

Smt. Sarbani Samanta Vs. Pratap Kumar Panja and Others

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Court : Kolkata

Decided On : Sep-07-2012

Judge : Prasenjit Mandal

Appeal No. : C.O. No. 2399 of 2011

Appellant : Smt. Sarbani Samanta

Respondent : Pratap Kumar Panja and Others

Judgement :

Challenge is to the Order No. 70 dated September 18, 2010 and the Order No.39 dated April 25, 2011 passed by the learned Civil Judge (Junior Division), Second Court, Burdwan in Title Suit No.104 of 2003.

The plaintiff/petitioner herein instituted a suit being Title Suit No.104 of 2003 against the opposite parties praying, inter alia, for declaration that the plaintiff/petitioner has 12.5 per cent shares in the partnership firm; that the reconstituted Deed dated January 16, 1998 of the partnership firm is void, illegal and not binding upon the plaintiff and also for other consequential reliefs.

The defendant No.1 entered an appearance in the said suit and filed a written statement denying all the material averments made in the plaint of the said suit.

The defendant No.3 is also contesting the said suit by filing a written statement denying the material allegations contained in the plaint.

The said suit was at the stage of recording evidence. The plaintiff/petitioner called for the copy of the partnership Deed dated April 1, 1996 which was filed by the defendant No.1 before the Income Tax Office at the time of submission of the Income Tax Return. As per order of the learned Trial Judge, the copy of the partnership Deed was produced and the petitioner wanted to mark the said document as 'Exhibit'; but by the impugned order, the learned Trial Judge rejected the prayer. As such, this application has been preferred.

Now, the question is whether the impugned order should be sustained.

Having heard the learned Counsel for the parties and on going through the materials-on-record, I find that prayer for marking the photocopy of the partnership Deed in question was rejected by the earlier order No.70 dated September 18, 2010 and against such orders, no revision was preferred. Subsequently, on November 20, 2010, the petitioner filed an application under Section 151 of the CPC for review of that order dated September 18, 2010 and that application was rejected by the order dated April 25, 2011.

So far as the merit of the application is concerned, I find that the original partnership Deed had been produced by the defendants and it had been marked as 'Exhibit' on behalf of the defendants. When the original Deed had been produced and marked as 'Exhibit' in the suit, it would serve the interests of both the parties with regard to the original Deed of partnership. It does not matter in whose favour the document had been marked 'Exhibit'. In the instant case, the document which the plaintiff/petitioner herein wanted to mark 'Exhibit' was nothing but a 'mere photocopy' as recorded by the learned Trial Judge in the order dated September 18, 2010 and it was submitted by the defendant No.1 to the Income Tax Office along with the Income Tax Return and so, it could not be any certified copy of the original Deed but a 'mere photocopy' of the Deed which was submitted by the defendant No.1 before the Income Tax Department. Such copy can never be marked 'Exhibit'. Moreover, it was not authenticated and certified by the persons having capacity to act in the said manner.

Mr. R.N. Mahato, learned Advocate appearing for the petitioner, has contended that the original Deed of partnership had been marked on behalf of the defendants

and the certified copy produced by the plaintiff should have been marked 'Exhibit' on behalf of the plaintiff and upon comparison, the matter in dispute could well be solved.

With due respect to Mr. Mahato, I am of the view that this is a total misconception about the procedure for marking a document as 'Exhibit'. Section 63 of the Indian Evidence Act lays down what documents/materials may be described as secondary evidence. The photocopy of a copy of the Deed called for by the plaintiff from the office of the Income Tax cannot be described as secondary evidence, at all, according to Section 63 of the Indian Evidence Act. Moreover, as per provisions of Section 64 of the Indian Evidence Act, the contents of a document must be proved by the primary evidence. The secondary evidence is permissible only in the circumstances as mentioned in Section 65 of the Indian Evidence Act. The plaintiff/petitioner herein has failed to satisfy any of the conditions laid down in Section 65 of the Act to give the secondary evidence. So, the secondary evidence is not permissible. Since the original document had already been marked 'Exhibit' in the suit, the 'mere photocopy' produced by the petitioner which does not ensure the accuracy of the original document, I hold, cannot be accepted as secondary evidence.

Mr. Mahato has referred to the decision of H. Siddiqui (Dead) By Lrs. v. A. Ramalingam reported in (2011) 4 Supreme Court Cases 240 particularly the Paragraph No.s 12, 13, 14, 15 and 16 and thus, he has submitted that the admissibility of a document or its contents may not necessarily lead to drawing any inference unless the contents thereof have some probative value. As such, he has submitted that the photocopy which has been certified by an Officer of the Income Tax Department should be marked 'Exhibit'. He has drawn my attention to the difference between the original Deed and the copy of the Deed particularly with reference to Paragraph No.13 of the so-called photocopy of the Deed and thus, he has submitted that in order to show the difference, the photocopy should have been marked as 'Exhibit'.

With due respect to Mr. Mahato, I hold that for the reasons discussed above, this photocopy which is not authenticated by the proper authority cannot be marked as

‘Exhibit’ at all. So, this decision will not be helpful to the petitioner.

Mr. Mahato has referred to the decision of Life Insurance Corporation of India and anr. v. Ram Pal Singh Bisen reported in (2010) 4 SCC 491 particularly the Paragraph No.21 and thus, he has submitted that Rule 2-A of Order 12 CPC deals with the situation where notice of document as contemplated in Order 12 Rule 2 of the CPC has been served but is not denied, then the same shall be deemed to have been admitted. Similarly, Rule 3-A of the aforesaid order grants power to the Court to admit any document in evidence, even if no notice has been served.

With due respect to Mr. Mahato, I am of the view that this decision does not govern the situation at all and so, this decision is not also applicable in the instant situation.

Mr. Mahato has lastly referred to the decision of M. Chandra v. M. Thangamuthu and anr. reported in (2010) 9 Supreme Court Cases 712 and thus, he has submitted that the secondary evidence must be authenticated by foundational evidence that the alleged copy is, in fact, a true copy of the original. Since in the instant case, an Officer of the Income Tax Department certified the copy of the partnership Deed as ‘certified to be true copy’, the document should have been accepted and marked ‘Exhibit’ by the learned Trial Judge.

With due respect to Mr. Mahato, I am also of the view that this decision is not applicable because the photocopy tendered by the plaintiff cannot be accepted as secondary evidence at all. Since the said document was not prepared from the original and compared with the same, there is a scope of manipulation.

Mr. Mahato, as a last resort, has submitted that the document tendered by the plaintiff could be marked as ‘Exhibit’ after objection on behalf of the plaintiff and then it should be taken as evidence. This submission, I am of the view, cannot also be accepted because the photocopy tendered by the plaintiff cannot be described, at all, a certified copy. Accordingly, the said document is not admissible at all as secondary evidence.

The learned Advocates for the opposite party no.s 1 and 3 have supported the impugned order.

Since the defendants had challenged the said photocopy about the truthfulness of the same and since the original had been marked 'Exhibit' on behalf of the defendants, the learned Trial Judge, I hold, has rightly observed that the plaintiff cannot be permitted to use the so-called photocopy as 'Exhibit' in the suit.

In that view of the matter, I am of the opinion that the learned Trial Judge has rightly rejected the prayer of the plaintiff for marking the said photocopy as 'Exhibit'. He has not committed any illegality and the material irregularity in passing the impugned orders.

So, there is no scope of interference with the impugned order.

The application is, therefore, dismissed.

Considering the circumstances, there will be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

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