IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

C. R No. 4109 of 2019
Date of decision : 08.07.2019

Yogesh Kumar Sikka ....Petitioner

versus

Monika ...Respondent

CORAM: **HON'BLE MS. JUSTICE RITU BAHRI**

Present: Mr. Aayush Gupta, Advocate
for the petitioner.

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RITU BAHRI , J. (Oral)

Challenge in this petition is to order dated 18.04.2019 passed by learned Civil Judge (Jr. Divn.) Ludhiana whereby an application dated 13.02.2019 (P-4) of the petitioner-defendant, has been dismissed.

Learned counsel for the petitioner-defendant *inter alia* contends that the application of the petitioner under Section 35 of the Indian Stamp Act (for short 'the Act') for impounding the alleged agreement to sell dated 25.05.2015 and for issuance of direction to the plaintiff to pay the deficiency in stamp along with 10 times penalty has wrongly been dismissed, vide impugned order dated 18.04.2019 by referring to judgment of Hon'ble Apex Court in a case of ***Javer Chand vs. Pukhraj Surana, 1961 AIR (SC) 1655.***

Learned counsel is relying upon judgment of Hon'ble the Supreme Court of India in a case of ***Ram Rattan (dead) by legal representatives v. Bajranj Lal and others, 1978 AIR (SC) 1393 wherein Javer Chand's case (supra)*** has been discussed. Learned counsel contend that if the document is not duly stamped then at the stage of objection, the trial Court has to decide the objection and if it is not decided after the objection was raised then the application cannot be dismissed, in view of Section 36 of the Act.

Reference has further been made to judgment of Hon'ble the Supreme Court in a case of ***Om Prakash v. Laxminarayan and others, 2013 (4) RCR (Civil) 747***

Heard learned counsel for the petitioner.

In ***Ram Rattan's case (supra)***, Hon'ble the Supreme Court in para 6 has observed as under:-

> 6. When the document was tendered 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 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-theless 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 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 Javar Chand v. Pukhraj Surana).(1) The, endorsement made by the learned trial judge that "objected, allowed subject to objections 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.

Further in ***Om Parkash's case (supra)***, Hon'ble the Supreme Court in para 10 and 11 has observed as under:-

10. *The aforesaid Explanation has come into* effect with effect from 26th September, 1990. The Explanation, therefore, creates a legal fiction. The agreement to sell shall be deemed to be a conveyance and stamp duty is leviable on an instrument whereby possession has been transferred. Thus the agreement to sell in question is a conveyance within the meaning of Section 2(10) of the Act and is to be duly stamped. Section 35 of the Act makes instruments not duly stamped inadmissible in evidence, the relevant portion whereof reads as follows:

"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 shall 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;

xxx xxx xxx."

11. From a plain reading of the aforesaid provision, it is evident that an authority to receive evidence shall not admit any instrument unless it is duly stamped. An instrument not duly stamped shall 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 penalty. As we have observed earlier, the deed of agreement having been insufficiently stamped, the same was inadmissible in evidence. The court being an authority to receive a document in evidence to give effect thereto, the agreement to sell with possession is an instrument which requires payment of the stamp duty applicable to a deed of conveyance. Duty as required, has not been paid and, hence, the trial court rightly held the same to be inadmissible in evidence. The view which we have taken finds support from a decision of this Court in the case of ***Avinash Kumar Chauhan v. Vijay Krishna Mishra, (2009) 2 SCC 532***, in which it has been held as follows:

" 21. It is not in dispute that the possession of the property had been delivered in favour of the appellant. He has, thus, been exercising some right in or over the land in question. We are not concerned with the enforcement of the said agreement. Although the same was not registered, but registration of the document has nothing to do with the validity thereof as provided for under the provisions of the Registration Act, 1908.

22. We have noticed heretobefore that Section 33 of the Act casts a statutory obligation on all the authorities to impound a document. The court being an authority to receive a document in evidence is bound to give effect thereto. The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The court, therefore, was empowered to pass an order in terms of Section 35 of the Act."

Reference at this stage can now be made to a Division Bench judgment of Karnataka High Court in a case of ***Miss Sandra Lesley Anna Bartels vs. Miss P. Gunavathy, 2014 (12) R.C.R (Civil) 886*** wherein in para 11 and 12, it has been observed as under:-

> *11. There are two different circumstances under the Stamp Act for impounding a document; (1) the Court has power to impound the document, moment it appears to the Court that such instrument is not duly stamped and (2) or to wait till such document is tendered in the evidence. A combined reading of Sections 33 and 34 clearly reveal that a discretion is granted to the Court either to impound the document under Section 33 before the same is tendered in evidence and even if a document is not impounded under Section 33, the Court is bound to impound the document when the same is tendered in the evidence under Section 34. In other words, the Court cannot say that it will wait till the document is tendered in the evidence. It is only an option given to Court to exercise the power under Section 33 & 34 but the difference between Sections 33* and *34 is that, Section 34 can be enforced by a Court when a document has to be received in the evidence but Section 33 can be invoked not only by the Court, but, by every person in-charge of a public office. A person in-charge of a public office has no power to exercise the power vested under Section 34 of the Act.*
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> *12. Court cannot say that it would impound the document only when the document is tendered in evidence for marking. There may be instances where duty and penalty payable may be very high and the party may not choose to rely upon such insufficiently stamped document in order to avoid stamp duty and penalty. In such circumstances, it would result in loss of revenue to the exchequer. The power of impounding a document is to collect stamp duty and penalty whenever there is an escape of duty. Therefore, when it is brought to the notice of the Court that a document is insufficiently stamped, the Court exercising its power under Section 33 of the Act has to pass an order at the first instance for impounding the document. Though there is a discretion vested in the Court to exercise powers under Sections 33 and 34 of the Act, no Court can hold that it would wait till the document is tendered in evidence. In such circumstances, there may be chances of loss of revenue to the exchequer.*

Applying the ratio of the above said judgments, the revision petition stands allowed and order dated 18.04.2019 is set aside. A direction is given to the trial Court to decide the matter afresh in accordance with law as per Section 35 of the Act without taking the objection of Section 36 of the Act. Fresh orders be passed after giving due notice to the defendant.

08.07.2019 **(RITU BAHRI)**
G Arora **JUDGE**

Whether speaking/reasoned	***Yes***
Whether reportable	***No***