

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

Present:

**THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**APOT 30 of 2023
arising out of
CS 576 of 1990
IA NO. GA 1 of 2023**

**Jagannath Marothia & Ors.
Vs.
Norman William Wilson & Ors.**

Appearance:

For the Petitioners	:	Mr. Jishnu Saha, Sr. Adv. Mr. Rupak Ghosh, Adv. Mr. Sanjib Dawn, Adv. Mr. Varun Kothari, Adv.
For the Respondents	:	Mr. Sudip Deb, Adv. Mr. Vivek Basu, Adv. Mr. Aranyak Saha, Adv. Ms. Sayanika De, Adv. Mr. P. K. Bagaria, Adv.
Judgment On	:	28.04.2023

Harish Tandon, J.:

Initially, the order impugned in the instant appeal appears to us in tune with the spirit of the order passed by the Division Bench on 17th November,

2022 while disposing of APOT 159 of 2021 but the course adopted by the Single Bench in admitting various documents disclosed in the written notes of argument to be admitted in evidence, we invited the counsel to address the aforesaid point.

Undisputedly, a suit for specific performance of an agreement in relation to the immovable property being CS 576 of 1990 was filed before this Court by the predecessor of the appellant. The said agreement was entered into between the predecessor-in-interest of the present appellant and Mrs. Helen Wilson who was admittedly a foreign national. The said foreign national during a lifetime made and published a last Will and Testament appointing the respondent no.3 as executor therein to carry out the last wish and desire indicated therein. The original plaintiff died during the pendency of the said suit and the appellant have been substituted in his place and instead. A plea was taken by the executor to the said Will that this said testatrix being a foreign national did not obtain any permission from Reserve Bank of India to transfer the immovable property being the subject matter of the said agreement. It is, thus, contended that the said agreement is *per se*, illegal and void in view of an embargo created under Foreign Exchange Regulation Act, 1973.

On the conspectus of the aforesaid defense having been taken by the said respondent no.3, an application for rejection of the plaint was taken up which was dismissed on 4th May, 2021. The said order was carried to an Intra-Court appeal and the Division Bench although declined to interfere with the said impugned order, categorically observed that the point so taken for the purpose

of rejection of plaint strikes at the root of the matter and therefore, the Trial Court has to arrive at the decision whether such issue could be determined as a pure question of law or a mixed question of fact and law. The Division Bench further observed that for such limited purpose, the Single Bench may direct the parties to discover the documents and select the documents already disclosed on discovery pertaining to the said issue only and determined the same by trial on evidence.

This lead to passing the impugned order upon framing an additional issue as to whether the said suit is barred under Section 31 of the Foreign Exchange Regulation Act, 1973 upon admitting certain documents in evidence for aforesaid purposes as disclosed with the written notes of argument.

At the very outset, we did not find any infirmity into the impugned order relating to framing of an additional issue in the light of the observations of the Division Bench but the second limb of the impugned order involves a question whether the documents disclosed by the said contesting respondent no. 3 in the written notes of argument can be admitted in evidence and thereafter directing the said contesting respondent to examine the necessary witness or adducing evidence to determine the said additional issue as preliminary issue. The admissibility of the documents in evidence is seriously questioned by the appellant which according to them are opposed to the rule of evidence and the provisions in this regard contained in the procedural law as well as the Evidence Act.

The list of document so admitted in evidence has been elaborately jotted down in the impugned order which apart from the amended plaint and the written statement filed in the suit contained several letters exchanged by the vendor to various persons. The appellant has seriously questioned the admissibility of the document or in other words document to be received in evidence without strictly proving the same in accordance with the relevant provisions of law.

Chapter 5 of the Evidence Act contained various provisions relating to documentary evidence and the manner of proving the same to be received in evidence and the determination of the issue to be made depending upon its evidentiary value or throwing light upon the contents thereof. Section 61 of the Evidence Act postulates that the content of documents required to be proved by primary or secondary evidence and therefore, before admitting the document in evidence the same has to be proved by tendering the same and by leading evidence in this regard before the same is admitted in evidence. Such statutory duties cast upon the party tendering the documentary evidence has to pass the muster of proving the same as envisaged in the Evidence Act. Sections 62 and 63 of the Evidence Act define the primary and secondary evidence when produced before the Court for its inspection. Section 64 of the Evidence Act postulates that the documents must be proved by the primary evidence except when it is required to be proved by secondary evidence. The effect of the aforesaid provision admits no ambiguity that the moment the document is produced before the court for inspection, it has to be proved before the Court

proceeds to admit the same in evidence. The rule of evidence does not envisage the moment the documents are produced and sought to be relied upon by either of the parties to suit, it is admitted in evidence and then invited the party producing the same to prove the same.

A distinction is sought to be drawn between a production of the document and discovery thereof inviting the attention of the adverse party that such documents shall be relied upon but that itself does not envisage a situation that the said document is automatically admitted in evidence. The admissibility of a document in a judicial proceeding is distinct and different from mere production and/or tendering the document for inspection of the Court or the parties to the proceeding. In this regard, the Court is bound to consider any document which is disclosed or tendered before the Court for the purpose of being admitted in evidence but it is totally different when such document is admitted in evidence and to be considered such. A distinction has to be kept in mind between the disclosure or tendering the document by either of the parties, and such document after being disclosed and tendered to be received in evidence as it is always an ardent duty of the Court to decide whether such document has been duly proved before being admitted in evidence as the power of the Court is not fettered in refusing to admit the document in evidence having not proved in accordance with the rule of evidence.

The provision contained in Order 13 Rule 1 of the Code of Civil Procedure can also be pressed in action in this regard which postulates that the party or the pleader shall produce all the documentary evidence in original in the event,

the copies whereof has been filed along with the plaint or written statement and the moment the same is produced, the Court shall receive the same but that itself does not dispense with the proving such documents to be admitted in evidence. Mere production or receiving the document does not done away with the requirement of proving the said document in accordance with the rule of evidence. There is a clear distinction between the production and receiving the document as a part of the record than the admissibility of the said document in evidence in such case it is required to be proved. A valuable right is vested upon a party to raise objection to the admissibility of the document in evidence or even a Court may reject any document considering the same to be irrelevant and otherwise in admissible under Order 13 Rule 3 of the Code of Civil Procedure. Such valuable right of putting an objection on receiving a document in evidence can be defeated nor be taken away by accepting the document so disclosed being admitted in evidence and then inviting the parties to lead evidence in support thereof. The moment the documents are admitted in evidence which cannot be treated a complimentary procedure relating to proving of the document as it takes away the valuable right of raising an objection on the mode of proving the same.

There is no ambiguity in our mind that the document which is inherently inadmissible in evidence, even admitted in evidence bestowed a right upon the party to raise the objection as to its admissibility at a later stage of proceeding or before the appellate Court but the embargo may be seen in relation to an objection on the mode of proving the documents in the later stage of proceeding

or before the higher forum. The head note contained in Order 13 Rule 4 of the Code may throw some lights in this regard having used the expression “admitted in evidence”. The said rule provides for endorsement on every document admitted in evidence in the suit in a manner indicated therein. The endorsement by the Court or marking the document as exhibit is not a mere ministerial act but has far-reaching consequences on being admitted in evidence and forming part of the record of the suit (**see Order 13 Rule 7 of the Code**). The conjoint reading of the various provisions of Order 13 of the Code manifestly indicate that mere production or tendering of the document does not automatically make such document a part of the record nor to be admitted in evidence unless the same is duly proved and on being satisfied the Court made an endorsement of the said document and marked it exhibit. It is at this juncture, the documents are admitted in evidence and becomes a part of the record and the court thereafter is obliged to take into consideration, the evidentiary value of the said document and its impact on the issues raised in the suit. Therefore, the admissibility of a document in evidence is not a casual exercise nor should be regarded as a mere procedural in nature but must pass through the requirement of proving such document while adducing in evidence.

It is axiomatic to record that the production and tendering the document cannot be equated with the notion that the document have been admitted in evidence and then called upon the party to prove the same.

In the instant case, the learned Single Bench has adopted a course which does not appear to have been made fulfilling the requirements of law both the

Evidence Act as well as the Code of Civil Procedure. The admissibility of the document can only arise after the same is duly proved by the parties and cannot be resorted to at the stage of disclosure and/or production or the discovery. We are not oblivious of the fact that the adverse party made at the time of discovery, inspection and/or production of document may not raise an objection to its admissibility in evidence but unless such stand is categorically taken the valuable right to raise an objection not only on the mode of its proving but inherent admissibility cannot be taken away.

We, therefore, do not countenance to the procedure and the manner in which the documents disclosed in the written notes of argument to be admitted in evidence for the purpose of deciding the preliminary issue. Even the Coordinate Bench in an earlier appeal did not suggest in explicit term that the discovery of documents on such issue is to be admitted in evidence to decide the same as preliminary issue by trial on evidence. The tenet of the Coordinate Bench decision expounded the intention that the issue relating to an embargo created under the Foreign Exchange Regulation Act would have a vital impact on agreement for sale of the immovable property which is essentially a pure question of law or may be mixed question of fact and law to be decided by the Single Bench. The moment such a preliminary issue is framed in the impugned order on the direction of the Coordinate Bench to decide the same on trial, it does not dispense with proving such documents relatable to such issue nor to automatically admit the same in evidence as it would run contrary to the manifest intention of the Coordinate Bench inviting the parties to go on trial on

such issue before the other issues are taken up and/or decided by the Single Bench.

We do not intend to make any comments on the Coordinate Bench's decision which has attained finality at this stage whether such issue is a mixed question of fact and law or a pure question of law and respecting the dictum of the said observations the harmonious interpretation which can be given to the said judgment is that the said preliminary issue is to be decided on trial permitting the parties to make a discovery of the documents sought to be relied upon having relevance on such preliminary issue. Since the Single Bench has directed the respondent no.2 to examine necessary witness or adduce evidence in relation to the said preliminary issue and also provided a right to the plaintiff to cross-examine such witness, we does not find any infirmity in the aforesaid directions as we find the same to be in tune with the order of the Coordinate Bench as well as the law applicable in this regard.

However, we do not accept the portion of the order where the Single Bench has admitted such documents disclosed in the written notes of argument to be admitted in evidence and therefore, the order impugned in the instant appeal is modified to the extent that the aforesaid document shall not be regarded as admitted in evidence but to be treated as disclosure on production for inspection of the Court and if those are proved to the satisfaction of the Court in accordance with the provisions of the Evidence Act, may be marked as an exhibit.

With these observations, the appeal is disposed of and all the connected applications are accordingly disposed of.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

(Harish Tandon, J.)

(Prasenjit Biswas, J.)