the ambit of either Section 53-A of the TPA or Section 17(1A) of the Act and does not require any registration. Such agreement to sell falls under the mischief of Section 17(2)(v) of the Act. It itself does not create, declare, assign, limit or extinguish any right, title or interest in the property. Rather it creates*

*a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish. Not only that, proviso to Section 49 of the Act makes the things more clear. It envisages that an unregistered document affecting immovable property and required by this Act or the TPA to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877. A conjoint reading of Section 17(2)(v) and proviso to section 49 of the Act leaves no room for doubt that an agreement to sell property itself does not create any right, title to the property. It is the sale-deed which when executed will create right, title and interest in the property. Hence, an agreement to sell is not required to be registered and the same is receivable in evidence in a suit for specific performance under Chapter II of the Specific Relief Act, 1877.*

*10. In Gurbachan Singh's case (supra), the provisions of Section 17(2)(v) and proviso added to Section 49 of the Act got overlooked leading to intermingling of two distinct situations. One is: where in pursuance to a contract which is unregistered, the transferee takes possession, the law mandates that now such a transferee cannot protect his possession on the basis of unregistered contract and the same is required to be registered. Two: an agreement to sell is executed between the parties. The agreement to sell does not itself create, declare, assign, limit or extinguish any right, title or interest in the property rather it gives a right to obtain another document which will when executed, create, declare assign, limit or extinguish any such right, title or interest. Such agreement to sell is not required to be registered per Section 17(2)(v) of the Act and the same is received in evidence."*

The execution of documents including agreement to sell as well as the payment of part of the consideration amount is not in dispute. The agreement to sell does not contain recital of delivery of possession. The agreement itself does not create any right or title in the property, but it is the sale deed, which when executed will create right, title and interest in the property.

In the instant case, the plaintiff has not sought relief based on part performance under Section 53A of the Transfer of Property Act and that being so, Section 17(1A) of the Registration Act, which is only meant for the provisions of Section 53A of the Transfer of Property Act, is not attracted and thus, the agreement did not require registration. Such an agreement falls under the mischief of Section 17(2) (v) of the Registration Act, and it itself does not create, declare, assign, limit or extinguish any right, title or interest in the property. Rather as held in ***Sukhwinder Kaur's (supra),*** an agreement creates a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish right, title or interest in the property. Not only this, provisions of Section 49 of the Registration Act make the position more clear. It envisages that an unregistered document affecting immovable property and required by this Act and the Transfer of Property Act to be registered may be received as evidence of a contract in a suit for specific performance under Chapter -II of Specific Relief Act, 1877. As further held in ***Sukhwinder Kaur (supra)***, a conjoint reading of Section 17(2)(v) and proviso of Section 49 of the Act leaves no room for doubt that agreement to sell itself does not create any right or title over the property. For the sake of repetition, it is the sale deed, which when executed will create such right in the property. Hence, an agreement to sell is not required to be registered and the same is receivable in evidence in a suit for specific performance under Chapter-II of the Specific Relief Act, 1877.

Now, with regard to the agreement to sell being not properly stamped, as per Article 23A of Schedule 1A of Stamp Act, I am of the definite view that Article 23A also is not attracted as much as it applies to the contracts for transfer of properties under Section 53A of the Transfer of Property Act. As noted above, the plaintiff's suit is not based on the part performance under Section 53A of the Transfer of Property Act and the agreement to sell could not be said to be conveyance in the nature of part performance as envisaged in Article 23A. As per Section 2(10) of Stamp Act, "conveyance" includes conveyance of sale and other instruments by which property, whether movable or immovable, is transferred intra-vivous and which is not otherwise specifically provided for by Schedule-I. Considering interpretation from any angle, such an agreement to sell cannot be termed as conveyance as defined in Section 2(10) of Stamp Act. That being so, and the agreement to sell in question not creating any right, title or interest over the suit property, except that of the cause of action asking for the execution of the sale deed, Article 23A of Schedule 1A of the Stamp Act, was not attracted and thus, the provisions of Sections 33 of Stamp Act are not attracted. The Article in Schedule-I A (as applicable to Punjab) specifically provides that agreement to sell of immovable property would come within the ambit of clause (c) of Article 5 of Schedule 1A of Stamp Act (as applicable to Punjab). Section 35 of the Stamp Act reads as under:

> *"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, or acknowledgment or delivery order, 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;*
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> *(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, it 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 provisions of this Act."*

The first limb of Section 35 of the Stamp Act clearly excludes from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it relates to acting upon the instrument. It bars acting upon such document which is deficient in stamp duty meaning thereby there is no evidentiary value of such instrument. Allowing such document to be led in evidence when the original admittedly chargeable with duty but not duly stamped insufficiently stamped, would tantamount to the document being acted upon by the person having by law or authority to receive evidence. This would be against the very spirit of Section 35 of the Stamp Act. Proviso (a) to Section 35 of the Stamp Act is only applicable when the original instrument is actually before the court of law and the deficiency in stamp with a penalty is paid by the party seeking to rely upon the document. A party can only be allowed to rely on a document which is an instrument for the purpose of Section 35. Instrument is defined in Section 2 (14 ) as including every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. In the present case, the agreement to sell in question is on stamp paper of ₹300/-, the stamp duty on agreement to sell immovable property as per clause (c) of Article 5 as applicable to Punjab is ₹2000/- so there is deficiency of ₹1700/-only and as per Section 35 proviso (a), the same would become admissible in evidence on payment of penalty equivalent to 10 times of the deficient portion of the stamp duty. The deficiency being of ₹1700/-, the penalty payable comes to ₹17,000/- and thus, this penalty and the deficiency of ₹1,700/- i.e. ₹18,700/- would be payable by the plaintiff for seeking admissibility of this agreement. The authority of ***Avinash Kumar Chauhan Vs. Vijay krishna Mishra*** 2009(2) SCC 532 is not applicable to the facts of the present case.

Therefore, in view of the discussion above, the impugned order dated 05.08.2015 is clarified and modified that if the petitioner-plaintiff deposits the deficient stamp portion along with penalty within two months from passing of this order, the court shall consider the admissibility of agreement to sell in accordance with law.

Disposed of in the aforesaid terms.

**18.02.2016** **(Paramjeet Singh Dhaliwal)**
kanchan/parveen kumar **Judge**