17.11.2021
Sl. No. 13
Court No.25
B.M.

C.O. 4105 of 2019

M/s. Sthapati represented by its Partner Smt. Indrani Chakraborty
Vs.
Sushil Chakraborty

(Via Video Conference)

Mr. Tanmoy Chowdhury
Ms. Ritoprita Ghosh ... for the petitioner

Mr. Sanjib Mitra
Mr. Suryasarathi Basu ... for the opposite party

The petitioner/defendant in Title Suit No.45 of 2002 re-numbered as Title Suit No.567 of 2013 has assailed the order dated September 11, 2019 in this revisional application under the scheme of Article 227 of the Constitution of India.

Brief facts leading to the case is that the opposite party as the plaintiff filed a suit in the trial court for specific performance of contract and for mandatory injunction.

The suit property belongs to the defendant no.1 and defendant no.2, the petitioner herein. The defendant no.1 executed a power of attorney in favour of the defendant no.2 for developing and constructing a multi-storied building on the suit property. The defendant no.2 proposed to construct a four storied building consisting of eight flats of different area ranging to 550 sq. ft. to 780 sq. ft. and offered to sell the said flats to different customers and the opposite party agreed to book and purchase one such flat with a total consideration money fixed at Rs.2,90,000/-.

The defendant no.2 agreed to sell the flat to the opposite party herein and a written agreement was entered in between the defendant no.2 and opposite party on May 6, 1993 wherein a sum of Rs.1,50,000/- was paid on May 6, 1993 as earnest money to the defendant no.1 as the partner of defendant no.2. Upon acceptance of the earnest money an agreement of sale on May 6, 1993 was executed. The agreement was that the opposite party would pay Rs.20,000/- to the defendant on or before July 10, 1993 and it was duly paid. Further a settlement between the opposite party and the defendant no.2 was arrived at that balance consideration money amounting to Rs.1,20,000/- for payment within December, 1994 and the defendant no.2 would deliver possession of the flat within 10 months from the date of agreement and in default the defendant no.2 to pay interest @ 24% per annum for the period of default in delivery of possession but the defendant no.2 failed to perform their part of contract as alleged and asked for sum of Rs.50,000/- from the opposite party for completing the work of construction of the said flat which the opposite party paid on May 19, 1995.

The petitioner sent a letter to the opposite party to get the sale deed executed in respect of the flat in his favour on payment of balance consideration money but no reply was received by the opposite party herein and the petitioner paid no heed to the request of the opposite party for which the opposite party, being aggrieved filed a suit for Specific Performance of Contract and mandatory injunction.

During trial of the suit un-registered agreement for sale dated May 6, 1993 was exhibited as Exhibit-1. According to the petitioner, objection was raised regarding acceptance of the unregistered agreement for sale as an exhibit on the ground that an unregistered agreement cannot be exhibited without paying any proper stamp duty and the document was required to be impounded by the trial court but the prayer so made by the petitioner was rejected by the learned Judge on 15th January, 2010 and the document was exhibited as Exhibit-1. So being aggrieved by the said order, the petitioner preferred a revision being CO No.1320 of 2010 which was decided by a coordinate bench of this Hon'ble Court and the Hon'ble Court by an order dated August 14, 2014 giving an opportunity to the petitioner to file written objection for impounding agreement for sale dated May 6, 1993 as no written objection was filed against impounding of the said document.

Thereafter, Ld Trial Court upon hearing the petitioners, rejected the prayer for impounding the agreement for sale dated 6.5.1993 which is the order impugned under challenge in the present revisional application inter alia, on the ground that the learned court below ought to have looked into the aspect of provision relating to impounding of unregistered agreement for sale as the unregistered instrument cannot be exhibited unless and until proper stamp duty is paid on the instrument.

It is also pointed out that the learned court should have considered the fact that unregistered agreement for sale is transferring and creating the rights and liabilities in favour of the parties. It should come within the purview of the instrument upon which the proper stamp duty must be paid otherwise it is not admissible.

It is also pointed out that as per the provision of Section 49 of the Registration Act where there is relinquishment of right in respect of immovable property through a document which must be registered, it becomes in-admissible if the document is not registered and such unstamped instrument is not admissible as evidence for collateral purposes, until the same is impounded. Attention is also invited to the West Bengal Amendment Act XVII of 1990 which came into force that unregistered document should have been impounded before accepting as an exhibit. As such, it is contended that the learned Judge has mis interpreted the provision of Section 17 and 49 of the Indian Registration Act and the amended provision of West Bengal Act XVII of 2019 which came into force in the month of January, 1994 impounding Indian Stamp Act of 1899. Accordingly the petitioner has sought for setting aside the order as bad in law.

Mr. Tanmoy Chowdhury learned advocate for the petitioner at the outset refers to a decision in the case Gopi Krishna Trivedi v. Sudama Prasad Ojha reported in 2009(1) CLJ (SC) to support his contention that right and liability having being created or purported to have been transferred and extended or created, the agreement for sale comes within the meaning of instrument as defined in Section 2(14) of the Indian Stamp Act, 1899 therefore, the learned court should be directed to take steps for impounding the agreement for sale by expunging the agreement marked as Exhibit-1.

The Hon'ble Supreme Court relying on the decision in case of Brij Mohan & Ors. v. Sugra Begum & Ors. reported in 1990(4) SCC 147 held that stamp duty will have to be paid by treating the agreement for sale as an instrument as defined in Section 2(4) of the Act. In cited case the suit was filed by the plaintiff for Specific Performance of Contract wherein an application was made for acceptance of letter incorporating the terms and conditions of the agreement for sale of immovable property and certain rent receipts showing payment to the defendant out of total consideration in respect of suit property and in that set of fact , application was made for impounding the letter but on being refused by the trial court, but the Hon'ble Court directed for impounding the said letter/document before the same being exhibited.

Taking cue from the above cited decisions, Mr. Chowdhury submits that in the instant case too, the learned trial court ought to have taken steps for impounding the agreement for sale before the agreement for sale was exhibited and for that he has committed error in law.

Reliance is also placed on a decision in the case of Dr. Swapnadib Lahiri v. Tridip Das Roy reported in 1999(2) CLJ 259 in respect of above submission wherein it has been held that in a suit for Specific Performance an agreement for sale bearing stamp of Rs.10/- was filed wherein the defendant contended that agreement should be valued like conveyance and as such it should be impounded but the trial court having rejected the contention, the defendant preferred the revisional application before the Hon'ble Court and the Hon'ble Court held that the explanation to Item No. 5 of Schedule IA of the Amendment Act(West Bengal Act XVII of 1990) of the Indian Stamp Act clearly provides that expression agreement or memorandum of an agreement relating to a sale shall include an agreement to sale or any memorandum or acknowledgement in transfer or delivery of possession of immovable property with intent to transfer right interest or title to such property at any future date, the agreement for sale is required to be stamped as it is a conveyance as mentioned in item No.23 of the said Schedule and therefore, the disputed agreement is required to be stamped according to item no.23 of the Schedule-1A and the document with a stamp of Rs.10/- is required to be impounded, accordingly, before it is marked as an exhibit.

In rebuttal Mr. Sanjib Mitra, learned advocate for the opposite party has referred to a decision in the case of Javer Chand & Ors. v. Pukhraj Surana reported in 1961 Supreme (SC) 211 wherein the question as to the admissibility of document was raised on the ground that it was not stamped or has not been properly stamped. It has to be decided when a question as to the admissibility of the document is raised, 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 parties are concerned the matter is closed. It is observed that 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 determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit.

In the cited decision, it was held that once a 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 used by the party examination and cross examination of the witnesses, Section 36 of the Act comes into operation. Once a document has been admitted in evidence, it is not open either to the trial court itself or to Court of Appeal or revision to go behind that order. Such an order is not on those judicial orders which are liable to be reviewed or revised by the same court or a court of superior jurisdiction, as held in Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655.

The above cited decision has been relied on by Division Bench of this Hon'ble Court in case of Subimal Chatterjee Chatterjee v. Saraswati Bardhan reported in 2013 Supreme (Cal) 102 : 2013 (2) CHN 272, in which case money receipt was admitted in evidence and was marked as an exhibit. It was not an agreement but it was an acknowledgement accepting payment in response to an agreement. The document was used by the parties in examination and cross examination of the witnesses. So it was not open to the learned trial court to reject the said document on the footing that the plaintiff asked for impounding the document.

It appears that Coordinate bench of this Hon'ble Court while deciding revisional application in CO 1329 of 2010 dated 14.8.2014 held that there is no infirmity in the order earlier passed by the trial court on 15.09.2010 but the petitioner was given liberty to file objection on the issue of impounding of the agreement for sale as an instrument. The learned trial court has observed that the agreement for sale dated 6.5.1993 was challenged by the defendant on the contention that the agreement cannot be exhibited without impounding the same but the court found that the agreement was already exhibited along with the signature as exhibit-1 which was executed in 1993 whereas West Bengal Amendment Act, 1990 came into force only in the month of January, 1994 wherein it has been held that provision would apply to an agreement for sale which requires to be stamped as if it is a conveyance as mentioned in item no.23 of the Schedule IA.

The learned trial court opined that the agreement for sale was executed prior to coming into force the said amended Act so the agreement was not required to be impounded. It appears that the suit was at the cumulative stage of argument after conclusion of evidence of both the parties and if the suit is decreed by the trial court, the stamp duty would be payable for registration of the sale upon the report of the ADSR.

Having perused the impugned order and in consideration of the decision of the Hon'ble Supreme Court cited above, this court is of the view that there is no ground to assail the order impugned as parties have proceeded in the trial with the marking of the document as exhibit-1 on the prove of the signature of the seller/petitioner herein.

In the context of the discussion above, the revisional application being CO 4105 of 2019 is hereby dismissed. However, the trial court is directed to hear out the argument and pass judgement on the merit of the case based on the evidence adduced by the parties to the suit.

All parties shall act in terms of copy of this order downloaded from the Official Website of this Hon'ble Court.

(Shivakant Prasad, J.)