

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 3906 of 2019

**Niyaz Ahmed Siddique
Vs**

Sanganeria Company Pvt. Ltd. & ors.

**With
C.O. 4388 of 2019**

**Uma Shankar Singh
Vs**

Sanganeria Company Pvt. Ltd. & Ors.

For the Petitioner In C.O. 3906 of 2019	:	Mr. Aniruddha Chatterjee Mr. Rishav Karnani Mr. Pranav Sharma
For the petitioner In C.O. 4388 of 2019	:	Mr. Mainak Bose Mr. Supratim Laha
For the O.P. No. 7 In C.O. 3906 of 2019	:	Mr. Mainak Bose Mr. Supratim Laha
For the opposite party In C.O. 3906 of 2019 & In C.O. 4388 of 2019	:	Mr. Kishore Dutta, Sr. Adv. Mr. Prabal Kr. Mukherjee, Sr. Adv. Mr. Sumit Dutta Mr. Rajat Dutta Mr. Sanjay Jhunjhunwala
Heard on	:	24.04.2023
Judgment on	:	07.06.2023

Ajoy Kumar Mukherjee, J.

1. The present two applications under Article 227 of the Constitution of India are directed against the same order dated 22nd July 2019 passed by the learned Civil Judge (Senior Division), 2nd Courts, Howrah in Title Suit no. 1 of 2011. Aggrieved by that order Uma Shankar Singh Defendant No. 7/ purchaser preferred C.O. No. 4388 of 2019 and Niyaz Ahmed Siuddique defendant No.3/ owner preferred C.O. 3906 of 2019. Since issue involved in both the aforesaid two applications are same, both the applications are hereby disposed of by this common order.

2. Petitioners of said two applications contended that the opposite party no 1 herein as plaintiff instituted aforesaid Title Suit no. 1 of 2011 before Learned Civil Judge (Senior Division) 2nd court, Howrah inter alia praying for specific performance of agreement for sale dated 1st November, 2010. In the plaint, plaintiff /opposite party no.1herein contended that he is in possession of land measuring more or less 7 Bigha 11 Kathas as a tenant since 1955. Further case of the plaintiff is that defendant no. 1 to 6 of that suit agreed to sale the said suit premises to the plaintiff at a consideration of Rs. 2,79,35,000/-and such agreement also records payment of Rs. 30 lakhs by the plaintiff to the original defendant no. 1-6 against the aforesaid agreed consideration. Opposite party no.1 herein as plaintiff further contended that he was surprised to find to newspaper notice on 11th December, 2010 that proforma opposite party no.5 of C.O. 3906/ 2019 and petitioner of C.O. 4388 of 2019, who is also defendant no. 7 of the suit has purchased the suit property. Thereafter on 20th December, plaintiff further realised that the original defendants no. 1 to 6 have caused to deposit a

sum of Rs. 35 lakhs in the plaintiffs bank account. Immediately thereafter the plaintiff sent a legal notice and in the above backdrop plaintiff/opposite party no. 1 herein has filed aforesaid suit being no. 1 of 2011.

3. The aforesaid defendants/owners in the said suit appeared and filed written statement denying all material allegations. Defendants No. 1 to 6 also instituted eviction suit being Title Suit no. 86 of 2006 against opposite party no. 1 herein and the same has been decreed in favour of defendant no. 1 to 6 of the present suit. Opposite party no. 1 herein being aggrieved by the said judgment, and decree dated 09.11.2017 has preferred appeal which is still pending.

4. In the aforesaid Title Suit instituted by opposite party no. 1 herein, an application under order XIII Rule 8 of Civil Procedure Code (C.P.C.) along with section 33 and 35 of the Indian Stamp Act 1989 (herein after called as act of 1899) was filed by defendant no. 1 to 6 praying to impound said unregistered and insufficiently stamped agreement for sale dated 01.11.2010 produced before the court so as to keep the same in the custody of the court. Opposite party no.1 as plaintiff filed written objection to the said application. By an order dated 3rd September, 2013 the court below allowed the said application filed under order XIII Rule 8 on contest and the court below issued a letter to the collector /DSR(District Sub-Registrar) Howrah, requesting him to supply the market value of the suit property. In compliance of the requisition, the collector /DSR sent a report on 19th November, 2013 but said report was incomplete and not according to the procedure of calculation of the market value. Defendant no. 1 to 6 filed an application on 5th May, 2014 under section 151 of CPC

for appropriate direction asking the collector /DSR to supply the market value of the suit property afresh, after reconsideration and rectification of the same in view of the details of structure mentioned in the registered lease deed. The op no.1 filed an objection to the said application filed under section 151 but the learned Court below by and order dated 9th January, 2015 called for supplying information as to whether the said market value of the suit property has been ascertained after physical verification of the suit property or not. Pursuant to the said order, the collector/DSR after physical verification submitted a fresh report.

5. Thereafter on the basis of intimation provided by the DSR as to the market value, stamp duty and registration fees payable in respect of the aforesaid agreement for sale, which was impounded, the Trial court heard the parties on the point of the penalty to be imposed in respect of the said impounded document and by the impugned order, was pleased to direct the opposite party to pay a sum of Rs. 67,64,800/- as stamp duty and additional amount of Rs. 67,64800/- as penalty. Petitioner of C.O. 3906 of 20196 has challenged the said order on the ground that civil court has no jurisdiction to impose penalty less than ten times, whereas petitioner of C.O. 4388 of 2019 has also questioned the said order of court below imposing only one time penalty on stamp duty.

6. Mr. Anirudha Chatterjee learned Counsel on behalf of the petitioner submits that ld. Court below acted without jurisdiction by imposing penalty less than ten times of the deficit stamp duty as stipulated in the Act of 1899. He further contended that court below acted with material irregularity in not appreciating that the civil court has no discretion to

impose penalty less than ten times of the deficit stamp duty under section 38, read with section 33 and 35 of the Act of 1899. He further contended that the court below failed to consider that refund of any amount from the amount received as penalty under section 38 (1) of the Act of 1899 exclusively falls within the sphere of revenue authority under section 39 of the Act of 1899. He further submits that it is not understandable how the Trial Court directed the plaintiff to pay penalty of one time of the stamp duty, instead of ten times and such direction is contrary to the provisions of section 35(a) and 38 of the act of 1899 and for which the impugned order deserves to be set aside on that ground alone.

7. Mr. Chatterjee further argued that from a conjoint reading of the provisions of the Act, it would be evident that the court who has authority to record evidence is neither empowered nor clothed with the authority or jurisdictions to reduce the quantum of the penalty. The provisions of the Act only authorizes the Collector to reduce the penalty by way of refund when the entire ten times penalty is collected and sent to the collector together with the authenticated copy of impounded instrument for regularization.

8. Mr. Chatterjee also distinguished section 38 (1) with 38 (2) by arguing that section 39 in no uncertain terms envisages a situation and provides an opportunity to a party who has paid the ten times penalty to apply for refund of any portion of the penalty which has been paid on such instruments under section 38(1), whereas sub-section (2) of section 38 contemplates a situation where a court does not exercise its power under sub section (1) i.e. when the stamp duty has not been assessed, the party

to the proceeding is not directed to pay the stamp duty and the penalty for regularization and when the instrument has not been sent to the collector together with the stamp duty and penalty for regularization. In such a situation when a party neither wants to pay the stamp duty or the penalty amount, the authority of the court as specified under section 38(2) is to impound the instrument under section 33 and to send the same in original to the collector. In such cases the Collector is required to exercise his power under section 40 of the said Act, which is evident from the conjoint reading of section 38(2) and section 40. In this context Mr. Chatterjee strenuously argued that section 38(1) is required to be read with section 39 and section 38(2) is required to be read with section 40. Accordingly section 38 39 and 40 contemplates two different situations altogether.

9. Coming to the present situation Mr. Chatterjee submitted that in the present case the parties accepted that the instrument be send for assessment of stamp duty. The parties also accepted the order by which the stamp duty assessed by the collector was accepted by court and the plaintiff has sought for relief based on such instrument i.e. Agreement for sale, which is admittedly inadequately stamped. In such circumstance the court below has no authority to reduce the penalty in contravention to section 35(a) and the court below has exceeded his jurisdiction in passing the order impugned. Petitioner in this context has relied upon **Gangappa and another Vs. Fakkirappa** reported in **(2019) 3 SCC 788** and also a subsequent decision in **Trustees of H.C. Dhanda Trust Vs. State Of Madhya Pradesh and others.** reported in **(2020) 9 SCC 510.**

10. Ld. Counsel appearing on behalf of the opposite party no. 2, 3 & 4 argued almost in the same line with that of the petitioner and also contended that the order impugned has been passed in violation of the relevant provisions of the Act 1899 and as such is liable to be rejected.

11. Mr. Prabal Kumar Mukherjee learned senior Advocate appeared on behalf of the Opposite party no.1 herein contended that under the scheme of the Act of 1899, except in case of section 44 thereof, no one has any right to insist payment of deficit stamp duty or penalty. A party to a proceeding only has right to draw the attention of the person having authority to receive evidence that the instrument is not sufficiently stamped. He also contended that section 35, proviso (a) and section 40 of the Act leaves it to the absolute discretion of the collector to impose penalty upto ten times of the deficit stamp duty.

12. He further contended that ratio laid down in ***Trustees of H.C. Dhanda Trust Vs State of Madhya Pradesh and others*** reported in **(2020) 9 SCC 510** cases is not applicable in the present context as the question to be determined in the said appeal was as to whether the imposition of ten times penalty by the collector of stamps under section 40 of the Stamp Act 1899 was validly imposed or not which is not the issue in the present case. Mr. Mukherjee further submits that section 40(1)(b) makes it clear that the amount of penalty can be an amount not exceeding ten times and the expression “an amount not exceeding ten times” is preceded by expression “if he thinks fit”. Accordingly statutory scheme vests the discretion to impose the penalty amount not exceeding ten times. Neither imposition of penalty of ten times under section 40(1)(b) is automatic

nor can be mechanically imposed. The legislative intent which is clear from reading of section 33,35,38 and 39 indicates that with respect to the instrument not duly stamped ten times penalty is not always retained and power can be exercised under section 39 to reduce penalty in regard to that and there is a salutary discretion to refund penalty.

13. Referring **Gangappa's case (supra)** Mr. Mukherjee contended that the court noticed the legislative scheme and held that the legislature has never contemplated that in all cases penalty to the extent of ten times should be ultimately realised. The discretion given to the collector by using the expression "if he thinks fit" gives ample latitude to the collector to apply his mind on the relevant factors to determine the extent of penalty to be imposed for a case where instrument is not duly stamped. Unavoidable circumstance including the conduct of the party, his intent are the relevant factors to come to a decision.

14. His further argument is, the purpose of penalty generally is a deterrence and not retribution. When a discretion is given to public authority such public authority, should exercise such discretion reasonably and not in oppressive manner. The responsibility to exercise a discretion in a reasonable manner lies more in cases where discretion vested by the statute is unfettered. Imposition of the extreme penalty i.e. ten times of the duty cannot be based on the mere factum of evasion of duty. The reason such as fraud or deceit in order to deprive the revenue or undue enrichment are relevant factors to arrive at a decision as to what should be the extreme penalty under section 40(b). In this context he also referred the case of **Peteti subba Rao Vs. Anumala s. Narendra**, and he

contended that it's only in the very extreme situation that penalty needs to be imposed to the extent of ten times. In the present case plaintiffs intention was never dishonest or contumacious.

15. He further contended that there is a clear contrast in the language of section 35 which provides at flat rate of penalty with that of section 40 (1)(b). The legislative scheme does not indicate any distinction between the court receiving insufficiently stamped instrument in evidence with other authorities. In the present case DSR submitted valuation report as per direction of court and he did not impose penalty. Learned court below in fact relegated the issue as to determination of stamp duty to the collector in accordance with section 38/40 of the Act of 1899. Accordingly he concluded when the facts and circumstances of present case is tested in the light of the ratio of the judgments of the Apex court as well as this court, the decision of the learned Judge of the trial court cannot be faulted and as such the order impugned does not call for interference.

16. During argument both the parties have drawn my attention to the provisions of section 35 and 38 of the Act of 1899 in regard to the instruments not duly stamped. By section 33 of the Act, all public officers with certain exceptions are required to examine every instrument chargeable with duty which comes before them, in the performance of their official functions and to impound any instrument which appears not to be duly stamped. Section 35 of the Act provides, every such instrument may be admitted in evidence in civil court if the party desiring to use it shall pay the amount necessary to make up the proper stamp duty together with a penalty of Rs. 5 or ten times when the amount of proper duty or

deficient portion thereof exceeds Rs.5. Section 42 requires that civil court shall certify by endorsement on every instrument admitting such instrument in evidence that the proper duty and penalty have been levied in respect thereof and shall also state the name of the residence of the person paying them. Section 38 requires every civil court to send to the collector an authenticated copy of such impounded instrument admitted in evidence with a certificate in writing stating the amount of the duty and penalty levied in respect thereof and shall send such amount to the collector or in other cases the court impounding an instruments shall send it in original to the collector under section 38(2). The endorsement required by section 42 should be transcribed on such copy.

17. In view of aforesaid provisions it is clear that a document insufficiently stamped is a curable defect. It may be cured by impounding it on payment of proper stamp and penalty. The penalty to be levied by court is ten times the deficient duty (subject to a minimum of Rs 5/-), the collector only may refund the penalty in excess of Rs 5/- under the provision of section 39. Section 33 provides that all instruments unstamped or deficiently stamped are to be impounded by court. If the instrument happens to be one of the excepted instruments mentioned in the proviso, the court has no option but to send it to the collector under section 38(2) who will destroy it. In the cases, if the deficient stamp duty and penalty are offered before offering them in evidence, they will be admitted and copies thereof will be sent to the collector under section 38(1). If the duty and penalty are not paid, they will be sent in original to the collector under section 38(2). The terms of the proviso to section 35 are mandatory and the court is to accept an

instrument which is not duly stamped on payment of the requisite stamp duty and penalty, if it is not one of the exceptional instrument mentioned in clause(a). If the party producing the document wants adjudication by the collector, the court must follow the procedure prescribed in section 33 and 38(2) and cannot impose court's own decision upon a party. However the demand of duty and penalty by court under section 35 is provisional order liable to be altered by the procedure prescribed by section 39 and 40 and by subsequent sections.

18. The duty chargeable on an insufficiently stamped document must be decided with reference to the requirements of the law in force at the time of the execution, but the penalty leviable is determined in all cases by section 35, proviso (a). In the present case, which is a suit for specific performance of contract, the court below sent agreement to the collector for valuation and assessment of stamp duty after impounding it. In such circumstances, Civil Judge has no jurisdiction of imposition of penalty at a lesser amount. Under section 40(b) of the Act of 1899 that discretion lies with the collector and not with the court.

19. In fact Section 38 provides the procedure in which instruments impounded are to be dealt with. As per section 38(1) when an instrument chargeable with duty is impounded by the court then the court can collect the duty and penalty and send that amount, along with an authenticated copy of the instrument together with a certificate in writing stating the amount of duty and penalty levied in respect of instrument. As per the section 38(2) in other cases instrument impounded shall be sent to the collector who shall exercise his power as provided under section 40 of

the Act and shall return the instrument to the impounding officer after collecting the duty in case of instrument chargeable with duty is not duly stamped after issuing a certificate to that effect . When an instrument filed before the court is found to be insufficiently stamped the court can admit it in evidence, only if the party pays the stamp duty together with ten times of that stamp duty amount as penalty. If the person concerned is not satisfied with the decision of the court on the nature of the document, or with respect to the amount of duty and penalty payable thereon, he can apply to the court for sending the original document to the collector, which necessarily means that document will not be admitted in evidence at that stage. Accordingly if the party is not willing to pay ten times penalty as mandatorily provided in section 35, the court however cannot compel party to pay stamp duty and ten times penalty and have it admitted in evidence. It is for the party to have the documents admitted in evidence by paying stamp duty and ten times penalty or leave it to the court to take action as provided in section 38(2).

20. In this context, law is very specific and in a similar context in **Gangappa and another case (supra)** paragraph 18 of the said judgment runs as follows:-

“18. The above view of the Karnataka High Court that there is no discretion vested with the authority impounding the document in the matter of collecting duty under Section 33, is correct. The word used in the said proviso is “shall”. Sections 33 and 34 clearly indicate that penalty imposed has to be 10 times. The Division Bench of the Karnataka High Court in Digambar Warty [Digambar Warty v. Bangalore Urban District, 2012 SCC OnLine Kar 8776 : ILR 2013 KAR 2099] has rightly interpreted the provisions of Sections 33 and 34 of the Act. We, thus, are of the view that the High Court in the impugned judgment [Fakkirappa v. Gangappa, 2014 SCC OnLine Kar 12775] did not commit any error in relying on the judgment of the Division Bench in Digambar Warty [Digambar Warty v. Bangalore Urban District, 2012 SCC OnLine Kar 8776 : ILR 2013 KAR 2099] . We thus have to uphold the above view

expressed in the impugned judgment [Fakirappa v. Gangappa, 2014 SCC OnLine Kar 12775].”

21. Accordingly it is quite clear that since the word “shall” has been used in section 33 and 35, it clearly indicates that penalty imposed has to be ten times. The Apex Court has affirmed the Karnataka High Court’s Judgment in ***Digamabar Warty Vs. District Registrar Bangalore Urban District*** reported in **2012 SCC Online Kar 8776** and observed that the high court has rightly interpreted the provision of 33 & 34 of the Karnataka Stamp Act 1957. In the said case Trial Court had imposed penalty at the rate of two times and had given reasons. Here in the present case the court below has imposed one time penalty without assigning any reason and the order is also cryptic in nature. Though in the said case the Apex Court invoking its extraordinary jurisdiction and after considering the fact that the trial court’s order was passed five years back and trial court had also given reason for imposing two times penalty, had accepted the said amount in order to avoid further delay in the said case but ultimate conclusion of the court was that no discretion vested with the authority impounding the documents in the matter of collecting duty under section 33 of the Act.

22. In view of such I am agreeable with the contention of Mr. Chatterjee that when a court impounds an instrument under section 33 of the Act he can admit such instrument in evidence upon payment of penalty as provided by section 35 and authority/court who impounded the instrument is required to send to the collector an authenticated copy of such instrument together with a certificate in writing stating the amount of duty and penalty levied in respect thereof and shall also send the amount to the

collector and section 35 of the act specifies that the quantum of the penalty can only be ten times. There is no provision under the Act, which authorises court which is empowered to deal with evidence, to either reduce the quantum of penalty after impounding the document or call upon the party to pay penalty less than what is specified in section 35(a).

23. It is under this circumstances the only option left for the trial court was to call upon the plaintiff to pay and deposit in the court ten times of the stamp duty as penalty as contemplated under section 35(a) and upon receipt of such penalty together with stamp duty, send the said collected amount of the stamp duty and penalty to the collector together with the authenticated copy of the instruments, since it is well settled in **Gangappa's case** that in the matter of collection of duty and penalty no discretion is vested with the authority admitting/impounding such instrument and dealing with such evidence. The duty payable on the instrument is prescribed by statute. Once the duty payable is ascertained from the statute no discretion is vested with the court in the matter of imposition of duty and penalty as it is mandatory.

24. In view of above C.O. 3906 of 2019 and C.O. 4388 of 2019 are hereby disposed of with a direction upon the court below to call upon plaintiff to pay and deposit stamp duty as assessed along with ten times of said amount towards penalty and on such payment, to act in accordance with section 38(1) of the Act of 1899 and thereafter liberty is given to the petitioner herein to pray for invoking the jurisdiction of the Collector seeking refund of penalty (if any) by an appropriate proceeding.

There will be no order as to costs.

25. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)