IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6528 OF 2019

Wax Oils Pvt. Ltd. … Petitioner
Vs.
C. P. Ships (UK) Ltd. and others … Respondents

Mr. Kishore D. Shah for Petitioner.
Mr. Vishal Talsania i/b. M/s. Motiwalla & Co. for Respondent Nos.1 and 2.

CORAM : UJJAL BHUYAN, J.
Reserved on : JANUARY 3, 2020
Pronounced on : MARCH 17, 2020

P.C. :

Heard Mr. Kishore D. Shah, learned counsel for the petitioner and Mr. Vishal Talsania, learned counsel instructed by M/s Motiwalla & Co. for respondent Nos.1 and 2.

2. By filing this petition under Article 227 of the Constitution of India, petitioner seeks quashing of order dated 23.01.2019, passed by learned Ad-Hoc Judge and Assistant Sessions Judge, City Civil Court, Greater Mumbai in Notice of Motion No.1132/2018 in Summary Suit No.7646/1998.

3. Respondent Nos.1 and 2 as the plaintiffs had instituted Summary Suit No.397/1998 initially in the Bombay High Court which was subsequently transferred to the City Civil Court in view of enhancement in pecuniary jurisdiction in the year 2012 whereafter it has been registered as Summary Suit No.7646/1998.

4. In the suit plaintiffs stated that in or about last week of June, 1995, SUDCHEMIE A.G. (Shipper) entrusted to Plaintiff No.1 one container containing certain consignments for carriage from the port of Hamburg to the port of Nhava Sheva. On receipt of the consignment on

board of the concerned vessel, plaintiff No.1 issued a bill of lading dated 30.06.1995 stipulating defendant No.1 (petitioner herein) as the notified party.

5. The said vessel carrying the consignment arrived at the port of Nhava Sheva in the last week of July, 1995 and was discharged to the custody of the port authorities. It is stated that the container detention and demurrage charges started accruing from 08.08.1995.

6. In the first week of October, 1995 defendant No.1 approached plaintiff No.2 to take the container along with the consignment to its factory at Bharuch in the State of Gujarat.

7. On or about 5th October, 1995 defendant Nos.1 and 2 executed an agreement/guarantee in favour of plaintiff No.2 agreeing to pay container detention and demurrage charges to the plaintiffs till the container was returned by the defendants to the plaintiffs. It is stated that defendants undertook to indemnify the plaintiffs for all the losses which the plaintiffs would suffer as a consequence of the plaintiffs permitting the defendants to remove the said container to Bharuch.

8. On 06.10.1995, defendant No.2 paid to plaintiff No.2 Rs.74,194.00 being the container detention and demurrage charges which had accrued till 10.10.1995. Thereafter on 11.10.1995, plaintiffs permitted the defendants to remove the loaded container to the factory of defendant No.1 for destuffing in terms of the agreement/guarantee dated 05.10.1995.

9. It is alleged that defendants failed and neglected to remove the container within appropriate time. It was belatedly removed on 12.10.1995 but was not returned back despite several correspondences. This led to serving of legal notice by the plaintiffs upon the defendants calling upon them to pay to the plaintiffs the container detention and

demurrage charges.

10. Since the defendants failed to return the container, the above suit was filed by respondent Nos.1 and 2 as the plaintiffs seeking a decree that defendants are jointly and severally liable to pay to the plaintiffs Rs.15,70,560.00 with interest from the date of filing of the suit till payment and realization.

11. Defendant No.1 i.e., petitioner herein filed written statement disputing the claim made by the plaintiffs. Defendant No.1 has contested the claim of the plaintiffs on merit. However, in paragraph 5 of the written statement, it is stated that the bill of lading dated 30.06.1995 and letter of guarantee dated 05.10.1995 were not properly stamped and thus could not be admitted in evidence. The suit being based on these two documents was liable to be dismissed.

12. Defendant No.1 filed the notice of motion, being Notice of Motion No.1132/2018 in the summary suit seeking a declaration that the document of undertaking/guarantee dated 05.10.1995 produced and relied upon by the plaintiffs be impounded for being not properly stamped as required by the Maharashtra Stamp Act, 1958 and that the said document be removed from being admitted in evidence. In the affidavit filed in support of the notice of motion, defendant No.1 i.e., petitioner stated that the document of undertaking/guarantee dated 05.10.1995 was actually a bond and was insufficiently stamped, being typed on stamp paper of Rs.100.00. It was contended that since the plaintiffs had not paid proper stamp duty as required under the law, the said document was required to be impounded and could not be taken on record.

13. Plaintiffs submitted objection to the said notice of motion. It was stated that regarding admissibility of the agreement/undertaking dated 05.10.1995, the Court had heard arguments from both the sides

whereafter an order was passed by the Court on 06.02.2018 admitting the said document in evidence as Ext.18. This order dated 06.02.2018 has not been assailed by defendant No.1 in any forum. Instead, the notice of motion was filed which virtually amounts to seeking review of order dated 06.02.2018 which is not permissible. Once a document is admitted in evidence, it is not open to anybody to go behind that order. On merit, it was contended that the said document i.e., undertaking/guarantee dated 05.10.1995 was properly stamped and denied the allegation that it was improperly stamped. The document was executed on Rs.100.00 stamp paper though it would have sufficed if it had been executed on a stamp paper of Rs.20.00 in terms of Article 5(h) of the Maharashtra Stamp Act, 1958. It was contended that the notice of motion filed at the instance of defendant No.1 was nothing but an attempt to delay the trial and obstruct the course of justice.

14. After hearing the matter, learned court below passed order dated 23.01.2019 rejecting the notice of motion.

14.1. Aggrieved, the present writ petition has been filed by defendant No.1 as the writ petitioner.

15. Contention of the petitioner i.e., defendant No.1 in the suit is that the document dated 05.10.1995 was admittedly a bond and the proper stamp duty was not Rs.20.00 for the entire document but Rs.20.00 for the value of Rs.500.00. Learned Court below failed to consider this aspect of the matter and that the stamp duty would be more than a lakh of rupees in view of the claim of the plaintiff being more than Rs.15,00,000.00. It is further contended that when a document is sought to be tendered in evidence before the Court and if it is found that the document is not sufficiently stamped, it is the duty of the Court to impound the document in accordance with Section 33 of the Maharashtra Stamp Act, 1958 (briefly 'the Stamp Act' hereinafter). In view of Section 34 of the Stamp Act, such a document cannot be

admitted in evidence. After impounding the document for being insufficiently stamped, the Court is required to send the said document to the Collector for determining the correct stamp duty to be paid. Only after the deficit stamp duty and penalty are paid after determination by the Collector and certificate to that effect is issued by the Collector, the Court can only thereafter admit the document in evidence if it is proved and is otherwise admissible in evidence.

16. Respondents i.e., the plaintiffs have filed an affidavit-in-reply to the writ petition. It is reiterated that the document was properly stamped as per the Stamp Act. Referring to the provisions contained in Order 43 Rule 1A of the Civil Procedure Code, 1908, it is contended that the writ petition is not maintainable. The document dated 05.10.1995 is not a bond within the meaning of the Stamp Act. It is merely an undertaking/agreement indemnifying the plaintiffs. The document was properly stamped. That apart, the document has already been admitted in evidence and exhibited as Ext.18.

17. Petitioner has filed rejoinder-affidavit reiterating the contentions made in the writ petition.

18. Detailed submissions were made by learned counsel for the parties which are on pleaded lines. Therefore, a detailed reference to the same is considered not necessary. However, the submissions so made have been duly considered. Also perused all the decisions cited at the bar.

19. At the outset reference may be made to the document of undertaking / guarantee dated 05.10.1995 which is contended to be a bond by the petitioner. Perusal of the same would go to show that it was typed on stamp paper of Rs.100/- and addressed to respondent No.2 by the petitioner. As per the document, petitioner in consideration of respondent No.2 allowing it to remove the mentioned import loaded full container to its premises, undertook and guaranteed respondent No.2 the

following:-

> 1) The container would be removed from the nominated site to the premises of the petitioner at Bharuch at the risk and cost of the petitioner within seven days and returned back within one month from the date of removal;
>
> 2) ***
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> 3) In case of any damage to the container while in custody of the petitioner, petitioner would pay the repairing cost as estimated by the surveyors of respondent No.2;
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> 4) Petitioner would pay respondent No.2 the container detention charges and other charges as and when demanded by respondent No.2;
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> 5) ***
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> 6) In case the containers are lost while in custody of the petitioner, petitioner would pay the cost of the containers and the customs duty applicable for the containers;
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> 7) ***
>
> 8) ***
>
> 9) This bond will remain in force till such time petitioner complied with its above undertaking and fulfilled all the requirements of respondent No.2 as well as of the custom authorities.

20. Though in clause No.9, petitioner referred to the document as a bond, a *prima facie* view may be taken that the said document is nothing but an undertaking and / or guarantee given by the petitioner to respondent No.2 that in the event of damage, loss etc. of the container, respondent No.2 would be compensated by the petitioner. However, no amount of indemnification was quantified in the said document. As already noted, this document was typed on stamp paper worth Rs.100.00.

21. From the documents on record it is seen that when this document dated 05.10.1995 was tendered in Court by the plaintiffs i.e., respondent Nos.1 and 2, the Court had heard the arguments from both the sides about its admissibility whereafter an order was passed on 06.02.2018 admitting the said document in evidence as exhibit-18. It is further seen that this order dated 06.02.2018 on the admissibility of the document has

not been challenged by the petitioner and thus has attained finality.

22. Having noticed the above, it would be apposite to advert to the impugned order dated 14.02.2019. Petitioner being defendant No.1 had filed notice of motion to impound the above document dated 05.10.1995 alleging that it was not properly stamped. Learned court below upon considering the notice of motion and the reply filed by the plaintiffs framed the following point for determination:-

> "Whether the document of undertaking / guarantee dated 05.10.1995 tendered by the plaintiffs is to be impounded under the Maharashtra Stamp Act, 1958 and removed from being admitted in evidence?"

23. Learned court below considered the submissions made by the rival counsel as well as perused the decisions cited at the Bar. According to the learned court below, issues in the suit were framed on 12.02.2013. Issue No.1 as framed is as under:

> "Do the plaintiffs prove that on 05.10.1995 both the defendants had executed an agreement to pay container detention and demurrage charges?"

24. It was noted that defendants had disputed only the contents of the documents but admitted execution of the same which is reflected in the order dated 06.02.2018 and thereafter marked as Exhibit-18. Learned court below also took note of the fact that in the document dated 05.10.1995, there was no mention on charges at all. That apart, the document though admitted and marked as an exhibit, defendants denied contents of the same. Contents of the document would have to be proved by the plaintiff. It was also noted that as per Article 13 of the Stamp Act, the court fee to be paid on such a document is Rs.20.00. Therefore, learned court below took the view that the notice of motion filed by defendant No.1 i.e., the petitioner to impound the document dated 05.10.1995 and to remove the same from the list of exhibits was misconceived and untenable. Accordingly, the notice of motion was rejected.

25. From the above, no error or infirmity is discernible in the impugned order dated 14.02.2019. That apart, it is seen that the suit is of the year 1998. 22 years have gone by without any end in sight. Therefore, an early adjudication of the suit is called for.

26. Even then Section 33 of the Maharashtra Stamp Act, 1958 (already referred to as ‘the Stamp Act’) may be looked into. It says that subject to the provisions of Section 32-A (which deals with instrument of conveyance, etc. undervalued - how to be dealt with), every person competent to receive evidence and in charge of public office 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 irrespective as to whether the instrument is or is not valid in law. Thus, as per Section 33, a person having authority under the law to receive evidence and in charge of a public office, when is confronted with an instrument which in his opinion is chargeable with duty and if it appears to him that such instrument is not duly stamped, he shall impound the same. What is crucial to note is that it must appear to the person before whom the instrument is produced that the instrument is chargeable with duty and is not duly stamped. If he forms the opinion as above, then he shall impound the instrument.

27. As per Section 34, no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having authority under law or by consent of parties to receive evidence, or shall be acted upon unless such instrument is duly stamped.

28. A conjoint reading of Sections 33 and 34 of the Stamp Act would indicate that it is the duty of the person having authority to receive evidence, not to admit any instrument chargeable with duty in evidence if the instrument is not duly stamped; besides impounding the same. Therefore, what is of relevance is the opinion formed by the competent

person as to whether the instrument is duly stamped or not.

29. In so far the present case is concerned, it is seen that learned court below had taken note of the fact that in the document dated 05.10.1995, there was no mention about payment of charges. In other words, the said document did not quantify what would be the exact amount payable by defendant No.1 to the plaintiffs in the event of damage or loss of the container. In the absence thereof, learned court below after noticing that the Stamp Act provided for payment of court fee of Rs.20.00 on such instrument whereas the document was typed on stamp paper worth Rs.100.00, rejected the prayer for impounding the document. Therefore, the view taken was that the document / instrument was duly stamped; rather it appeared to the court below that there was no deficiency in payment of stamp duty. Rejecting the objection, the document was marked as exhibit-18.

30. Having regard to the discussions made above and the fact that the suit is of the year 1998, Court is of the view that there is no infirmity in the decision of the learned court below. Impugned order dated 14.02.2019 therefore calls for no interference. As rightly pointed out, the contents of the document would have to be proved by the plaintiff. Mere marking of the document as an exhibit does not amount to proof of content. In *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal*, **(2003) 8 SCC 745**, Supreme Court reiterated the legal position that marking of a document as exhibit and its proof are two different legal concepts. Mere production and marking of a document as exhibit cannot be held to be a due proof of its contents. This position was re-stated in *LIC Vs. Rampal Singh Bisen*, **(2010) 4 SCC 491** wherein Supreme Court opined that mere admission of a document in evidence does not amount to its proof; in other words, mere marking of exhibit on a document does not dispense with its proof which is required to be done in accordance with law.

31. In the light of the conclusions as above, reference to the judgments cited at the Bar is considered not necessary as there is no dispute to the propositions of law laid down in those judgments but the facts of the present case are quite distinguishable. Therefore the judgments cited are not applicable to the facts of the present case.

32. Before parting with the record, it is made clear that any observation made in the present order is only for the purpose of deciding the writ petition and shall not influence the outcome of the suit. All contentions are kept open which may be argued and decided at the time of final hearing of the suit.

33. Consequently, Court finds no merit in the writ petition. Writ petition is accordingly dismissed.

(UJJAL BHUYAN, J.)

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