In the High Court of Punjab and Haryana at Chandigarh

CR-7310 of 2016(O&M)
Date of Decision:10.11.2016

Susheel Kumar Khullar

---Petitioner

vs.

Roshan Lal

---Respondent

Coram: Hon'ble Mrs. Justice Rekha Mittal

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Present: Mr.I.S.Pabla, Advocate
for the petitioner

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Rekha Mittal, J.

CM No. 22697-CII of 2016

Allowed as prayed for.

Annexures P-12 to P-16 are taken on record subject to just exceptions.

CR-7310 of 2016

The present petition directs challenge against order dated 19.9.2016 (Annexure P-10) passed by the Civil Judge (Junior Division), Ludhiana whereby application filed by the petitioner for clarification of order dated 5.2.2016 (wrongly typed as 5.2.2015) regarding deficient stamp duty has been disposed of with a direction to the petitioner to pay penalty to the tune of 10 times of the stamp duty leviable under Column-2, Entry -23 of Schedule 1(a) of The Indian Stamp Act, 1899 (in short "the Act") (9% at the time of execution of the instrument).

Counsel for the petitioner inter alia contends that the petitioner has filed a suit for possession by way of specific performance of agreement of sale in respect of plot No. 77-B, detailed in head note of the plaint on the basis of agreement to sell dated 19.1.2006 whereby an amount of Rs. 30 lakhs was paid in advance as earnest money and the balance sale consideration of Rs. 5 lakhs was to be paid at the time of execution of the sale deed. In the alternative, prayer has been made for recovery of Rs. 35,00,000/- with a relief of permanent injunction. On completion of pleadings of the parties, issues were framed. The petitioner/plaintiff examined Vipin Kumar one of the attesting witnesses of the agreement as PW1 who tendered into evidence his affidavit Ex. PA by way of examination in chief alongwith document Ex. P1, agreement to sell dated

21.5.2012 (Annexure P-13). The petitioner/plaintiff examined in chief on 5.6.2012 and tendered into evidence his affidavit Ex. PW5/A alongwith documents including Ex. P1. Neither Vipin Kumar nor Susheel Kumar Khullar plaintiff were cross examined on various dates fixed for the purpose. In the meantime, the petitioner examined Madan Lal, Clerk of HRC Branch, DC office, Ludhiana whose examination and cross examination was completed on 4.6.2012. Another witness Harbaksh Singh Mander, Finger prints expert and forensic science consultant was examined who tendered into evidence his affidavit (Annexure P-15) and was cross examined on 15.6.2012. It is vehemently argued that as agreement to sell Ex. P1 was tendered into evidence in the statement of Vipin Kumar PW1-Susheel Kumar Khullar PW5 and two witnesses PW3 and PW6 in regard to the said agreement have already been cross examined by the respondent, the trial court has committed a serious error rather illegality in allowing application of the respondent filed for striking off contents beyond pleadings made in the affidavit PW5/A and de-exhibiting the documents Exs. P1, P-5, P-9 and P-11 to P-18, by issuance of directions that the agreement dated 19.1.2006 stands impounded and the plaintiff is directed to make good deficiency in stamp duty in the manner provided under the provisions of the Act. It is further argued that once the agreement to sell has been admitted in evidence without any objection with regard to insufficiency of stamp duty, neither the trial court nor the Court of Appeal can re-open the matter with regard to deficiency in stamp duty. In support of his contention, he has referred to judgments of Hon'ble the Supreme Court ***Javer Chand and others vs. Pukhraj Surana AIR 1961 (SC) 1655*** and ***Shyamal Kumar Roy vs. Sushil Kumar Aggarwal 2007(1) RCR(Civil) 321.***

I have heard counsel for the petitioner, perused the paper book particularly the various annexures appended with the petition.

Before addressing the controversy raised in the petition, it is pertinent to note that there is no quarrel with the settled position in law laid down as back as in the year 1961 in ***Javer Chand and others' case (supra)*** wherein it has been held that where a question as to admissibility of a document is raised on the ground 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 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 determined the matter as soon as the document is tendered in evidence and it is marked as an exhibit in the case. Further held that once the document has been marked as an exhibit in the case and 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, Section 36 of the 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.

Counsel for the petitioner has not disputed that the agreement to sell propounded by the petitioner requires stamp duty at the rate of 9% of the sale consideration in view of Column-2 Entry- 23 Section 1(a) of the Act. However, he has disputed petitioner's liability to pay the stamp duty and penalty primarily on the ground that the document has already been marked as an exhibit, therefore, it is not open for the respondent to raise such an issue at a belated stage of the proceedings. Indisputably, Vipin Kumar one of the alleged attesting witnesses of the document was the first witness examined by the petitioner in whose examination in chief, the agreement was marked as Ex. P1 and the document was objected to by counsel opposite with another objection that the plaintiff should be examined first. It is also undisputed position of the case that Vipin Kumar has not been cross examined till date much less before filing an application by the respondent/defendant that the document Ex. P1 be de-exhibited as the same is not admissible for want of proper stamp. The petitioner/plaintiff appeared in the witness box on 5.6.2012 and tendered into evidence his affidavit alongwith documents including Ex. P1 by way of examination in chief. In the examination in chief itself, the Court has recorded objection of the respondent/defendant, reads "all documents objected to on the ground of non-reliance, late production, beyond pleadings, mode of proof and documents being not admissible". Similarly, the petitioner/plaintiff has not been cross examined till date. Counsel for the petitioner has referred to the examination and cross examination of Madan Lal Clerk PW-3. The witness was examined to prove purchase of stamp papers on which agreement to sell Ex. P1 has been prepared. In his examination in chief, he has stated, 'I have seen stamp papers of Ex. P1 (already exhibited)'. A casual reading of statement of Madan Lal would clearly indicate that the agreement to sell Ex. P1 has not been proved by the witness much less marked as an exhibit in his statement. Similarly, in the affidavit of Handwriting and Finger Prints Expert PW-6, there is reference to the agreement dated 19.1.2006 exhibited as P1.

Once respondent has raised an objection against Ex. P-1 at the first available opportunity when it was tendered in statement of PW1 and thereafter in the statement of PW-5 examined to prove the agreement in question, it is difficult to accept contentions of the petitioner that it was not open for the trial court to decide the question of admissibility of the document for want of stamps, by relying upon judgment of Hon'ble the Supreme Court in ***Javer Chand and others' case (supra)*** and ***Shyamal Kumar Roy's case (supra)*** decided by relying upon ***Javer Chand and others' case (supra)***. In this view of the matter, the petitioner cannot be heard to say that the trial court has committed any error much less illegality by upholding plea of the respondent that the document Ex. P.1 is liable to be impounded for payment of proper stamp fee and penalty in view of provisions of Section 35 of the Act. This apart, the petitioner did not challenge order dated 5.2.2016 passed by the trial court but has only challenged the order passed on his application seeking clarification of order dated 5.2.2016.

To be fair to the petitioner, counsel has made a vain attempt to argue that if the petitioner is held liable to pay stamp duty as well as penalty it would be more than Rs. 35 lakhs, therefore, the matter with regard to payment of stamp and penalty may be kept pending till decision of the suit. The plea raised is not only fallacious but misconceived as well and merits outright rejection. The petitioner cannot rely upon the agreement to sell for want of admissibility till the time the requisite stamp duty and penalty is paid.

In view of what has been discussed hereinabove, finding no merit, the petition fails and is accordingly dismissed in limine. However, nothing stated in this order shall be construed as an expression of opinion on merits of the case.

(Rekha Mittal)
Judge

10.11.2016
paramjit

Whether speaking/reasoned: Yes/No
Whether reportable : Yes/No