

Prasad Matty Vs Krishnapada Mohdal

Court: Calcutta High Court

Date of Decision: July 1, 2011

Acts Referred: Constitution of India, 1950 " Article 227

Special Economic Zones Act, 2005 " Section 2

Stamp Act, 1899 " Section 2(10), 2(12), 2(14), 2(6), 3

Citation: (2011) 4 CHN 563

Hon'ble Judges: Dipankar Dana, J

Bench: Single Bench

Advocate: Sulekha Mitra, for the Appellant; Arup Banerjee, for the Respondent

Final Decision: Allowed

Judgement

Dipankar Dana, J.

The defendant in a money suit is the petitioner in this revisional application under Article 227 of the Constitution. He

seeks to question the legality and/or propriety of order dated March 1, 2011 passed by the learned Trial Judge whereby he declined to impound

an agreement for sale dated March 5, 2007 on the ground that the suit was not for enforcement of the agreement but for realization of money

advanced by the plaintiff to the defendant and, thus, proceeded to admit the same in evidence.

2. The plaint case is that the plaintiff and the defendant had entered into an agreement for sale of an immovable property measuring 06 cents for a

total consideration of Rs. 3,10,000/-. It is alleged in the plaint that the defendant had received Rs. 2,70,000/- as advance on March 5, 2007 and it

was agreed by and between the parties that the balance consideration of Rs. 40,000/- would be paid to the defendant within November 30, 2008,

where after the defendant would execute the sale deed within that date. It is further alleged that the plaintiff had requested the defendant number of

times to take and receive the balance price and to execute the sale deed but he did not pay any heed. This resulted in, a legal notice dated

November 14, 2008 being served upon the defendant through the plaintiff's advocate whereby the defendant was requested to be present at

Memari sub-registry office at the sheerest of the deed writer named therein for acceptance of the balance price and for execution of the sale deed.

It was further mentioned in the legal notice that if the defendant did not choose to execute the sale deed, the money accepted by him may be

refunded. Neither did the defendant remain present at Memari sub-registry office nor did he refund the money received by him, forcing the plaintiff

to institute the suit for recovery of Rs. 2,70,000/- together with interest thereon computed at 6 percent per annum w.e.f. March 5, 2007 to

December 15, 2008 totaling to Rs. 2,82,145/-.

3. The suit is being contested by the defendant. He filed a written statement denying and disputing the material contents of the plaint. It is the

specific claim of the defendant that there was no agreement between him and the plaintiff in respect of sale of the property in question in any

manner and no such agreement was ever executed by him. According to him, the story of transfer is concocted and the agreement dated March 5,

2007 is a manufactured document, having no force to be acted upon. It is his further claim that the sentence appearing at the fifth line of page 3 of

the so called agreement appears to have been written subsequently and, therefore, there is an interpolation. There being no meeting of minds

between the parties, question of sale of the property in question does not and cannot arise and he, accordingly, prayed for dismissal of the suit.

4. In due course of time, the suit reached the stage of recording evidence. On behalf of the plaintiff, the agreement for sale was tendered for being

marked as an exhibit. It was at this stage that the defendant's advocate objected and urged the trial Court to impound the said agreement since it

was not properly stamped in terms of the requirements of the Indian Stamp Act, 1899 (hereafter the Act) as applicable to the State of West

Bengal. As has been noticed above, the contention of the defendant was overruled and the agreement admitted in evidence.

5. Mrs. Mitra, learned Advocate appearing for the defendant/petitioner referred to the provisions contained in section 33 of the Act read with

section 2(14), 2(6), 2(10) as well as entry 23 of Schedule 1A thereof, as applicable to the State of West Bengal, to contend that it was the duty of

the learned Judge to impound the agreement and to have the duty payable thereon assessed and paid by the party seeking to rely on it as evidence

on his behalf. It was further contended that the agreement could not have been admitted in evidence even for collateral purpose. In support of her

submission, Mrs. Mitra relied on various decisions viz. Avinash Kumar Chauhan Vs. Vijay Krishna Mishra, Government of Andhra Pradesh and

Others Vs. Smt. P. Laxmi Devi, Shyamal Kumar Roy Vs. Sushil Kumar Agarwal, . and 2002(2) CLJ 449, Biswajit Chakraborty vs. Mira Sen

Ray and prayed for setting aside of the order impugned and for a direction on the Trial Court to impound the document and to proceed further in

accordance with law.

6. Mr. Banerjee, learned Advocate for the plaintiff/opposite party opposed the application. According to him, the suit being one for recovery of

consideration money along with interest and not for enforcement of the terms of the agreement regarding sale of the property in question, the

learned Judge was right in rejecting the contention of the defendant. Elaborating on this point, he contended that in a suit for recovery of money

where the plaintiff has founded his claim on an agreement for sale of immovable property that has not fructified into a transfer owing to the terms

thereof not being performed, the agreement which is not duly stamped is not chargeable with duty, and it could be received and looked into as

evidence of collateral facts. The clause in the agreement obliging the defendant to return the money advanced on his failure to execute the sale

deed, he contended, is independent of or divisible from the transaction to effect which duty is payable under the Act, for, the Act does not require

payment of stamp duty for recovering money advanced which is reduced in writing in an agreement for sale, and in support thereof reliance was

placed on the decision of the Supreme Court reported in K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd., . That apart, it was

further contended by him that existence of the agreement having been disputed by the defendant in the Trial Court by alleging that the same is a

manufactured document, the learned Judge was justified in not directing the agreement to be impounded. He, accordingly, prayed for dismissal of

the application.

7. I have heard learned Advocates for the parties and perused the decisions cited at the bar. The point that arises for determination is whether the

learned Judge was justified in overruling the contention raised by the defendant.

8. It would be profitable to read first the statutory provisions referred to me by Ms. Mitra as well as those not referred to by her which, in my

opinion, would have a bearing on the point involved herein.

9. Section 33 of the Act, conferring power, inter alia, on the Trial Court to impound a document, insofar as the same is applicable to the State of

West Bengal, provides as follows:

Section 33. Examination and impounding of instruments. -- 1(a) Every person having by law or consent of parties authority to receive evidence,

and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is

produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(b) Notwithstanding anything contained in section 31, but without prejudice to the provisions of clause (a) of this sub-section, the Collector, before

whom any instrument is brought u/s 31 for determining the duty with which the instrument is chargeable, shall, if it appears to him that such

instrument is not duly stamped, impound the same:

Provided that nothing contained in this clause shall be deemed to authorise the Collector to impound any instrument which has not been executed

but is brought to him u/s 31 for determining the duty with which the instrument is chargeable or any instrument which he is authorised to endorse u/s

32.

Section 35 of the Act provides that--

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 not being an instrument chargeable [with a duty not exceeding ten naye paise] only, or a bill of exchange or promissory

note, shall, subject to all just exceptions, 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 admissibility 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 (5 of 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.

Section 3 of the Act is the charging provision. With the amendments effected in the Act and as applicable to the State of West Bengal, section 3

reads as follows:

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 presented 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 India and

is received in India:

Provided that, except as otherwise expressly provided in this Act, and notwithstanding anything contained in clauses (a), (b) or (c) of this section

or in Schedule I, the amount indicated in Schedule LA to this Act shall, subject to the exemptions contained in that Schedule, be the duty

chargeable under this Act on the following instruments, mentioned in clauses (aa) and (bb) of this proviso, as the proper duty therefor

respectively,--

(aa) every instrument, mentioned in Schedule IA as chargeable with duty under that Schedule, which, not having been previously executed by any

person, is executed in West Bengal on or after the first day of April, 1922; and

(bb) every instrument mentioned in Schedule IA as chargeable with duty under that Schedule, which, not having been previously executed by any

person, is executed out of West Bengal on or after the first day of April, 1922, and relates to any property situated, or to any matter or thing done

or to be done, in West Bengal and is received in West Bengal: Provided also that no duty shall be chargeable in respect of-

(1) any instrument executed by, or on behalf of, or in favour of, the Government in cases 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 by way 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 (10 of 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.

10. For the purpose of understanding what "instrument" and "chargeable" referred to in sections 3 and 33 mean, one has to look at the definition

clause being section 2. Section 2(14) and (6) of the Act defines "instrument" and "chargeable" respectively as follows:

Instrument includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or

recorded.

Chargeable means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as

applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed

the instrument at different times, first executed.

Entry 23 of Schedule IA, as applicable to the State of West Bengal, lays down as follows:

Conveyance [as (a) six per centum of the

defined by section market value, when the

2(10)] not being a property is situated in the

Transfer charged or areas to which the

exempted under Kolkata Improvement

No.62. Exemptions (a)Act, 1911 (Ben. Act V of

Assignment of 1911), or the Howrah

copyright by entry Improvement Act, 1956

made under the (West Ben. Act XIV of

Copyright Act, 1957 1956), extends;

(14 of 1957), section

18.

(b) Co-partnership (b) six per centum of the

Deed, See Partnership market value, when the

(No.46), property is situated in the

areas of any Municipal

Corporation or
Municipality or a notified
area other than those
included in clause (a);
(c) five per centum of the
market value, when the
property is situated in the
areas other than those
included in clause (a) or
clause (b)].

Conveyance referred to in entry 23 above is defined in section 2(10) of the Act and with the amendments effected for the State of West Bengal

reads:

Conveyance includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and

which is not otherwise specifically provided for by Schedule I or by Schedule 1A, as the case may be.

Explanation.-- An instrument--

(i) whereby a co-owner of a property having defined share therein transfers such share or part thereof to another coowner of the property or

divides such property among co owners, or

(ii) whereby a partner transfers his share in the property of the partnership business to another partner or to other partners, whether separately or

together with transfer of other business assets on retirement or dissolution, or whereby he contributes to the capital of the partnership firm by

transferring his right and title to, or interest in, any property, is, for the purpose of this clause, an instrument by which property is transferred

The word "executed" in section 2(6) of the Act and the word "execution" with reference to instruments, in terms of section 2(12) of the Act, mean

"signed" and "signature" respectively. The word "document" used in section 2(14) of the Act is, however, not defined but looking into its definition

in the General Clauses Act, 1897, it appears that a document shall include any matter written, expressed or described upon any substance by

means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of

recording that matter.

11. Implicit in the word "chargeable", as defined in the Act, is an instrument that has been duly executed i.e. signed. An instrument executed within

the meaning of section 2(12) of the Act and containing effective words of disposition transferring rights in immovable property, thereby coming

within the fold of conveyance would, in my opinion, attract stamp duty. One of the essential elements of due execution of a document is that it must

be signed by the party or parties associated with it. But a document that is not signed is not chargeable with stamp-duty.

12. There can be no dispute that the agreement between the parties here qualifies to be a document purporting to create right in favour of one and

liability of another and, therefore, is an instrument within the meaning of section 2(14) of the Act and a conveyance as defined in section 2(10)

thereof, which is chargeable with duty in terms of entry 23 of Schedule 1A, as applicable to the State of West Bengal. But the question that begs

an answer at this stage, considering the plea of the defendant/petitioner that he did not execute any such agreement and that the agreement

manifestly suffers from interpolation and, therefore, not binding on him is, whether the agreement in dispute is an instrument that could be treated as

a conveyance and hence, chargeable with duty?

13. On consideration of the applicable law, I am unable to be *ad idem* with the learned Judge that the agreement did not call for impounding since

the suit is one for recovery of money. In exercising the power conferred by section 33 of the Act, any Court authorized to receive evidence must

give due regard to the provisions of section 35 of the Act providing, *inter alia*, that "no instrument chargeable with duty shall be admitted in

evidence for any purpose...." (emphasis supplied) and is not to be guided by the purpose of the, suit or by the nature of relief claimed therein.

Sections 33 and 35 do not empower the Court to make a distinction in respect of a suit for money and a suit for specific performance of contract

for deciding whether the unstamped agreement that is sought to be relied on by a party ought to be impounded or not. The language of the statute

is plain and clear and, therefore, the reason assigned by the learned Judge in the impugned order for not impounding the agreement in dispute is

unacceptable. Since section 35 of the Act is couched in negative terms and was not at all the subject matter of consideration in the decision in *K.B.*

Saha & Sons Pvt. Ltd. (*supra*), the principles laid down in paragraph 34 thereof seems to me to be inapplicable here. The contention of Mr.

Banerjee is totally misconceived having regard to the decision in *Avinash Kumar Chauhan* (*supra*) wherein Hon^{ble} Satyabrata Sinha, J. (as His

Lordship then was) ruled that "If all purposes for which the document is sought to be brought are excluded, we fail to see any reason as to how the

document would be admissible for collateral purposes".

14. This takes me to the other point that has been canvassed. The specific defence plea in the suit is that the agreement is not binding on the

defendant/ petitioner since he did not execute the same, and that it is interpolated. Therefore, the inference that follow? is that he was never

associated with the agreement. In that view of the matter, there exists no legally valid document answering the definition of "instrument" in section

2(14) of the Act and hence chargeable with duty. Based on this reasoning, Mr. Banerjee claims that the conclusion reached by the learned Judge

that the agreement is not required to be impounded can be sustained.

15. The worth of this contention may now be considered. The cause of action of the suit has to be traced in the plaint. It is the plaintiff's specific

claim that the agreement for sale was executed by the defendant. Having regard to the settled law that one who asserts must prove, it would be the

duty of the plaintiff, if he were to succeed, to prove that the defendant did execute the agreement and that there is no interpolation. Had the

defendant in the suit not filed his written statement and the suit allowed to proceed ex parte, even then in order to entitle him to a decree the plaintiff

would have to rely on the agreement and if he wished the Trial Court to admit it in evidence, the Trial Court would be obliged in terms of the

statutory mandate to impound the agreement. The situation, in my view, would not be different just because the defendant/ petitioner in his written

statement had disputed the very agreement. Consideration of defence plea, if set up, that the agreement is void is not germane and relevant for a

decision at the stage the Court is called upon to impound an unstamped agreement. The statutory provisions extracted above are clear. Conjoint

reading thereof leads one to the unmistakable conclusion that an unstamped agreement, if it is an instrument and otherwise chargeable with duty,

has to-be impounded irrespective of the plea raised by the defendant regarding its validity. Whether an instrument ought to be impounded or not in

exercise of power conferred by sections 33 and 35 of the Act has to be determined exclusively with reference to the claim of the party seeking to

rely on such instrument.

16. The Act has been enacted keeping in mind the revenue of the State. In case the Trial Court receives the disputed agreement in evidence

without impounding it and ultimately, after trial, believes the defence plea and is inclined to hold that the agreement was not duly executed by the

defendant and it is interpolated and, therefore, not binding on him, the plaintiff would escape the rigours of the Act and the liability to pay stamp-

duty. Should the plaintiff be allowed to escape such liability which the law imposes? To this question also, my answer would be in the negative. No

premium to dishonest acts can be given. The plaintiff, before the disputed agreement is admitted in evidence, must therefore pay stamp duty that

might be assessed in terms of the provisions of the Act. The Trial Court shall immediately impound the disputed agreement and thereafter proceed

in accordance with law.

17. For the reasons aforesaid, the impugned order stands set aside. The re visional application is allowed, without order for costs. Urgent

photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.