IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR-2113-2021
Reserved on: 25.07.2023
Date of decision: 15.09.2023

AYAAN INSTITUTE OF MEDICAL SCIENCE AND ANR.

..Petitioners

Versus

GURU RAM DASS EDUCATIONAL AND CHARITABLE TRUST (REGD.) AND ORS.

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Sunny K. Singla, Advocate
for the petitioners.

Mr. Sumeet Mahajan, Sr. Advocate
with Mr. Saksham Mahajan, Advocate
for respondents.

ANIL KSHETARPAL, J.

1. This is plaintiffs revision petition against the interlocutory order passed by the trial Court on 23.03.2021, whereby, the Court of first instance has held that copy of agreement to sell dated 10.01.2012 (Ex.PW7/1) is inadmissible in evidence and it cannot be impounded as being a photocopy as it is not an instrument on which the plaintiff can be asked to make good the deficient stamp duty or pay penalty.

2. In order to comprehend the issue involved in the present case, the relevant facts, in brief, are required to be noticed.

3. The plaintiff has filed a suit for possession (as owner) by way of specific performance of an agreement to sell dated 13.09.2012 with respect to land measuring 58 bighas and 7 biswas.

4. It is the case of the plaintiff that on 10.01.2012 an agreement to

sell with respect to 75 bighas and 11 biswas land was entered into by defendant No.1 on the receipt of Rs.10,00,000/- as earnest money for a total sale consideration of Rs.5,55,00,000/-. The sale deed of the property was agreed to be executed on or before 11.07.2012. As per the agreement, Rs.40,00,000/- was to be paid on 18.01.2012. The defendant-Trust passed the resolution in a general meeting on 15.01.2012 to this effect and on 18.01.2012 Rs.40,00,000/- was paid against the receipt. On 23.03.2012, certain conditions of the original agreement to sell were modified and another sum of Rs.50,00,000/- as an earnest money was paid. The plaintiff has been making further payment from time-to-time, which was being received by defendant No.1. Thereafter, on 13.09.2012, the agreement to sell dated 10.01.2012, which was modified on 23.03.2012 and was further divided into three agreements and one sale deed in the following manner:-

> *"(i) Agreement to sell for land measuring 58 bigha 7 biswa dated 13.09.2012;*
>
> *(ii) Agreement to sell for land measuring 6 biswas 16 biswasi dated 13.09.2012;*
>
> *(iii) Agreement to sell for land measuring 11 bigha 18 biswasi dated 13.09.2012;*
>
> *(iv) Sale deed for land measuring 5 bigha dated 17.09.2012."*

5. On 09.10.2010, the suit of possession as an owner by way of specific performance of the agreement to sell dated 13.09.2012 was filed. Defendant No.1 admitted execution of agreement to sell dated 13.09.2012 with respect to 58 bighas and 7 biswas of land (the suit land). However, execution of the agreement to sell on 10.01.2012 was disputed. Defendant No.3 filed a separate written statement, wherein, it was stated that the agreements dated 13.09.2012 were not in the continuation of the previous agreements.

6. On an application filed by the plaintiffs for permission to prove

the agreement to sell dated 10.01.2012 by way of secondary evidence, the permission was granted on 31.08.2012. Thereafter, defendant No.1 made a statement in the Court as noted in orders dated 10.07.2018 and 01.10.2018 that he is ready to execute the sale deed on the basis of agreement to sell dated 13.09.2012. The matter was referred to the National Lok Adalat, however, defendants failed to appear in person for recording the statement for the purpose of compromise. Thereafter, the parties were directed to lead evidence. The defendants filed an application on 09.01.2019 for directing the plaintiff to deposit the balance sale consideration. The aforesaid application was disposed of on 01.03.2019. On 05.11.2016, Sh. Sher Singh appeared on behalf of the plaintiff and produced copy of the agreement to sell dated 10.01.2012 as Ex.PW7/1 as well as original agreement to sell dated 23.03.2012 as Ex.PW7/2. The statement of the plaintiff is extracted as under:-

> *"Stated that In am tendering my affidavit/examination-in-chief Ex.PW-7/A in my evidence and the same be read as a part and parcel of my evidence/statement. I have seen the copy of agreement to sell dated 10.01.2012 on the Court file and upon the same I identify my signature as a witness. The copy of the agreement to sell is Ex.PW-7/1. The witness is shown the original agreement to sell dated 23.03.2012 in the Court file and he identify his signature as a witness upon the same. The certified copy of the original agreement to sell dated 23.03.2012 is Ex.P-7/2. Witness is shown the original writing and endorsement dated 07.04.2012 and he identify his signature upon the same as witness. Original writing dated 07.04.2012 is Ex.PW-7/3 and endorsement is Ex.PW-7/4.*
>
> *Cross-examination by Sh. M.S. Chahal, Adv. counsel for def. no. 1, 2 & others counsel for other defs is deferred.*
>
> *RO&AC*
>
> *Sd/- Sher Singh*
>
> *Sd/-*
> *(Jaibir Singh)*
> *Civil Judge (Jr. Divn.)*
> *Malerkotla/06.11.2019*

7. A Court holiday was declared on 11.11.2019 and, thereafter,

the case was taken up on 08.11.2019 and the same was adjourned to 26.11.2019. The examination in chief of PW-8 and PW-9 was tendered in evidence and PW-9 was partly cross-examined. Thereafter, on 06.12.2019, Sh. Sher Singh was partly cross-examined by the learned counsel representing defendant No.1 and 2, however, when opportunity was given to the learned counsel representing defendant No.3, he filed an application for impounding the agreement to sell dated 10.01.2012. Thereafter, the case was adjourned to 09.12.2012. Ultimately, the trial Court, passed the order on 23.03.2021, declaring Ex.PW7/1 on the Court file, is inadmissible in evidence.

8. This Bench has heard the learned counsel representing the parties at length and with the able assistance perused the paperbook.

9. The learned counsel representing the parties have also filed written synopsis in support of their oral submissions.

10. On the one hand, the learned counsel representing the petitioners while relying upon the judgment passed in ***Shaman Kumar Roy Vs. Sushil Kumar Aggarwal (2006) 11 SCC 331***, submits that the agreement to sell though insufficiently stamped, has already been admitted in evidence without objection and marked as exhibit and therefore, in view of Section 36 of the Stamp Act, 1899 (hereinafter referred to as the '1899 Act'), they have lost right to object to its admissibility.

11. On the other hand, the learned counsel representing the respondents has submitted that such document cannot be admitted in evidence because it does not fall within the meaning of word 'instrument' and consequently, neither Section 35 nor Section 36 of the 1899 Act is applicable. He relies upon the judgments passed in ***Hari Om Agrawal Vs. Prakash Chand Malviya (2007) 8 SCC 514***, ***Jupudi Kesava Rao Vs.***

Pulavarthi Venkata Subbarao and others, (1971) 1 SCC 545 and ***State of Bihar Vs. Karam Chand Thapar and others AIR 1962 (SC) 110***.

12. This Court has considered the submissions and analysed the arguments of the learned counsel representing the parties.

13. At this stage, it will be appropriate to extract Section 35 and 36 of the 1899 Act.

> *"**35. Instruments not duly stamped inadmissible in evidence, etc.** — No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:*
>
> *Provided that—*
>
> *(a) any such instrument 6 [shall] be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of any instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;*
>
> *(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;*
>
> *(c) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;*
>
> *(d) nothing herein contained shall prevent the admission of any instrument in evidence in proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure 1898 (V of 1898);*
>
> *(e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Collector as provided by section 32 or any other provision of this Act.*
>
> ***36. Admission of instrument where not to be***

> ***questioned.*** *—Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.*

14. Section 49 of the Registration Act, 1908, reads as under:-

> *"**49. Effect of non-registration of documents required to be registered.**—No document required by section 17 1 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall—*
>
> *(a) affect any immovable property comprised therein, or*
>
> *(b) confer any power to adopt, or*
>
> *(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:*
>
> *[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) 2 , 3 *** or as evidence of any collateral transaction not required to be effected by registered instrument.]"*

15. Section 35 and 36 of the 1899 Act uses the expression 'admitted in evidence', whereas, proviso to Section 49 of the Registration Act, 1908 (hereinafter referred to as 'the 1908 Act'), uses the expression 'received as evidence'. This distinction is required to be kept in mind while deciding this case.

16. It may be noted here that the purpose of the 1899 Act is to collect the revenue for the State and Section 35 is in continuation of the aforesaid object. The 1899 Act is a fiscal statute and it has to be read in that context only. Reliance in this regard can be placed on ***Thiruvengadam Pillai Vs. Navaneethammal, (2008) 4 SCC 530***.

17. To recapitulate the facts, it is evident that the suit is for specific performance of agreement to sell dated 13.09.2012 and not with respect to agreement to sell dated 10.01.2012. Thus, the agreement to sell dated

10.01.2012 is only being produced as an evidence to corroborate the subsequent agreement executed between the parties on 13.09.2012.

18. By the Registration and Other Related Law (Amendment) Act, 2001, which was made applicable with effect from 24.09.2001, the amendments were made in Transfer of Property Act, 1882 and the Registration Act, 1908. Section 17(1A) was added in the 1908 Act. The agreement to sell evidencing delivery of possession is required to be registered. Thereafter, corresponding amendments have been made by the State legislatures to prescribe stamp duty on the agreement to sells, which are evidencing delivery of possession. In that context, the Punjab State has also made amendment in Schedule I-A of the 1899 Act.

19. Proviso to Section 49 of the 1908 Act permits the party to produce an unregistered agreement to sell in a suit for specific performance. Though, by amendment with effect from 24.09.2001, the provision with regard to admissibility of the unregistered document to prove part performance of the contract for the purpose of Section 53-A of the Transfer of Property Act, 1882, has been deleted, however, it is permissible to produce unregistered document as an evidence of the contract in a suit for specific performance even post 24.09.2001. As already noticed, the agreement to sell dated 12.01.2012 has been received by the Court as evidence and not in evidence, which is distinction between Section 49 of the 1908 Act and Section 35 and 36 of the 1899 Act.

20. This Court has also carefully read the judgments relied upon by the learned counsel representing the respondents.

21. In ***Hari Om Agrawal's case (supra)*** the Court relied upon the judgment of the judicial committee in ***Rajah of Bobbili Vs. Inuganti China Sitarasami Garu***. It has been held by the privy counsel that a photocopy of

an unstamped document is not an instrument within the meaning of 1899 Act and therefore, Section 35 and 36 would not apply. Thus, the Court held that neither the aforesaid document can be validated by impounding nor this can be admitted as a secondary evidence under the 1899 Act.

22. This Court has also carefully read ***Jupudi Kesava Rao's (supra)***. In that case again, the question was whether reception of secondary evidence of a written agreement to grant a lease is barred under the provisions of Section 35 and 36 of the 1899 Act. In this judgment again, the Supreme Court held, as it was held in ***Hari Om Agrawal's case (supra)***. In fact in ***Hari Om Agrawal's (supra)***, the Supreme Court had relied upon the ***Jupudi Kesava Rao's (supra)***.

23. In ***Karam Chand Thapar's case (supra)***, the Supreme Court held that since the arbitrator prepared the award in triplicate and signed all of them then original instrument was produced.

24. Thus, it is evident that none of the judgment relied upon by the learned counsel representing the respondents is applicable.

25. Now, the question arises, "Whether the photocopy of the agreement to sell is admissible in evidence in the suit or not?" Once it has been held that Section 35 and Section 36 of the 1899 Act are not applicable then the agreement to sell is the only a piece of evidence to rely upon. At the cost of repetition, the suit is not with respect to the specific performance of the agreement to sell. Thus, the document sought to be produced as an evidence of any collateral transaction. Hence, proviso to Section 47 shall be applicable. Consequently, the document could be produced as evidence in secondary evidence.

26. Keeping in view the aforesaid discussion, the order passed by the learned trial Court declaring that the agreement to sell dated 10.01.2012

is neither admissible in evidence nor can be impounded, and is thus required to be set aside. The document is admissible as evidence under proviso to Section 49 of the 1908 Act and it is not required to be impounded as it is an instrument, which has been produced as evidence and not in evidence.

27. With these observations, the revision petition is allowed.

28. All the pending miscellaneous applications, if any, are also disposed of.

September 15th, 2023 **(ANIL KSHETARPAL)**
Ay **JUDGE**

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No