Dinakaran Vs. Venkaesan,

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Court : Chennai

Decided On : Jul-17-2007

Reported in : 2007(5)CTC77; (2007)6MLJ825

Judge : S. Ashok Kumar, J.

Acts : Stamp Act, 1899 - Sections 35, 38 and 38(1); Indian Registration Act - Sections 17 and 49; Transfer of Property Act

Appeal No. : CRP(PD) No. 273 of 2005

Appellant : Dinakaran

Respondent : Venkaesan, ;chandrasekaran, ; Mohan and Banumathi

Advocate for Def. : S. Umapathy, Adv.

Advocate for Pet/Ap. : V. Raghavachari, Adv.

Judgement :
ORDER

S. Ashok Kumar, J.

1. The above Civil Revision Petition is filed against the fair and decretal order dated 4.1.2005 made in I.A.No.258 of 2004 in O.S.No:152 of 2000 by the learned Subordinate Judge, Arni, dismissing the I.A., filed by the plaintiff under Order 13

Rule 3 CPC to reject the Koorchit dated 19.5.1997, sought to be marked by the respondents/defendants on the ground that it is an unregistered document.

2. The revision petitioner/plaintiff filed the suit for partition of the suit schedule properties into 4 equal shares and to allot one share to him. The respondents are contesting the suit. It is the case of the respondents that their father died in the year 1994, after his death they entered into an understanding about the sharing of the joint family properties on 7.6.1996, thereafter to give effect to the understanding reached, they entered into a family arrangement (Kootchit) on 19.5.1997 with regard to the suit schedule properties. In continuation of understanding reached on 7.6.1996, they reduced he same into writing about the sharing of properties with its descriptions and they are in enjoyment of their respective shares. It is the case of the respondents that the plaintiff being the eldest son is keeping the original koorchit and the plaintiff has filed the suit falsely after 4 years of the said family arrangement.

3. During trial, the defendants marked Photostat copy of the said koorchit dated 19.6.199 which is unregistered. The plaintiff filed the I.A., to reject the said document. The respondents resisted the said I.A., stating that the very existence of the said Koorchit has been admitted by the plaintiff in his evidence. The learned Subordinate Judge, Arni on a consideration of the pleadings and submissions of the respective counsels, dismissed the said application holding that the document can be marked as an exhibit recording the objection raised by the plaintiff and also to frame an additional issue with regard to the admissibility of the said document. Aggrieved of the same, the present revision is filed.

4. Learned Counsel for the revision petitioner/plaintiff contended that since right of an immovable property has been transferred by the Koorchit in question, the same requires stamp duty and registration. Further the said Koorchit is sought to be introduced after the examination of the parties are over and at the time when the matter is posted for arguments. It is also contended that the admissibility of the document should be tested at the time of production of the document under Section 35 of the Stamp Act and not at a later stage.

5. On the contrary, it is contended by the learned Counsel for the respondent that the family arrangement is a matter of fact and evidence on record that the plaintiff and the defendants divided the property and are in possession and enjoyment of their respective shares for all these years and in act the petitioner has sold some trees that fell in his share and also gave no objection for transfer of the patta and Electricity connection to be obtained by the third defendant.

6. It is also contended by the learned Counsel for the respondents that oral partition and subsequent family arrangements reduced into writing are admissible and they have the same effect of a registered deed. Learned Counsel also relied on the judgment of the Apex Court in : AIR 2004 SC4130 to the effect that after partition deed when the parties have independently dealt with the properties by effecting sales and effected mutation and also paid assessment separately, the partition deed though unregistered does not require registration and the admissibility of the document can be looked into only at the time of trial. The decision of this Court reported in : AIR2004 Mad444 is also relied on for the proposition of law that the question regarding the time at which documents were produced are to be tested in trial after marking the same.

7. In In 2003 (3) MLJ 45 (Balakrishnan and Anr. v. Chandrasekharan), this Court held that it is settled law that if the family arrangement is reduced to writing and it purports to create, declare, assign, limit or extinguish any right, title or interest of any immovable property, it must be properly stamped and duly registered as per Indian Stamps Act and Indian Registration Act. But in the said decision it has been observed that if the family arrangement is stamped, but not registered, it can be looked into for collateral purposes.

8. In 2006 (1) TLNJ 595 (Lingappa Gounder v. Palanisamy and Ors.) this Court again held that interest on immovable properties for more than Rs.100/= are transferable only through a registered document as per Section 17 of the Indian Registration Act.

9. In : 2005(2)CTC385 (Amudha and Ors. v. K.Jeyaraman and Anr.) this Court held that even the suit property claimed to be purchased out of ancestral nucleus as evidenced by such unregistered document cannot be received in evidence and

the defect of non registration cannot be cured by paying penalty.

10. In 2006 (2) LW 437 (Pyarijan v. Puttapa and Anr.) also this Court held that when the document is inadmissible in evidence it cannot be looked into for any purpose and under Section 49 of the Registration Act, no document required by Section 17 or any of the provisions of the Transfer of Property Act to be registered shall be received as evidence of any transaction affecting immovable property, and the same cannot be used in any legal proceedings to bring out indirect effect which it would have if registered. This court further held that documents which are inadmissible for want of registration may at times be admissible for collateral purpose. A collateral purpose is a purpose other than creating, declaring, assigning, limiting or extinguishing a right of immovable property and in this case the purpose of document is for advancement of loan and at the same time creating an interest in the immovable property to enjoy the usufructs for a period of three years, the document being unregistered is inadmissible in evidence of the transaction, affecting the immovable property.

11. In 2005 (1) LW 343 (DB) R.Deivanai Ammal (died) and Anr. v. G.Meenakshi Ammal and Ors. , a Division Bench of this Court reiterated that if document of family arrangement is reduced to writing, it purports to create, declare/extinguish right, title or interest of the properties and in such circumstances it must be properly stamped and duly registered as per the Stamp Act and Registration Act.

12. In 2004 (I) LW. 706, Bondar Singh v. Nihal Singh wherein Their Lordships have held that 'Under the law, a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes.' The learned Counsel also relied on the Division Bench of this Court reported in : (2004)3MLJ362 (Venugopal @ Alagarsamy and Ors. v. Bajanai Alagarsamy and Anr.) wherein this Court held that 'though unregistered documents are inadmissible in evidence, they may be considered for collateral purpose'.

13. In : AIR1987 Pat191 (FB) Amar Singh Yadav v. Shanthi Devi a Full Bench of the Patna High Court held that where there is a direct conflict between two

decisions of the Supreme Court by co-equal Benches, the High Court must follow the judgment which states the law more elaborately and accurately and the question whether the decision is earlier or later, is not the criteria.

14. Therefore, when there is a conflicting judgments by the two co-equal Benches, the judgment of the larger bench which directly deals with in detail about the controversy regarding the stamp Act has to be preferred than the other judgments which does not discuss about such controversy.

15. However, in 2005 (4) MLJ 337 (Tmt.Indirani v. Seetharaman), which is elaborate on the point of admissibly, a learned Single Judge of this held as follows:

14. In Bondar Singh and Ors. v. Nihal Singh and Ors. (2004) I L.W. 706 the Apex Court has observed:

Under the law, a sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, legal position is clear law that a document like the sale deed in the present case, even though not admissible in evidence, can be looked into for collateral purposes. 15. This observation guided the learned trial judge to admit the documents, in question, in evidence, though they are unstamped. In the case involved in the above decision also, the documents ought to be relied on was an unregistered and unstamped sale deed. But, the same was admitted, in evidence, for collateral purposes. Though such an observation has been made, the Hon'ble Apex Court has not considered the effect of Section 35 of the Stamp Act. If Section 35 of the Stamp Act was considered and the wording stated therein, vi., 'for any purpose', is ignored, then, if it is said, it can be taken as the law declared by the Apex Court, which is binding upon the Courts below throughout the breadth and length of this country. As seen from the above decision, nowhere it is discussed about the effect of Section 35 of the Stamp Act, though in the head note, the publishers have stated, Stamp Act Sections 35, 32, 36 Registration Act, 49, etc., In the absence of any discussion about the payment of stamp duty and penalty, mere observation that the document could be looked into, for collateral purposes, alone, is not sufficient to allow all the documents un stamped, which required stamp duty, should be admitted in evidence, thereby offending the statute viz., in this case Section 35 of the Stamp Act. In this context, it is useful to refer to the decision of the Apex court in Bipin Shantilal Panchal v. State of Gujarat and Anr. (2001) 3 SCC 1 and Chilakuri Gangulappa v. Revenue Divisional Officer, Madanapalle and Anr. (2001) 2 MLJ 33(SC).

16. In the first decision, the objection raised regarding the admissibility of a document came before the Apex Court, for consideration. The Apex Court in a way, criticised the archaic practice and prescribed guidelines as to how the documents should be admitted in evidence, despite the objection raised by the other side. It is observed that,

Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence, the trial court can make a note of such objection and mark the objected documents tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable, the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document, the Court has to decide the objection before proceeding further. For all other objections, the procedure suggested above can be followed. 17. The last portion of the above observation makes it clear that if the objection relates to deficiency of stamp duty of a document, the court has to decide the objection before proceeding further.' Therefore, in this case, the trial court should have considered, whether the documents require stamp duty and penalty or not, before allowing the documents to be admitted, in evidence, for collateral purposes, which was not followed. Therefore, I am unable to affix my seal of approval, as such, to the order passed by the trial Court, which requires modification.

18. In the second case viz., Chilakuri Gangulappa v. Revenue Divisional officer, Madanpalle and Anr. 2000 2 MLJ 33, the Apex Court considering Section 38 of the Indian Stamp Act, 1899, and the fact under what circumstances, as insufficiently stamped document could be admitted in evidence, has observed that it is the duty of the Court, at the first instance, that if the Court finds that the instrument is

insufficiently stamped, it should call upon the party, as to whether he would remit the deficient portion of the stamp duty together with a penalty, amounting to ten times the deficiency, and in the case if the party agrees to remit the said amount, the Court has to proceed with trial, after admitting the document in evidence. Then, it contemplates what are the further proceedings to be initiated under Section 38 of the Stamp Act etc. In the case involved in the above decision also, an insufficiently stamped document came to the consideration of the Apex Court. If the Apex Court was of the view that un-stamped or unregistered documents are, automatically, to be admitted in evidence, without reference to Section 35 of the Indian Stamp At, then the Apex Court would not have observed that the Court should call upon the party to remit the deficient portion of the stamp duty together with a penalty, amounting to ten times the deficient or even the lesser penalty. Since the Apex Court was conscious about Section 35 of the Stamp Act, while considering Section 38, it is observed on the basis of Section 38(1) of the Stamp Act:

It is clear from the first sub section extracted above that the court has a power to admit the document in evidence if the party producing the same would pay the stamp duty together with a penalty amounting to ten times the deficiency of the stamp duty. When the court chooses to admit the document on compliance of such condition, the court need forward only a copy of the document to the Collector, together with the amount collected from the party for taking adjudicatory steps.

Thus, showing, if the party fails to pay the stamp duty and penalty, the document is not to be admitted in evidence, in view of the embargo contemplated under Section 35 of the tamp Act. This ruling also, supports Section 35 of the Stamp Act, that no document shall be admitted in evidence for any purpose, unless it is properly stamped, and in case, if it is not properly stamped, without payment of stamp duty and penalty and that is the reason, we find the words in Section 38(1) of the Stamp Act that 'when the person impounding an instrument in evidence, upon payment of a penalty, as provided by Section 35 or of duty as provided by Section 37...'thereby confirming, without payment of stamp duty and penalty, no document shall be admitted in evidence.

xx xx xx xx xx20. There cannot be any dispute, as long as Section 35 of the Stamp Act is available in the Statute, that the same is to be applied for all the instruments, which require stamp duty. This being the position, unless a finding is given as observed by the three Judges Bench of the Apex Court, in Bipin Shantilal Panchal v. State of Gujarat (2001) 3 SCC 1, regarding the stamp duty and penalty, the document cannot be admitted in evidence, as if it can be looked into for collateral purpose. No doubt, it is true, a document, which is unregistered or unstamped can be looked into for collateral purpose, provided, provisos to Section 35 of the Stamp Act are complied with, and not otherwise. The above position of law was not considered properly by the trial court and therefore, the order of the trial Court requires modification, in my considered opinion, in view of the admitted position that the documents in question, require stamp duty and penalty.

16. I am in agreement with the views expressed by my Learned Brother M.Thanickachalam,J., Though the judgment of the Supreme Court relied on by the revision petitioner in 2001 (1) CTC 112 (AC.Lakshmipathy and Anr. v. A.M.Chakrapani Reddiar and 6 Ors), still, the judgment of this Court in 2005 (4) MLJ 337 (Tmt.Indirani v. Seetharaman) relied on by the learned Counsel for the respondent, which is supported by several decisions of the Apex Court as relied on by the learned Single Judge in the said decision, has to be followed, because the point is not which is the earlier or later, but the point is which judgment discusses the point in issue directly involved in the particular case elaborately and accurately.

17. Therefore it is clear that no document shall be admitted in evidence if it is not properly stamped, and if already not stamped, then stamp duty should be paid with penalty as prescribed by the authority. As far as the present case is concerned, it is alleged that the plaintiff himself admitted the existence of the koorchit in his evidence. As rightly held by the trial court unless the document is marked, there will not be any opportunity for the plaintiff to oppose and cross examine the defendants on the execution of the said koorchit. In the absence of payment of the stamp duty with penalty, the trial court has committed an error in marking the document. Hence, the order of the trial court is liable to be modified.

18. In the result, this CRP is allowed in part and the order of the trial court is modified. The trial court is directed to ascertain the stamp duty and penalty payable upon the disputed document, then call upon the defendants who want to rely on the document, to pay the stamp duty and penalty, and then on payment of stamp duty and penalty, admit the document in evidence, whether it is for collateral purpose or otherwise, and admissibility of the same can be decided by framing necessary issue at the later stage while hearing the case as guided by the Apex Court in Bipin Shantilal Panchal v. State of Gujarat and Anr. (2001) 3 SCC 1. Consequently, connected MP is also dismissed. No costs.