

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

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

C.O. 4083 of 2019

With

C.O. 4283 of 2019

Sri Chandan Saha

Vs.

Sri Amalendu Dey & Ors.

For the Petitioner : Mr.Sanjay Mukherjee

For the opposite parties : Mr. Supratim Laha
Mr. Sk. Saud Nafisul Islam

Heard on : 01.08.2024

Judgment on : 19.11.2024

Dr. Ajoy Kumar Mukherjee , J.:

1. The instant revisional applications under article 227 of the constitution of India arises out of the following orders:-

(a) Order no. 25 dated 03.04.2017 passed by learned Civil Judge (Senior Division), Sealdah in T.S. No. 158 of 2014 which resulted present application no. CO 4283 of 2019. By the impugned order.

Learned Court below allowed defendant's application for impounding insufficiently stamped agreement for sale dated 19.07.2009 and thereby sent the authenticated copy of the said agreement for assessing deficit stamp duty payable on such instrument, while considering plaintiffs application for temporary injunction.

(b) Order no. 43 dated 01.11.2019 passed in the same proceeding wherein the petitioner has prayed for review of the aforesaid order dated 03.04.2017, which culminated to the other application herein being no. CO 4083 of 2019. By the said impugned order the court below also rejected the plaintiff/ petitioners prayer for review of the order dated 03.04.2017.

2. Plaintiffs/ petitioners case in a nutshell is that petitioners as plaintiff filed aforesaid T.S. 158 of 2014 seeking specific performance of the agreement agreed through exchange of letters upon amendment of original agreement for sale dated 19.07.2009 executed by and between the parties. Terms of original agreement dated 19.07.2009 which is sought to be impounded, plaintiff/petitioner initially agreed to purchase one self contained flat measuring about 400sq.ft. at second floor at the back side of the western portion of a building situated at premise no.1, Matilala Sen Lane and also the entire ground floor measuring an area or more or less 646 sq.ft. in a proposed G+3 storied building to be constructed as per sanction plan at a consideration price Rs. 9 lacs and plaintiff paid advanced consideration price.

3. Further case of the plaintiff /petitioner is that subsequently by mutual agreement and through exchange of letters, plaintiff agreed to forgo his right of purchase of 2nd floor flat of the suit building and only expressed his readiness and willingness to purchase the three car parking spaces at the ground floor at a total consideration of Rs. 3lacs which appears from a letter dated 19.03.2010, issued by the defendants through constituted power of attorney addressed to the plaintiff/petitioner and plaintiffs reply dated 26.03.2010 addressed to the constituted power of attorney of the defendants namely defendant No.1. Accordingly as per revised terms as agreed through letters, the petitioner/plaintiff is required to pay Rs. 3 lacs for three car parking spaces at the ground floor, out of which, Plaintiff had already stated to have paid Rs.1,50,000/-. The defendants/opposite parties after obtaining sanction plan made construction and as per alleged revised agreement the opposite party herein were supposed to execute and register deed of sale and handover possession of the three garage spaces at ground floor but inspite of plaintiffs repeated request the defendants /opposite parties failed to execute and register the three car parking spaces upon receiving the balance consideration of Rs. 1,50,000/-. Thereafter at the request of the defendant issued on 14.03.2021, the period for execution of the deed of conveyance for three garage spaces had been extended upto 15.01.2012 for one year but the defendants failed and neglected to execute and register the deed of sale and instead threatened the plaintiff to create third party interest by selling the spaces. This prompted the plaintiff/petitioner to file the aforesaid suit seeking decree for specific performance of revised contract for three garage spaces at the ground floor.

4. The plaintiff/petitioner immediately after filing the suit, moved an application for injunction and plaintiff was granted ad interim order of injunction and upon exchange of affidavits thereafter, the application for temporary injunction came up for hearing on 03.04.2017. In the interregnum the defendants filed an application for impounding the aforesaid insufficiently stamped original agreement for sale on 19.07.2009 before hearing of the temporary injunction application.

5. By the impugned order, learned trial court relying upon the decision of ***Abjer Ali Mullick Vs. Rohima Bibi.*** reported in **(2016) 2 WBLR (Cal) 513** had held that no injunction can be granted since the agreement upon which the plaintiff rests its case is an insufficiently stamped paper and the said document is required to be impounded under the provisions of section 33 and 35 of the Indian Stamp Act. Accordingly the learned court below deferred the hearing and decision of the temporary injunction prayer, though he extended the ad interim order of injunction and thereby allowed the defendant's application for impounding insufficiently stamped agreement.

6. Thereafter plaintiff/petitioner filed review application and by the another impugned order dated 03.04.2018, the Court below rejected the review application on the ground that the order impugned was passed in the year 2017 on merit considering the materials on record and also after hearing both sides. Plaintiff never challenged the said order before any higher forum and as such the court below does not have jurisdiction to consider the validity and legality of an order passed by the court on merit.

7. Mr. Sanjoy Mukherjee learned counsel appearing on behalf of the petitioner submits that the Trial Court has erred in insisting an insufficiently stamped agreement to be impounded at the interlocutory stage of hearing injunction application, instead of considering the application for injunction on merit. Relying upon the judgment reported in **AIR 2004 Cal310 (Sachi Prasad Mukherjee Vs. Pampa Kumar and Others)** Mr. Mukherjee Argued that while granting or refusing temporary injunction the court should only consider whether prima facie case has been made out by the plaintiffs which needs adjudication at the trial and prima facie case must not be confused with prima facie title, which requires elaboration during trial stage. He further contended that at this stage plaintiff is only required to prima facie establish that in the event of non interference by the court, it will result irreparable injury and substantial loss and while considering irreparable injury, which of the parties would be comparatively put to more or substantial mischief in the event of refusal a temporary injunction is to be considered and also to consider the balance of conveyance and inconvenience of the parties. He further contended that when an interim injunction upon the suit property is continuing, it is incumbent on the part of the court to dispose of the same in one way or the other, instead of deferring the same for an indefinite period. In this context he further argued that there is no qualitative difference between interim and ad *interim* order except about the period for which they operate and the stage at which they are passed and in this context he relied upon judgment of Bombay High Court in **Rajendra**

Prasad Singh Vs. Municipal Corporation of G.R. Bombay reported in **AIR 2003 Bom 392.**

8. Mr. Mukherjee further argued that plaintiff has forgone his right for the flat in terms of original agreement dated 19.07.2009 and his claim in the present suit is confined only on 3 garage spaces at the ground floor at a revised consideration price of Rs. 3lacs and plaintiff has pleaded his readiness and willingness to perform to his part of the contract in the plaint.

9. In this context Mr. Mukherjee submitted that defendant had taken a plea that there cannot be any agreement by exchange of mere letters and therefore the suit itself is clouded but defendants have not yet challenged the maintainability of suit and it is settled now that an agreement even oral is valid and enforceable and in this context he relied upon the judgment of ***Aloka Bose Vs. Paramatma Devi and others***, reported in **(2009) 2 SCC 582** and another privy council judgment in ***Shankar lal Narayan Das Mundade Vs. New Mufussal Company Ltd. and others*** reported in **AIR 1946 PC 97.**

10. Relying upon another judgment in ***Biswajit Chakraborty Vs. Meera Sen Ray*** reported in **(2002) 2 CLJ 449**, Mr. Mukherjee argued that the Trial court acted without jurisdiction and it cannot compel a party to produce document for impounding. His further contention is rigours of Section 33 of the Stamp Act will be attracted only when the same was produced before the court in the ordinary course of evidence. Mere production of the photocopy of the document along with the application for

temporary injunction or otherwise is not enough to attract the provision of Section 33(1) of the Stamp Act.

11. He further submits that non stamping or inadequate stamping is curable defect and such cure can be made only at the evidence stage and as such court below while considering application for temporary injunction ought not to be concerned about the adequacy or inadequacy of the stamp and that stage would come only when the document is sought to be rendered in evidence, since inadequately stamped document is not a document which is *void abinitio* or which is unenforceable. Accordingly Mr. Mukherjee concluded by submitting that the trial court had swayed away for deciding the acceptability of the document instead of deciding the injunction prayer on merit and based his observation on hyper technicality and as such the orders impugned are liable to be set aside.

12. Mr. Supratim Laha appearing on behalf of the opposite party relying upon ***Abjer Ali Mallick case (supra)*** argued that an injunction proceeding is an integral part of the main suit and as such it is facile to argue that two contrary sets of yardstick must be allowed, one for the injunction application and the other for hearing the main suit. As such a document which is insufficiently stamped should be impounded even when such a document is not being tendered as a piece of evidence in a suit but rather is being relied upon for the purpose of obtaining order of injunction in the suit. He further submitted that the provision of Section 35 of the Indian Stamp Act 1899 envisages that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person, having by law or consent of the parties, authority to receive evidence unless such

instrument is duly stamped and it cannot be admitted for any purpose whatsoever. Moreover when a document cannot be relied upon or cannot be brought in evidence then there is no reason as to why such a document shall not be considered as inadmissible even for co-lateral purposes. In this context he relied upon Supreme Court judgment in the case of ***Avinash Kumar Chauhan Vs. Vijay Krishan Mishra*** reported in **(2009) 2 SCC 532**. He further contended that the law in relation to section 35 of the Indian Stamp Act with respect to an instrument, which is not duly stamped, being inadmissible in evidence for any other purpose has been reiterated by the Seven Judges Bench of the Supreme Court in the judgment reported in **(2023) SCC online 1666**.

13. Mr. Laha also referred ***K.B. Saha & sons Pvt. Ltd. Vs. Development Consultant Ltd.*** reported in **(2008) 8 SCC 564** and tried to explain the ambit and meaning of “co-lateral purpose” as provided in proviso to section 49 of Registration Act. He further submitted that the revisional application being co. 4283 of 2019 is not at all maintainable since the order impugned in C.O 4283 of 2019 is an appealable order and the order was passed while considering the application for injunction filed by the present petitioner. He further submitted that the judgment cited by the opposite party is not applicable in the present context since there is no dispute about the cardinal principle for granting or refusal of the prayer for injunction. Infact the issues involved for adjudication in the present two applications, revolve around the interpretation of section 33 and 35 of the Indian stamp Act, read with section 49 of the Registration Act 1908 and as such the proposition of law as envisaged in the judgments referred by the petitioner,

have got no application whatsoever in the fact and circumstance of the present case. Accordingly the opposite party has prayed for dismissal of the present applications.

Decision

14. Learned Trial Court heavily relied upon ***Abjer Ali Mallick Case (supra)*** decided by this High Court in favour of defendant but in the said Case the opposite party/defendant at the time of injunction hearing, raised objection with regard to the agreement being insufficiently stamped and therefore learned Trial Court found it fit to refer the document to the collector to ascertain the stamp payable and kept the application for injunction pending after obtaining the report of the collector and to deposit of the deficit stamp duty and penalty payable. However the facts and circumstances of the present case is completely different. Plaintiff/petitioner's case in substance is that by the impugned deed of agreement originally it was agreed that plaintiff would purchase one self contained flat on the second floor and the entire ground floor at a total consideration of Rs. 9 lakhs and accordingly plaintiff paid a sum of Rs. 50,000/- to the defendant towards advance but thereafter on 19.03.2010 the defendant no.1 being the constituted attorney of the other defendants served a letter to plaintiff with a request to forgo the plaintiffs' right to purchase the second floor flat and to purchase only three ground floor car parking spaces at a consideration of Rs. 3,00,000/-, which the plaintiff agreed and accordingly plaintiff gave reply to defendant no.1 on 26.03.2010 expressing his consent to such modified proposal and

accordingly plaintiff paid a sum of Rs. 1,50,000/- . So, the written agreement in respect of which defendant has sought for impounding, which is comprising of one self contained flat on the second floor and the entire ground floor at a total consideration of Rs. 9,00,000/- has allegedly turned into an agreement in between the plaintiff and defendant no.1 in respect of only ground floor three car parking spaces at a total consideration of Rs. 3,00,000/- on the basis of defendant no.1's letter dated 19th March 2010 and plaintiff's reply dated 26.03.2010 and accordingly plaintiff prayed for injunction restraining defendants from encumbering or transferring or letting out the suit property which is comprising of only three open car parking spaces situated on the ground floor at premises no.1 Motilal Sen Lane and not the entire property mentioned in the agreement.

15. Defendant no.1 filed written objection against plaintiff's prayer for injunction where he admitted that said defendant no. 1 convinced the plaintiff to forgo the right of purchasing the second floor and also agreed to sale out only three car parking space and thereby the consideration price was modified from 9 lakhs to Rs. 3 Lakhs and defendant no.1 for self and as constituted attorney of defendant no. 2 and 3 accepted earnest money from the plaintiff towards part payment and defendant no.1 further stated that he is also ready and willing to execute deed in favour of plaintiff in respect of said three car parking spaces in the ground floor and he never refused to execute the deed.

16. Per contra legal heirs of defendant no. 2 and 3 filed written objection against plaintiff's prayer for injunction with a completely different story

contending that defendant no.1 has misused the power of attorney and for which they have revoked the power of attorney by a registered deed of revocation dated 28.09.2012 and they have already filed a different suit for cancellation of a deed executed by present defendant no.1 in favour of another purchaser alleging that defendant no. 1 and his wife have misused the power of attorney and in that suit the present defendant no.2 and 3 obtained injunction where learned court directed the parties to maintain status quo in respect of suit property. It is specific case of the defendants that the agreement which has sought to be impounded herein by them is a forged one and for which said agreement had not been notarized or registered by the plaintiffs. It is also alleged that plaintiff is/was in collusion with defendant no.1.

17. It is no less resintegra that while praying for an injunction, the burden is on the plaintiff to show that there exists a prima facie case in his favour, which needs adjudication at the trial but the prima facie case is not to be confused with prima facie title, which has to be established on evidence at the time of trial and the court is further to satisfy while granting interim relief that non interference by the court would result irreparable injury to the party seeking relief, which means that the injury if occurred could not be compensated by way of damages and the other condition is that balance of convenience must be in favour of granting injunction. In the present case plaintiffs prima facie case is that interms of written correspondence dated 19.03.2010 and reply dated 26.03.2010, read with original agreement he has already paid Rs.1,50,000/- out of total consideration of Rs.3 lakhs and on the contrary defendant no. 1 admitted

about such modified agreement and also plaintiffs payment of part consideration price. Against this, legal heirs of defendant no.2 and 3 has described the said original agreement has forged document and they have also not accepted liability of the aforesaid correspondences made in between plaintiff and their constituted attorney defendant no.1 and thereby totally denied plaintiffs prima facie case in the suit property with further contention that defendant no. 1 is in collusion with plaintiff and that a status quo order has already been granted in respect of the suit property in a separate suit filed by them.

18. Accordingly while adjudicating a prayer for injunction the court below only ought to have considered as to whether plaintiff succeeded in proving three cardinal principles for granting injunction or not. In the present case plaintiff has not prayed for injunction in respect of the entire property incorporated in the schedule of agreement, sought to be impounded but only three garage spaces in the ground floor which he claimed on the basis of abovementioned written correspondences. The other peculiar fact in the present case is while court below kept the injunction application pending for disposal till the document in question is impounded, on same breath, he extended order of ad interim injunction from time to time. In this context Mr. Mukherjee on behalf of plaintiffs/ petitioner has rightly argued that there is no qualitative difference between granting interim and ad interim order of injunction except about the period for which they operate and the stage at which they are passed.

19. Defendant/opposite parties herein in their written objection also submitted that in title suit no. 141 of 2014 which is a separate suit in

connection with self-same holding, the learned court directed the parties to maintain status quo in respect of the said property.

20. Needles to say that order XXXIX Rule 3A mandated that where such interim order of injunction has been granted, the court shall make an endeavor to finally dispose of the application within 30 days from the date on which the injunction was granted and where it is unable to do, it shall record its reasons for such inability. It cannot be the ground that since the copy of agreement which subsequently allegedly got modified through correspondences and upon which plaintiff is relying his case, unless duly stamped, prayer for injunction cannot be disposed of. Moreover, it is settled law that section 33 of Stamp Act will be attracted only when the original instrument is produced before the court in the ordinary course of evidence, but mere production of a copy of the document along with application of temporary injunction without an attempt to prove it or tender it in evidence does not amount to 'production of the document' under the provision of section 33 (1) of the Stamp Act.

21. It is palpably clear that by the order no 25 dated 3rd April 2017 the court below had ordered for sending the authenticated copy of agreement for sale dated 19.07.2009 to the district collector for assessing the deficit stamp duty payable on such agreement. This court in ***Biswajit Chakraborty (Supra)*** held the trial court in such a situation acted without jurisdiction and it cannot compel a party to produce document for impounding.

22. It appears that the court below ignoring all the aforesaid peculiarities involved in the instance suit, had got obsessed with the observation made in

the ***Abjer Ali Mullick case (supra)*** which has got no relevance in the present context and thereby has caused miscarriage of justice. In fact the order of keeping injunction application pending till the authenticated document has been duly stamped in one hand and on the other hand extending the ad interim order of injunction time to time on the basis of plaintiffs prayer, is perverse and is liable to be interfered invoking supervisory jurisdiction of this court. The perversity in the observation of the court below is further fortified by the another impugned order being no. 43 dated 01.11.2019 passed in T.S. 158 of 2014, where learned court below while disposing plaintiffs prayer for modification of the abovementioned order dated 03.04.2017 observed that since plaintiffs have not moved any upper forum challenging the aforesaid order dated 03.04.2017, so the court does not have any jurisdiction to consider the validity or legality of an order passed by the court on merit.

23. Since the court below did not finally decide the injunction application on merit but only kept the application pending after obtaining report of the collector and upon deposit of court fee and penalty by the plaintiff, the argument advanced by the opposite party that present application under Article 227 of the constitution of India is not maintainable, does not have any substance.

24. In view of above discussion both the orders dated 03.04.2017 and 01.11.2019 passed in T.S. No. 158 of 2014 by the court below are hereby set aside. Learned court below is directed to dispose of plaintiffs application for injunction based on three cardinal principles for granting or refusing prayer for injunction on the basis of documents available on

record, preferably within a period of 12 weeks from the date of communication of this order, without being influenced by any observation made herein.

25. C.O. 4083 of 2019 and **C.O. 4283 of 2019** are accordingly disposed of.

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

(DR. AJOY KUMAR MUKHERJEE, J.)