

12.12.2023

CO 3542 of 2022

with

CAN 1 of 2023

The Kolkata Metropolitan Development

Authority and others

vs.

Sri Ashim Kumar Law and another

Mr. Satyajit Talukder

Ms. Piu Karmakar

... for the petitioners

Mr. Debmalya Ghoshal

Mr. Indra Prosad Mullick

... for the opposite parties

This revisional application arises out of an order dated August 24, 2022 passed by the learned Civil Judge (Senior Division), 2nd Court at Barasat in Title Suit No.547 of 2014. By the order impugned, the learned Court rejected an application dated August 10, 2022 filed by the defendants/petitioners praying for recall of D.W.1 for the purpose of marking the notarial affidavits sworn by the plaintiffs, as exhibits.

The petitioners have challenged the said decision on the following grounds:-

a) The document sought to be exhibited, were the original affidavits dated April 2, 2004 and November 16, 2009, sworn by the plaintiff No.1 and the plaintiff No.2, respectively. They should be marked as per the provisions of the Evidence Act.

b) The documents were filed in Court, but had not been marked as exhibits, although those documents were relevant and vital evidence, in support of the defendants' case.

c) The fact that the said affidavits had been submitted by the plaintiffs before the Kolkata Metropolitan Development Authorities, has been admitted by the plaintiffs in the plaint and in the oral evidence.

d) For the ends of justice, the D.W.1 was required to be recalled in order to tender the relevant affidavits in evidence and mark them as exhibits.

Mr. Talukder, learned Advocate for the petitioner refers to the plaint and states that there were specific averments in paragraphs 4 and 7 of the thereof, with regard to affirmation of the affidavits and submission of these affidavits along with the application form, in the office of the Kolkata Metropolitan Development Authority (hereinafter referred to as the KMDA). The plaintiffs admitted that the plaintiff No.1 had affirmed such affidavit on April 2, 2004. In paragraph 15 of the plaint, the affidavit sworn by the plaintiff No.2 in the prescribed format, akin to the affidavit affirmed by the plaintiff No.1 as stated in paragraph 4, has been admitted. Mr. Talukder submits that cancellation of the allotment of the flat by the KMDA, vide letters dated April 8, 2011 and April 28, 2011, are the subject matters of dispute in the suit. The ground for

cancellation was that the said affidavits contained false statements.

In the brochure advertised by the defendant No.1, in respect of the construction of a housing project known as Sourav Abasan, Phase-II, FB Block, Salt Lake City, certain eligibility criteria had been prescribed. Any applicant interested to book a flat had to satisfy such criteria. One such condition was that an affidavit duly sworn/affirmed in the proforma attached to the said brochure in respect of the applicants' (plaintiffs') existing ownership of any property within KMDA area, had to be enclosed with the application. The applicants were required to submit a sworn statement that they did not own a house or land or a building site, either in their own names or in the name of any of their family members within KMDA area.

The KMDA cancelled the allotment of the plaintiffs/opposite parties on the ground that affidavit affirmed by the plaintiffs contained incorrect information. The plaintiff/opposite party No.1 had concealed the fact that he was in possession of a property within the area under KMDA. Such misstatement was in violation of the terms and conditions of the brochure, rendering the plaintiffs ineligible for a flat in the said project. Similar

incorrect statement was also made by the plaintiff no.2 as alleged by KMDA.

Learned Advocate for the opposite parties submit that the question of allowing marking of the said documents as exhibits, would not arise, as the notarized affidavits would have to be proved by the maker of the document. The contents of the documents could not be proved by the D.W.1. The admission in the plaint indicates that the affidavits were filed by the plaintiff Nos.1 and 2, in the format enclosed with the brochure, but such admission would not amount to proof of the contents of the document.

According to the learned Advocate, notarized affidavits were not ipso facto admissible in evidence as had been held by several decisions of the Hon'ble Supreme Court. The documents produced as primary evidence would have to be proved in the manner laid down in Section 67 to 73 of the Indian Evidence Act, 1872. A person who could vouch for the truth of the facts in issue, had to be examined. Unless the same was done, the documents could not be said to have been proved in accordance with the provisions of the Evidence Act. Referring to Section 3 of the Evidence Act, learned Advocate submits that such affidavits were not included within the definition of 'evidence'.

Referring to the cross-examination of P.W.1, Mr. Ghoshal submits that questions with regard to the affidavit filed by the plaintiff No.1, had been put to the P.W.1. A suggestion was also put by the defendants that the allotment of the flat was obtained on account of the false and misleading statements in the affidavits, but the petitioners failed to exhibit the documents.

Heard the parties. In paragraphs 4 to 7 and 15 of the plaint, there are clear admissions in unequivocal terms, that the two affidavits dated April 2, 2004 and November 16, 2009 had been sworn by the plaintiff Nos.1 and 2. The fact that the notarized affidavits were filed with the KMDA, has been admitted in the cross-examination of P.W.1. It has been clearly recorded that the affidavit sworn by the plaintiff No.1 on April 2, 2004 could not be filed in court, as the same was not in the possession of the P.W.1.

In the evidence-in-chief, the P.W.1 had accepted that the affidavit dated April 2, 2004 had been affirmed. P.W.1 is the plaintiff No.2 who admits to have submitted an affidavit with her application for inclusion of her name as a joint co-owner of the flat in question. The plaint case is that the said affidavits were not sworn by making false statements, but on a misconception that the property owned by the father

of the plaintiff No.1 and the father-in-law of the plaintiff No.2, in which the plaintiff No.1 may have had a limited interest, would not be a bar to apply for allotment of a flat at Sourav Abasan, Phase-II. The plaintiffs were under the impression that only exclusive land or property in the name of either of the plaintiffs, would operate as a bar.

On the other hand, the defence case is that the plaintiffs had intentionally suppressed that the plaintiff No.1 had a share in his father's house which was within the Kolkata Metropolitan Development area, in order to obtain the allotment of the flat by misrepresentation and by misleading the KMDA.

Thus, the entire dispute in the suit revolves around the affidavits sworn by the plaintiffs and the cancellation of the allotment as also the possession certificate by the KMDA, on the ground that the affidavits contained false and untrue statements and was vitiated due to suppression of facts.

In my opinion, the documents are vital. The documents were produced, but not marked as exhibits. From the examination-in-chief of the D.W.1 and answer to questions 4 and 5, it is established that the documents were filed in Court, but were not marked as exhibits.

Under such circumstances, from the deposition and from the plaint case, it is available that the

original affidavits sworn by the plaintiff are in the custody of the KMDA authorities, which had come upon the possession of the KMDA, in the official course of business. The D.W.1 should be allowed to recall himself and mark the affidavits. The witness must also be given a chance to prove the same in terms of the Indian Evidence Act, 1872. The plaintiffs would not suffer any loss or injury as they shall have the chance to cross-examine D.W.1 on such exhibits. Moreover, Order 12 Rule 2A and 3A of the Code of Civil Procedure also provides that a party can be called upon to admit a document by issuance of notice for such purpose and notwithstanding the fact whether such notice to admit the document had been given or not, the Court can, at any stage of the proceeding of its own motion, call upon a party to admit any document.

In the decision of *Ramji Dayawala and sons (P) Ltd. vs. Invest Import* reported in **(1981) 1 SCC 80**, the Hon'ble Apex Court held that contents of the documents have to be proved by admissible evidence, but not necessarily by the author of the document. It can be proved by any person who could vouchsafe for the truth of the facts in issue. Section 47 of the Evidence Act provides that the opinion of a person acquainted with the hand writing of the maker of the document may also be a relevant fact.

Moreover, mere production and marking of a document as an exhibit cannot be held to be due proof of its contents. It is also well settled that if the documents are admitted by the signatories, no further burden to lead additional evidence to prove the writings and executions, survives. Reference is made to the decision of *Narbada Devi Gupta vs. Birendra Kumar Jaiswal and anr.* reported in **(2003) 8 SCC 745.**

Under such circumstances, for the reasons stated hereinabove, the document sought to be tendered, are vital documents which are necessary for adjudication of the dispute between the parties. The execution of the two affidavits are admitted. The D.W.1 should be allowed to be recalled in order to mark the affidavits as exhibits and adduce evidence thereon. The plaintiffs are always at liberty to cross-examine the D.W.1 on such evidence. The corroborative or the evidentiary value of such exhibits, would ultimately be decided in the trial.

The learned court below erred in not appreciating the above propositions of law and the fact that the plaintiffs had admitted the affirmation of those affidavits. The relevance of the documents cannot be denied. The learned court proceeded on the procedure of proving, rather than deciding

whether they were necessary for determining the facts in issue and/or relevant facts in the suit.

Under such circumstances, this revisional application is allowed. The order impugned is set aside. All other connected applications are disposed of accordingly.

There shall be no order as to costs.

Parties are to act on the server copy of this order.

(Shampa Sarkar, J.)