

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

JAI PUR BENCH, JAI PUR

ORDER

S.B. Civil Writ Petition No.12075/2010

Prembai Versus Khurshid Bano & Ors.

Date of Order :: 20th December, 2013HON'BLE MR. JUSTICE VEERENDR SINGH SIR RADHANA

Mr.Sanjay Mehrishi for the petitioner.

Mr.Salim Khan on behalf of Mr. Tanveer Ahmed for the respondents.

REPORTABLE:

* * *

BY THIS COURT:

The petitioner/defendant (for short 'the petitioner'), in the instant writ application, has projected a challenge to the order dated 6th August, 2010 passed by the learned Trial Court declining her application under Order 8 Rule 1(3) read with Section 151 of the Code of Civil Procedure (for short 'CPC').

2. Briefly, the essential material facts necessary for appreciation of the controversy raised are: that on 22nd February, 2010, the petitioner filed an application under Order 8 Rule 1(3) read with Section 151

CPC, for placing on record the sale deed dated 7th March, 2005, executed by one Rafiq Bhai (predecessor-in-title of plaintiff-non-petitioner number 1 and 2), after closing of the evidence of the respondent/plaintiff (for short 'the respondent') on 28th August, 2009.

The matter was posted for evidence of the petitioner on 18th September, 2009. The respondents/plaintiffs resisted the application stating that the document which is sought to be brought on record, is the sale deed, which was neither executed on sufficient stamp duty nor the same was registered and therefore, the same is inadmissible in

evidence. The learned Trial Court dismissed the said application vide impugned order dated 6th August, 2010.

3. The learned counsel for the petitioner stressed, referring to the proviso to Section 49 of the Registration Act, 1908, that the legislature being conscious of the fact of the provisions contained under Section 33(2) and 35 of the Stamp Act, 1899 (hereinafter referred to as 'the Act of 1899', for short), which provides that no instrument chargeable with duty shall be admissible in evidence for any party; still has enacted Section 49 proviso with an overriding provision and therefore, even an unregistered document may be received in evidence for any collateral transaction and as such, provisions of Section 33 and 35 of the Stamp Act, 1899, did not lay any bar in receiving a document unstamped as evidence for collateral transaction. The learned counsel further submitted that even if, Section 35 of the Act of 1899 created a bar, still in view of Section 49 proviso of Registration Act, 1908, the statutory authorities are obliged by virtue of Section 39 of the Stamp Act of 1899, before whom such an instrument, chargeable with duty is produced and is not duly stamped; to impound the same and therefore, the learned Court below ought to have passed an order impounding the document and should have directed the petitioner to deposit the deficiency in stamp duty as per mandate of Section 38 of the Stamp Act of 1899 and ought to have admitted the document in admission for collateral purpose.

4. Per contra, the learned counsel for the respondents supporting the impugned order of the learned Trial Court, urged that keeping in view the text of Section 35 of the Stamp Act of 1899, the parliament has cautiously used the words "for any purpose whatsoever". Therefore, the document sought to be admitted in evidence or the

extent thereof is not relevant. The learned counsel to reinforce his submission placed reliance on the opinion of the Hon'ble Supreme Court in case of *Avinash Kumar Chauhan Versus Vijay Krishna Mishra* : AIR 2008 SC 1489.

5. I have heard the learned counsel for the parties and with their assistance perused the material available on record.

6. In the instant case at hand, it is an admitted fact that the respondents/plaintiffs have filed a suit for eviction and recovery of arrears of the rent against the petitioner/defendant. The application under Order 8 Rule 1(3) read with Section 151 CPC for bringing on record the sale deed dated 7th March, 2005 executed by Rafiq Bhai (predecessor-in-title of plaintiff-non-petitioner number 1 and 2). Thus, it is apparent on the face of record that the unregistered sale deed was an instrument, which required payment of stamp duty and admittedly required stamp duty was not paid. In such circumstances, the Court below was required to pass an order in terms of Section 35 of the Stamp Act of 1899. The learned counsel for the petitioner, therefore, argued that the unregistered sale deed was sought to be put in evidence not for the purpose of enforcement of contract but only for collateral purpose. At this juncture, it will be relevant to consider the text of Stamp Act, 1899, enacted to consolidate the law relating to the stamp duty. Under Section 2(10) of the Act of 1899, "conveyance" has been defined to mean:-

““conveyance” includes a conveyance on sale and every instrument by which property, whether moveable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I ;”

"Receipt" has been defined in Section 2(23) of the Act to mean:

"receipt" includes any note, memorandum or writing-

(a) whereby any money, or any bill of exchange, cheque or promissory note is acknowledged to have been received, or

(b) whereby any other moveable property is acknowledged to have been received in satisfaction of a debt, or

(c) whereby any debt or demand, or any part of a debt or demand, is acknowledged to have been satisfied or discharged, or

(d) which signifies or imports any such acknowledgement ;

and whether the same is or is not signed with the name of any person.

"Stamp" has been defined in Section 2(26) to mean:

"Stamp" means any mark, seal or endorsement by any agency or person duly authorised by the State Government, and includes an adhesive or impressed stamp, for the purposes of duty chargeable under this Act.

10. Chapter II of the Act provides for stamp-duties.

Section 3, which is the charging Section reads as under:

3. Instruments chargeable with duty. - Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor, respectively, that is to say-

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;

(b) every bill of exchange payable otherwise than on demand or promissory note drawn or made out of India on or after that day and accepted or paid, or resented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in India; and

(c) every instrument (other than a bill of exchange or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in 8 [India] and is received in India.

Provided that no duty shall be chargeable in respect of-

(1) any instrument executed by, or on behalf of, or in favour of, the Government incases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer or other disposition, either absolutely or byway of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act 1894, or under Act 19 of 1838, or the Indian Registration of Ships Act, 1841, as amended by subsequent Acts.

(3) any instrument executed ,by, or , on behalf of, or, in favour of, the Developer , or Unit or in connection with the carrying out of purposes of the Special Economic Zone,

Explanation- For the purposes of this clause, the expressions "Developer", "Special Economic Zone" and "Unit" shall have meanings respectively assigned to them in clause(g), (za) and (zc) of Section 2 of the Special Economic Zones Act, 2005."

The other provisions contained in the said chapter deal with the mode and manner of payment etc.

Chapter III of the Act provides for adjudication with regard to proper stamps; whereas Chapter IV deals with instruments not duly stamped.

Section 33 casts a duty upon every person who has authority to receive evidence and every person incharge of a public office before whom the instrument is produced, if

it appears to him that the same is not duly stamped, to impound the same. Sub-section (2) of Section 33 of the Act lays down the procedure for undertaking the process of impounding. Section 35 provides that an instrument shall be inadmissible in evidence if the same is not duly stamped in the following terms:

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 shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an 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 any proceeding in a Criminal Court, other than a proceeding under Chapter

XII or Chapter XXXVI of the Code of Criminal Procedure 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."

7. A bare perusal of Section 35 of the Act of 1899 would reveal that the Parliament has used words "for any purpose whatsoever". Therefore, the purpose for which the document is sought to be admitted in evidence would not be a relevant factor. The execution of a deed of conveyance in respect of the premises for which suit has been instituted for eviction and recovery of arrears of rent, indisputably, is an instrument executed and by reason of such an instrument not only the entire amount of consideration was paid, but possession of the property was also transferred and therefore, the submissions made by the learned counsel referring to the judgment in the case of *Bondar Singh v. Nihal Singh* : (2003) 4 SCC 161, are not attracted for the reason that in the case of Bondar Singh (supra), the Hon'ble Supreme Court only dealt with the interpretation of the provisions of the Registration Act, 1908 and was not concerned with the provisions of the Stamp Act of 1899. In the instant case at hand, on account of statutory interdiction, no transfer at all is permissible in the light of the law delivered by the Hon'ble Supreme Court in the case of *Pandey Oraon v. Ram Chander Sahu* : 1991 Supp (2) SCC 77 and *Amrendra Pratap Singh v. Tej Bahadur Prajapati & Ors.* : (2004) 10 SCC 65.

8. The Registration Act, 1908 makes a provision for such a

contingency in terms of proviso to Section 49, which read thus:-

“49. Effect of non-registration of documents required to be registered.-

No document required by Section 17 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) or as evidence of any collateral transaction not required to be effected by registered instrument.”

9. A bare reading of the provisions of Section 35 of the Act of 1899, rules out applicability of such a provision for the reason that it is provided in unambiguous terms that the document of this nature, shall not be admitted for any purpose whatsoever. This view is reinforced in view of decision by the Privy Council in the case of *Ram Tattan v. Parmanand* : AIR 1946 PC 51.

10. In view of the facts and law declared by the Hon'ble Supreme Court, it can safely be concluded that the bar against the admissibility of an instrument, which is chargeable with stamp duty, and is not stamped, is of course absolute whatever be the nature of purpose, be it for main or collateral purpose, unless the requirements of proviso (a) to Section 35 of the Act, 1899, are complied with. Therefore, the

natural consequence is that if the requirement of proviso (a) of Section 35 of the Act of 1899, are satisfied, then the document which is chargeable with duty, but not stamped, can be received in evidence.

11. I have noticed herein above that Section 33 of the Act of 1899 casts a duty upon every person who has authority to receive evidence and every person incharge of a public office before whom the instrument is produced, if it appears to him that the same is not duly stamped, to impound the same. Further, sub-section (2) of Section 33 of the Act provides the procedure for undertaking the process of impounding. The Court being an authority to receive a document in evidence is, therefore, in my opinion, required to give effect to the mandate of Section 33 read with Section 35 of the Act of 1899. Since the unregistered sale deed, which is sought to be produced in evidence, was an instrument which required payment of stamp duty applicable to a deed of conveyance which admittedly not paid. The Court below, therefore, ought to have passed an order in terms of Section 35 of the Act of 1899.

12. For the reasons and discussions herein above, the writ application is partly allowed. The impugned order dated 6th August, 2010 is set aside. Ordered accordingly.

13. In view of the final adjudication of the writ application, the stay application stands closed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(VEERENDR SINGH SIRADHANA),J.

Sunil/ PA

All corrections made in the judgment/ order have been incorporated in the judgment/ order being emailed.

(Sunil Solanki)
P.A.