

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **22.02.2017**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP NPD No.1263 of 2016

and

C.M.P.Nos.7020 and 15858 of 2016

1. N.Ethiraj Chettiar
2. Balakujalammal
3. Sakthi
4. Siva
5. Kesavan
6. Ramesh
7. Jayaraj

.. Petitioners

vs

1. Samundeeswari Ammal
2. Murali
3. Bhuvaneswari

.. Respondents

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure to set aside the fair and decreetal order dated 16.03.2016 passed by the learned District Judge, Tiruvannamalai in I.A.No.42 of 2015 in A.S.No.14 of 2013.

For Petitioners : Mr.R.Rajarajan

For Respondents : Mr.M.Madhu Prakash

ORDER

The defendants, who are the appellants, before the Court below are the revision petitioners. Challenging the order passed by the appellate Court in dismissing the application filed by them under Section 38 and 151 of the Code of Civil Procedure in I.A.No.42 of 2015 in A.S.No.14 of 2013, seeking a direction to impound Ex.B1 and collect stamp duty with reasonable penalty and to certify the same in Ex.B1, has preferred this revision.

2. The case of the revision petitioners is that, the respondents herein filed a suit seeking partition of the suit scheduled property based on a family arrangement. The written family arrangement, known as Koor Chit was marked as Ex.B1 on their side and the same was marked subject to objection. However, it is stated that the trial court has not framed any issue qua the admissibility of Ex.B1 but had given a finding that the same was inadmissible in evidence, since the same was not duly stamped. Since Ex.B1 is a family arrangement, it need not be stamped and registered as the same is evidencing partition.

According to the defendants/petitioners, Ex.B1 having been marked and admitted in evidence, shall not be called in question at any stage of the proceedings on the ground that the instrument has not been duly stamped. However, the trial court has held that Ex.B1 is inadmissible in evidence, which is contrary to law. Therefore, the defendants have preferred an appeal and pending appeal, the above application was filed to collect stamp duty with reasonable penalty and certify Ex.B1 to make it admissible in evidence.

3. The said application was opposed by the respondents/plaintiffs, who are the respondents in appeal, contending that the application itself is misconceived and the same is not maintainable as per Section 38 of the Indian Stamp Act, 1899 [in short, 'the Act']. It is further stated that though the argument in the appeal was over, as the learned District Judge, who reserved the orders was transferred before the pronouncement of the judgment, the appellant is said to have taken advantage of the situation and filed such an application. Hence, prayed for the dismissal of the same.

4. After considering the submissions on either side, the learned District Judge, Tiruvannamalai, by stating that once the judgment is delivered, the Court, which had become functus officio, cannot reopen the matter and impound the document. Further, it is stated that since the document has already been received in evidence and marked as Ex.B1 by the trial court, the present application is not maintainable. Aggrieved by the same, the defendants have filed the present revision.

5. The legal issue involved in the present revision is with respect to the powers of the trial court insofar as the unstamped document is concerned, which was refused to be admitted in evidence by the trial court.

6. The document in dispute is a Koor Chit. The revision petitioners, who are the defendants, while resisting the suit for partition filed by the respondents/plaintiffs, had marked the said document, as Ex.B1. The same was marked in the trial court subject to objections by the respondents herein. Despite the

objections raised by the respondents, the document was received in evidence as Ex.B1, but the trial court did not consider the same while delivering the judgment as the same was not properly stamped and held it as inadmissible in evidence. Aggrieved by the same, the defendants while filing an appeal in A.S.No.14 of 2013 on the file of the District Judge, Tiruvannamalai had filed I.A.No.42 of 2015 seeking to impound the document and to collect the stamp duty with penalty. The maintainability of the same is now under consideration.

7. The learned counsel appearing for the revision petitioners contended that the Court while adjudicating the admissibility of Ex.B1 failed to exercise its powers and the jurisdiction vested with it under Section 33 of the Act. Further, relying upon Section 36 of the Act, the learned counsel also contended that having received the documents and marked the same as Ex.B1, during trial, the trial court ought not to have held that the document is inadmissible at a later stage, while pronouncing judgment on the ground that the document is insufficiently stamped.

8. Per contra, the learned counsel appearing for the respondents herein defending the impugned order contended that once the document is admitted in evidence and consequently judgment is delivered, the Court becomes functus officio and the same cannot be re-opened, for the purpose of impounding the document.

9. Heard both sides.

10. As stated earlier, the revision petitioners had marked the document, which was a Koor chit and the same was received in evidence, marking it as Ex.B1, subject to objection raised by the respondents, with respect to the admissibility of the document on account of the same being insufficiently stamped. The learned trial Judge, however, at the time of delivering the judgment held the same to be inadmissible in evidence. In my opinion, the learned trial Judge ought not to have held that the document is inadmissible in view of the dictum laid down by the Hon'ble Apex Court in the judgment reported in **(2001)3 SCC 1 (Bipin Shantilal Panchal Vs. State of Gujarat and another)**

wherein it is held that any objection raised while marking the document pertaining to the insufficiency of stamps, the same shall be adjudicated immediately. Only when the document is not registrable the same may be received in evidence subject to its proof and relevancy. The relevant paragraphs are as follows:

"13. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fall out of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when

realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings.

14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

15. The above procedure, if followed, will have two advantages. First is that the time in the trial court, during evidence-taking stage, would not be

wasted on account of raising such objections and the court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior court, when the same objection is recanvassed and reconsidered in appeal or revision against the final judgment of the trial court, can determine the correctness of the view taken by the trial court regarding that objection, without bothering to remit the case to the trial court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses."

(emphasis supplied)

11. In the present case, the trial court has tentatively marked the document and rejected the same later in the judgment, as inadmissible in evidence.

12. It is now relevant for the purpose of this case to refer to Section 36 of the Act, which reads as follows:

"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."

Section 36 of the Act, categorically prohibits a Court of law from re-opening the matter in regard to sufficiency or otherwise of the stamp duty paid on instrument in the event of the same has been admitted in evidence.

13. In the case on hand, the trial court though received the document in evidence, refused to consider the same on the question of inadmissibility.

14. Now in this factual circumstances, the powers of the Appellate Court insofar as the unstamped document, which is refused to be accepted by the trial court, in the light of Section 33 of the Act has to be considered. Section 33 of the Act, which 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 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:

(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) [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."

A careful perusal of the above provision of law makes it clear that every person, who is an authority to receive in evidence and every person in charge of public office, shall impound the instrument, which is produced before him or comes in the performance of his functions, if in his opinion, it appears to him that document is not duly stamped.

15. The above provision empowers the authorities to impound the document, which includes even the Appellate Court while exercising its power under Section 96 and Order 41 Rule 33 of the Code of Civil Procedure. In every appeal, the Appellate Judge while exercising his power under Section 96 or an extraordinary power under Order 41 Rule 33 of the Code of Civil Procedure is bound to analyse and appreciate the entire materials on record. While exercising such powers, when the Appellate Court comes across the fact that a particular document is insufficiently stamped, it has got the power to impound the same by virtue of Section 33 of the Act. The Appellate Court, instead of exercising its power given under Section 33 of the Act, had dismissed the above application, which could be termed as

erroneous. As the Appellate Court, which is the final fact finding Court, failed to exercise the discretion vested in it, has committed an error in dismissing the application.

16. The learned counsel for the respondents relied on the judgment of the Hon'ble Apex Court reported in **(2006) 11 SCC 331 [Shyamal Kumar Roy vs. Sushil Kumar Agarwal]**, wherein it is held that Section 36 of the Act, would operate even if a document is improperly admitted in evidence. The relevant paragraphs are as follows:

"16. The said decision, therefore, is an authority for the proposition that Section 36 would operate even if a document has been improperly admitted in evidence. It is of little or no consequence as to whether a document has been admitted in evidence on determination of a question as regards admissibility thereof or upon dispensation of formal proof therefor. If a party to the lis intends that an instrument produced by the other party being insufficiently stamped should not be admitted in evidence, he must raise an objection thereto at the appropriate stage. He may not do so only at his peril.

17. Objection as regards admissibility of a document, thus, specifically is required to be taken that it

was not duly stamped. On such objection only the question is required to be determined judicially.

18.

19.

20. If no objection had been made by Appellant herein in regard to the admissibility of the said document, he, at a later stage, cannot be permitted to turn round and contend that the said document is inadmissible in evidence."

As the present application is filed by the revision petitioners/defendants only to cure the technical defect for the admissibility of Ex.B1 and when the parties are ready to cure the same, by paying the stamp duty and the necessary penalty, the application filed by them, ought to have been allowed.

17. In such circumstances, the impugned order deserves to be set aside and the Appellate Court is directed to exercise its powers vested with it under Section 33 of the Act.

18. Accordingly, the order dated 16.03.2016 passed by the learned District Judge, Tiruvannamalai in I.A.No.42 of 2015 in A.S.No.14 of 2013 is set aside and this Civil Revision Petition is allowed. No costs. Consequently, the connected miscellaneous petitions are closed.

22.02.2017

vj2

Index: yes/No

Internet: yes

To

The District Judge, Tiruvannamalai

PUSHPA SATHYANARAYANA,J.,

vj2

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