

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 6552 OF 2018

Karim Khan Dawood Khan

...Petitioner

Versus

Arshad Rafiq Charolia

And Anr

...Respondents

....

Mr. Bhavin Gada a/w. Najatiya i/b. Harakhchand & Co. for the
Petitioner.

Mr.S.M. Vyas, Advocate for the Respondents.

....

CORAM : R. G. KETKAR, J.

DATE : 01st AUGUST, 2018

P.C.

1. Heard Mr.Bhavin Gada, learned counsel for the petitioner and Mr.S.M. Vyas, learned counsel for the respondents, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the order dated 11.1.2018 passed by the learned Judge, Court Room No.21 of the Court of Small Causes at Bombay on admissibility of the plaintiffs documents produced along with list at Exhibit-21.
3. In support of this Petition, Mr. Gada invited my attention to the objections raised by the defendant on 1.11.2017 at Exhibit-22. In so far as the writing dated 5.3.1992, he submitted that the defendant raised following objections :

- b. The stamp paper on which the said writing is executed is not in the name of the executants. The same is issued to some third party unconnected to either of the parties.
- d. The defendant has in his written statement denied execution of any writing before notary public and has challenged the genuineness of the said writing.

4. As the stamp paper is not purchased in the name of the executants and same is issued to some third party unconnected to either of the parties, the writing dated 5.3.1992 is not admissible in evidence. That apart in the written statement the defendant has denied execution of any writing before notary public and has challenged the genuineness of the said writing. The learned trial Judge observed that the writing dated 5.3.1992 is executed by the defendant. The original document is signed and executed by the plaintiffs' father and accordingly marked it as Exhibit-23. He, therefore, submitted that the writing dated 5.3.1992 deserves to be removed from the record of the trial Court.

5. Insofar as the notice dated 30.11.2009 is concerned, he submitted that the defendant had issued notice dated 3.12.2011 under Order XI of the Code of Civil Procedure, 1908 (for short, 'C.P.C.') calling upon the plaintiffs to give inspection. No inspection of the notice was given by the plaintiffs. He relied upon Order XI Rule 15 of C.P.C. to

contend that if the plaintiffs did not comply with the notice, they are not at liberty to put such writing in evidence in the suit. He, therefore, submitted that the impugned order admitting notice dated 30.11.2009 in evidence and marking it as Exhibit deserves to be set aside.

6. On the other hand, Mr.Vyas supported the impugned order. He invited my attention to paragraph-2 of the plaint where the plaintiff had made reference to writing dated 5.3.1992 as also paragraph-12 of the plaint where the plaintiffs relying upon the documents a list whereof is annexed and the list of documents to contend that the plaintiffs have referred to and relied upon the writing dated 5.3.1992. He relies upon the provisions of Section 34 of the Maharashtra Stamp Act (for short, 'Stamp Act'). The relevant portion of Section 34 reads thus :

“34. 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 or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument.
xxxxxxx ”

7. Mr. Vyas submitted that the words “or if the instrument is written on sheet of paper with impressed stamp” are added by Maharashtra Tax Laws (Levy and Amendment) Act 29 of 1994 w.e.f. 1.5.1994. The words “such stamp paper is purchased in the name of one of the parties to the instrument” is substituted for the words “and the executor or one of the executors is the person in whose name such stamp paper is purchased” w.e.f. 15.9.1996. He, therefore, submitted that the objection raised by the defendant that the stamp paper on which the writing dated 5.3.1992 is executed is not in the name of the executants and that the same was issued to some third party unconnected to either of the parties is misconceived. Insofar as the objection to notice dated 30.11.2009 is concerned, he submitted that during the course of evidence, plaintiffs' witness has produced original notice and copy whereof is given to the defendant. He, therefore, submitted that no case is made out for interfering with the impugned order.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiffs have specifically referred to writing dated 5.3.1992 in the plaint and also in the list of documents on which the plaintiffs propose to rely. Reliance placed by

Mr. Gada on Section 34 of the Stamp Act to contend that the stamp paper must be in the name of either of the executants cannot be accepted as the amendments are made in the year 1994 and in the year 1996. As the writing is executed on 5.3.1992, said objection was rightly overruled by the learned trial Judge. It is, however, material to note that the defendant has denied execution of writing dated 5.3.1992. Though the learned trial Judge has observed in the impugned order that the writing dated 5.3.1992 is executed by the defendant and it bears the signature of the defendant, it shall be subject matter of trial before the learned trial Judge. After considering the evidence on record, the learned trial Judge will deal with this aspect. Insofar as notice dated 30.11.2009 is concerned, as the plaintiffs have produced original notice copy whereof is furnished to the defendant, I do not find that the learned trial Judge has committed any error in marking this notice. Subject to this direction, the Petition fails and the same is dismissed.

9. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)