S.B.CIVIL WRIT PETITION NO.5158/2011
Prem Kumar Dagar
Vs.
Kailash Chandra Dagar

Date of Order: 29th July 2011

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr.Mishri Lal Chhangahni for the petitioner

BY THE COURT:

This writ petition is directed against the order dated 27.09.2010 (Annex.8) as passed in Civil Suit No.7/2005 whereby, while dealing with the suit after remand, the learned Civil Judge (Jr.Division), Jodhpur City, Jodhpur has considered the application moved by the defendant-petitioner under Section 17 of the Registration Act, 1908 ('the Act') and has rejected the objection about admissibility of the disputed document, an agreement dated 27.01.1984, with the observations that the requirement of compulsory registration of such agreement came to be incorporated in the Act by the amendment of the year 1989 whereas the agreement in question was of the year 1984 and then, the agreement in question had already been exhibited in evidence and the defendant had already carried out cross-examination.

The dispute herein is between the brothers. The plaintiff-respondent has filed the suit for specific performance and perpetual injunction essentially on the allegations that the property described in paragraph-1 of the plaint was purchased him but as the suit for eviction in relation to another property comprised in shop No.7 was

pending against the father of the parties, the sale deed was got executed in the name of the petitioner-defendant because of such suit. The plaintiff alleged that the parties entered into an oral agreement for execution of the sale document in relation to the property in question by the defendant in favour of the plaintiff after decision of the said suit; and then, an agreement dated 27.01.1984 was also executed to the effect that after termination of the proceedings in other suit relating to shop No.7, the defendant would execute the sale deed in favour of the plaintiff. The plaintiff also alleged himself being in possession of the property in question from the date of purchase and himself alone having paid everything for purchase of the property.

The plaintiff alleged that the said suit in relation to shop No.7 has come to an end but the defendant was not executing the sale deed of the suit property in his favour, and on the contrary, had issued an advertisement proposing to sell the suit property though it belongs to the plaintiff and there has been agreement executed in favour of the plaintiff on 27.01.1984. On such nature averments, the plaintiff prayed for specific performance and for perpetual injunction.

The defendant-petitioner denied the suit in toto and asserted that the property in question had been purchased by him from his own income. The petitioner denied execution of the alleged agreement dated 27.01.1984 and stated the same to be a fabricated document. The petitioner, of course, took an averment that the agreement was not admissible in evidence for want of registration.

The learned Trial Court framed the issues essentially with reference to the relief claimed in the plaint and after taking evidence and hearing the parties decreed the suit.

However, the learned Appellate Court, in its order dated 06.10.2009 (Annex.4), found that the Trial Court had not framed proper issues in the matter where execution of the agreement was in dispute and other objections were also raised regarding admissibility of the document. The Appellate Court found that the Trial Court did not frame the issue on the question of readiness and willingness of the plaintiff either. The Appellate Court, therefore, proceeded to set aside the judgment and decree of the Trial Court and remanded the matter with the directions that the Trial Court shall frame proper issues and shall give opportunity to the parties for leading evidence, if sought to be adduced in addition to the evidence already led, and then shall decide the matter on merits. The Appellate Court directed as under:-

> "अत: अपीलार्थी-प्रतिवादी की ओर से प्रस्तुत अपील स्वीकार की जाती हैं व विद्वान अधीनस्थ न्यायालय द्वारा पारित निर्णय व डिक्री दिनॉक 23.01.08 अपास्त किया जाता है व मामला इस निर्देश के साथ अधीनस्थ न्यायालय को प्रतिप्रेषित किया जाता हैं कि वह उपरोक्त observation को ध्यान में रखते हुए पक्षकारों के अभिवचनों के आधार पर सही रूप से विवाद्यकों की सरंचना करे व कोई पक्षकार पूर्व में पेश की गई साक्ष्य के अतिरिक्त कोई साक्ष्य पेश करना चाहे तो उन्हें साक्ष्य का अवसर देकर पुन: प्रकरण का गुणावगुण पर निस्तारण करें। प्रकरण की परिस्थितियों को देखते हुए अपील व्यय पक्षकारान अपना अपना वहन करेगें।"

After remand, the Trial Court is said to have framed the followings as amended issues in the matter:-

> "1)- आया प्रतिवादी द्वारा दिनांक 27-1-1984 को वादग्रस्त संपति के बाबत् वादी के पक्ष में विक्रय विलेख निष्पादित करने हेतू इकरार किया था ?

:- वादी

2)- आया वादी इकरारनामा के मुताबिक संविदा की पालना करने के लिये सदैव तैयार व तत्पर रहा हैं ? :- वादी

3)- आया वादी प्रतिवादी के विरूद्ध इस आशय की स्थाई निषेधाज्ञा प्राप्त करने का हकदार है कि प्रतिवादी वादी के अलावा अन्य किसी को वाद पत्र की चरण संख्या 1 में वर्णित जायदाद का स्थानान्तरण या बेचान नहीं करें।:- वादी

4)- आया वादग्रस्त जायदाद का कब्जा वादी के पास है ?:- वादी

5) -आया तथाकथित इकरारनामा दिनांक 27-1-1984 प्रतिवादी को मुगालते में रखकर बनाया गया है और क्या यह इकरारनामा फर्जी व कूटरचित हैं :-प्रतिवादी

6)- आया इकरारनामा दिनांक 27-1-1984 पंजीकृत नहीं होने से साक्ष्य में ग्राहय नहीं है ?:- प्रतिवादी

7)- अनुतोष:-"

After framing of such issues, the defendant-petitioner proceeded to move an application on 12.02.2010 (Annex.6) with reference to Section 17 of the Act and submitted that the alleged agreement dated 27.01.1984 had been exhibited in affidavit as Ex.1 but the defendant has objection that such document was compulsorily registrable under Section 17 of the Act and was inadmissible in evidence for want of registration. The petitioner, therefore, prayed that issue No.6 relating to admissibility of the agreement be decided at the first and before taking the evidence of the plaintiff.

The application aforesaid has been considered by the learned Trial Court by the impugned order dated 27.09.2010. The learned Trial Court took note of the arguments of the parties including the arguments on the question of admissibility of the document and proceeded to reject the objection of the petitioner with the following observations and findings:-

"उक्त इकरारनामा दिनांक 27-1-84 का निष्पादित है जबकि धारा 17 (f) पंजीयन अधिनियम 1989 में जोड़ी गई। जिसके अनुसार इकरारनामा पंजीकृत होना चाहिए। इकरारनामा 1984 का है तथा 1989 में प्रावधान भूतलक्षी प्रभाव नहीं हो सकता। साथ ही वादी के शपथ-पत्र पर प्रतिवादी द्वारा जिरह की जा चुकी है। अत: वाद में ऐसा एतराज नहीं उठाया जा सकता कि इकरारनामा पंजीकृत नहीं होने के कारण साक्ष्य में ग्राह्य नहीं है। प्रार्थना-पत्र खारिज किये जाने योग्य है।"

Aggrieved by the order aforesaid, the petitioner has filed this writ petition. The learned counsel for the petitioner has strenuously argued that the procedure as adopted by the learned Trial Court has caused prejudice to the petitioner inasmuch as by the application dated 12.02.2010 (Annex.6), the petitioner only prayed for decision on issue No.6 before evidence but while dealing with this application, the learned Trial Court has proceeded to hold the document admissible in evidence and thereby, the issue No.6 is rendered redundant. It is also submitted that the learned Trial Court has been in error in rejecting the application of the petitioner on the premise that agreement has already been exhibited and admitted in evidence while failing to consider that the issue regarding admissibility was framed for the first time only on 14.12.2009. Thus, according to the learned counsel, the evidence previously recorded could not debar the petitioner from raising the question of admissibility of the document for want of registration. It is also submitted that the learned Trial Court has misconstrued the provisions of Section 17 (b) of the Registration Act and has failed to consider that the alleged agreement clearly purports to create and declare the rights in the respondent and to extinguish the petitioner's right, title and interest in the disputed property. It is submitted that

such document being compulsorily registerable, the question ought to have been decided in favour of the petitioner. The learned counsel has referred to and relied upon the decisions in Kashinath Bhaskar Datar Vs. Bhaskar Vishweshwar: AIR 1952 SC 153, Mt.Haliman & Ors. Vs. Md. Manir & Ors.:AIR 1971 Patna 385, Land Acquisition Zone Officer, Talcher – Sambalpur Rail Link, Angul Vs. Dhobani Sahu & Ors.: 2007 (59) AIC 404 (Ori.H.C.), and Naladhar Mahapatra & Anr. Vs. Seva Dibya & Ors.: AIR 1991 Orissa 166.

Having given a thoughtful consideration to the submissions made and having examined the record, this Court is not persuaded to consider interference in the impugned order dated 27.09.2010.

True though it is that the petitioner moved the application only seeking orders for decision on issue No.6 at the first and by the impugned order, the learned Trial Court has decided the question involved in issue No.6 itself but then, in the given set of facts and circumstances, the approach of the learned Trial Court cannot be said to be wholly unjustified or wholly without jurisdiction. The substance of the matter had been that the petitioner wanted to assert that the document in question was inadmissible for want of registration; and so had been the frame of issue No.6. Now, while arguing on the application, the parties also advanced their arguments on the merits of the question involved in issue No.6. In the given position, it would have been an empty formality if the learned Trial Court would have first decided the application and then posted the matter for hearing separately on issue No.6. In fact, from the contents of the order impugned, it is but apparent that

the question involved in issue No.6 was itself allowed to be argued before the Court; and hence, so far the prayer for decision on issue No.6 at the first was concerned, that stood impliedly granted. The learned Trial Court has simultaneously considered the question involved in issue No.6 itself and has pronounced the order that the question of admissibility was not available to be raised as the document had already been exhibited in evidence; and that the agreement being of the year 1984, the amendment of the year 1989 would not apply. The argument on the matter of form as raised on behalf of the petitioner does not relate to substance of the matter; and the impugned order does not call for interference on such grounds.

So far the merits of the case are concerned, this Court is clearly of opinion that the Trial Court has the jurisdiction to rule on admissibility of the document but then, the question of admissibility ought to have been raised at the time when the document was produced in evidence. It remains trite that the objection regarding admissibility cannot be raised by a party after the document has been exhibited without any objection at the time of exhibition. The decision in Naladhar Mahapatra's case (supra) as referred by the learned counsel for the petitioner itself refers to the decision of the Hon'ble Supreme Court in the case of P.C.Purushothama Reddiar: AIR 1972 SC 608 that it is not open for a party to object to the admissibility of the document which has been marked exhibit without any objection by such party. The other observations as made in Naladhar Mahapatra's case (supra) cannot be read as laying down

any principle contrary to the principles laid down by the Hon'ble Supreme Court. The decisions in Kashinath Bhaskar Datar, Mt.Haliman and Dhobani Sahu (supra) had been of the cases where the documents in question were purporting to create or extinguish interest in the immoveable property. In the present case, the document in question is said to be an agreement and that by itself is not said to be creating or extinguishing the rights in immoveable property.

In any case, it is but apparent that the document had long back been exhibited in evidence. In fact, after it was exhibited, the matter was decided by the Trial Court. The matter is now being considered by the Trial Court after remand but then, even in the remand order, the learned Appellate Court, despite making other observations, has only permitted taking of additional evidence. When in the existing evidence, the document had already been exhibited, merely because the matter had been remanded and issue on admissibility had been framed later, the existing evidence cannot be considered to have wiped out. In fact, such an objection was required to be raised by the petitioner at the very point of time when the document was being exhibited. Merely because such objection was suggested cursorily in the written statement, the petitioner-defendant could not have been acceded the liberty to raise objection on admissibility in the second round of litigation after remand though having not raised at the relevant time. Even on merits, as noticed, the objection remains baseless.

Viewed in its totality, the impugned order neither suffers from any jurisdictional error nor leads to failure of justice. No case for interference in the writ jurisdiction is made out and this writ petition is required to be dismissed.

However, it is made clear that this Court has, otherwise, not pronounced on the merits of the case either way and no observation in this order or in the impugned order dated 27.09.2010 shall have bearing on the merits of the case that shall be considered and decided by the learned Trial Court in accordance with law.

With the observations foregoing, the petition stands dismissed.

(DINESH MAHESHWARI), J.

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