

Abdu Vs. Gopalakrishnan

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Court : Kerala

Decided On : Jan-17-2006

Reported in : 2006(1)KLT701

Judge : R. Basant, J.

Acts : [Kerala Stamp Act, 1959](#) - Sections 35, 41, 42, 59 and 59(2); [Constitution of India](#) - Article 227; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 34 - Order 13, Rule 4

Appeal No. : W.P.(C) No. 24173 of 2005

Appellant : Abdu

Respondent : Gopalakrishnan

Advocate for Def. : S. Nirmal, Adv.

Advocate for Pet/Ap. : T. Resmi Damodaran, Adv.

Disposition : Appeal dismissed

Judgement :

R. Basant, J.

1. Petitioner is the sole defendant in a suit for money on the basis of Ext.P1 document. The petitioner denies execution of Ext.P1. It is inter alia contended that

Ext.P1 is not an agreement as described in the document and is a bond. The petitioner contended that the bond is not properly stamped and is hence not admissible unless the requisite stamp duty and penalty are paid. On the contentions raised inter alia an issue was raised as to whether Ext.P1 document is a bond or agreement.

2. The matter was listed for trial. There was no specific insistence that the issue as to whether Ext.P1 is a bond or agreement must be decided as a preliminary issue. Parties went to trial. Proof affidavit was filed by the plaintiff. The court below, considered the objection that Ext.P1 must be reckoned as a bond and not an agreement and should not be admitted in evidence without payment of the requisite stamp duty/ penalty. Vide Ext.P3 order passed by the learned Munsiff in the course of recording of evidence of the plaintiff, the contention that Ext.P1 is a bond and not an agreement was considered. The question was answered against the petitioner and in favour of the respondent/plaintiff. The relevant finding is available in Ext.P3 (order passed in the course of recording the chief examination).

3. Petitioner has approached this Court aggrieved by Ext.P3 order. The learned Counsel for the petitioner raises various contentions. First of all, it is contended that the issue as to whether the document in question is a bond or an agreement should have been decided as a preliminary issue and in not deciding the same as a preliminary issue, there is failure/miscarriage of justice.

4. My learned brother while admitting the petition, wanted it to be clarified whether there was any insistence that the said issue must be decided as a preliminary issue. Nothing has been produced before this Court to substantiate the contention that there was earlier insistence that the issue must be decided as a preliminary issue. The issue was raised but it was pressed for consideration only when the chief affidavit was received and the document was sought to be marked. Prior to the commencement of the trial there was no insistence on a decision on that question. In these, circumstances, the objection raised that the procedure followed is incorrect cannot be upheld inasmuch as I find no evidence of any earlier insistence that the issue must be decided as a preliminary issue.

5. I do not want to encumber the records with any finding on the question whether Ext.P1 is a bond or agreement. The learned Munsiff appears to have taken the view that Ext.P1 only acknowledges a prior loan transaction and makes stipulations as to the manner in which the liability is to be discharged. It is in this view of the matter that the learned Munsiff held that Ext.P1 is an agreement and not a bond. I need only mention that I do not find any such vice vitiating the said finding which would justify the invocation of the jurisdiction of this Court under Article 227 of the [Constitution of India](#).

6. It is contended that the petitioner will not get a later opportunity to advance this contention. Reliance is placed in the decision reported in Phiroskhan v. Jabbar : 2006(1)KLT38 . The play of Section 35 of the Stamp Act was considered and it was held that a Writ Petition under Article 227 of the [Constitution of India](#) would lie. But the facts scenario appears to be totally different. In that case, the document had not been admitted and marked and the challenge was against the finding in a preliminary issue regarding the nature of the document. In the instant case, Ext.P3 shows and there is no semblance of a doubt on that aspect, that the document had been admitted in evidence under Order XIII Rule 4. The document was marked as Ext.A1 after over ruling the objections and after receiving the chief affidavit.

7. One cannot be unmindful of the scheme of Section 35 and 59 of the Kerala Stamp Act which I extract below:-

Section 35:-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 59, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.

Section 59: - Revision of certain decision of Courts regarding the sufficiency of stamps: --

(1) When any court in the exercise of its Civil or Revenue jurisdiction or any Criminal Court in any proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898, makes any order admitting any instrument in

evidence as duly stamped or as not requiring a stamp, or upon payment of duty, and a penalty under Section 34, the Court to which appeals lie from, or references are made by, such first mentioned Court may, of its own motion or on the application of the Collector, take such order in to consideration.

(2) If such court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty under Section 34, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced.

(3) When any declaration has been recorded under Sub-section (2), the court regarding the same shall send a copy thereof to the Collector and, where the instrument to which it relates has been impounded or is otherwise in the possession of such court, shall also send him such instrument.

(4) The Collector may thereupon, notwithstanding anything contained in the order admitting such instrument in evidence, or in any certificate granted under Section 41, or in Section 42 prosecute any person for any offence against the stamp law which the Collector considers him to have committed in respect of such instrument.

Provided that -

(a) no such prosecution shall be instituted where the amount (including duty and penalty) which, according to the determination of such court, was payable in respect of the instrument under Section 34, is paid to the Collector, unless he thinks that the offence was committed with an intention of evading payment of the proper duty;

(b) except for the purpose of such prosecution, no declaration made under this section shall affect the validity of any order admitting any instrument in evidence, or of any certificate granted under Section 41.

Section 35 of the Kerala Stamp Act declares that the finding and the admission of the document on the basis of that finding cannot be the subject matter of challenge at any later stage of the same proceedings. But Section 59 gives power to the District Collector to challenge and discretion to the court concerned to reconsider and take appropriate action if the finding is later found to be erroneous. Even though, the petitioner does not appear to have a right under Section 59 of the Kerala Stamp Act, the petitioner shall be at liberty at later stages of the proceedings to bring to the notice of the Appellate Court the need to take action under Section 59 of the Kerala Stamp Act. In this view of the matter, I am not persuaded to agree that failure and miscarriage of justice would result by the impugned order. The Statute appears to have realistically accepted that the question of Stamp duty is one between the State and the individual and not essentially a dispute inter parties. That is why only one opportunity, prior to admission of the document is given to the party to object to a document if it is allegedly not stamped adequately. Later opportunity to challenge that is conceded only to the District Collector/State while retaining the discretion of the Appellate Court to take appropriate action.

9. It follows from the above discussions that this Writ Petition does not deserve to be admitted. I make it clear once again that I have not decided to express any final opinion on any disputed question of fact. I have only chosen to hold that this is not a fit case where the powers under Article 227 of the [Constitution of India](#) deserve to be invoked at this stage of the proceeding against the impugned order Ext.P3.

10. This Writ Petition is accordingly dismissed.

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