

W.P.No.2495/2010

(1)
HIGH COURT OF MADHYA PRADESH,
BENCH AT GWALIOR

JUSTICE ROHIT ARYA

W.P. No.2495/2010

M/S Abhiyank Builders Limited and another

Vs.

Daulat Singh and others

Whether approved for reporting : Yes

Shri H.D.Gupta, Senior Advocate with Shri Raju
Sharma, Advocate for the petitioner.

Shri Sanjeev Jain, Advocate for respondent no.1.

Ms. Sangeeta Pachauri, G.A. for respondent no.3-
State.

ORDER

15/03/2016

This petition, under Article 227 of the Constitution of India, by defendants is directed against the order dated 8/4/2010 passed by I ADJ, Gwalior in Civil Suit No.2A/09, dismissing defendants' application under S.35 of the Indian Stamp Act (*for short "the Act"*), as well as, amendment application under Order 6 Rule 17, CPC.

2. Facts necessary for disposal of this petition are to the following effect:

Respondent no.1/plaintiff has filed a suit for declaration, possession and injunction against petitioners and respondent nos. 2 and 3, alleging that the suit land situated at Village Thatipur, District Gwalior, was sold by him to the petitioners-

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defendants and respondent no.2 for a total sale consideration of Rs.1,27,000,00/- and agreement to sale was executed for the same amount i.e. Rs. 1,27,000,00/-, but, later on sale deed of the aforesaid land was executed on 30/3/2007 for Rs.38,30,000/- only and the same was registered on 27/7/2007. It was alleged that to avoid stamp duty, the sale deed was undervalued and, therefore, less stamp duty was paid by respondents-defendants. Besides, the complete consideration amount was also not paid as detailed in the plaint. With the aforesaid pleadings amongst others, declaration has been sought that the sale deed dated 30/3/2007 registered on 27/7/2007 be declared as null and void on the premise of non payment of complete amount of consideration as agreed to under the agreement to sale and playing fraud upon the respondent no.1-plaintiff.

3. Petitioners-defendants filed written statement and denied plaint allegations *inter alia* contending that there was no agreement to sale dated 3/8/2006 as alleged. The sale deed was executed on the actual amount of consideration agreed to and passed on to respondents-plaintiffs. Besides, respondents-plaintiffs in other judicial and revenue proceedings have admitted the factum of execution of sale deed on the amount of sale consideration shown therein. Thereafter, with their consent, the mutation order was passed and the suit land was mutated in the name of petitioners-defendants and the possession was delivered.

4. During pendency of the suit, respondents-plaintiffs filed an application under Ss.65 and 66 of the Evidence Act seeking leave of the Court to adduce secondary evidence (copy of alleged agreement to sale) on the premise that the original was with the petitioners-defendants. The trial Court allowed

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the application on 1/7/09. However, the said order was made subject matter of challenge by petitioners-defendants in W.P. No.3262/09. This Court, while disposing of the writ petition on 2/9/09, has concluded as under:-

“In our opinion, when a fact is asserted by one of the parties and it is denied by the other then the basic burden to prove the existence of the fact and of the document would be upon the party asserting the said existence. In the present case, after proving the existence, the plaintiff would still be required to prove the contents of the document. If permission is not granted to him then the plaintiff would suffer a brunt to his case and cause. The defendants, however, would be entitled to rebut the entire evidence and would also be entitled to lead evidence to show that the document upon which reliance is placed was never executed and the terms so alleged by the plaintiff were never settled.”

5. During the cross-examination of plaintiff, he was confronted with the alleged agreement to sale and questioned about the stamp duty paid on the said agreement. Plaintiff expressed his ignorance. At that stage, an application was filed by petitioners-defendants under S.35 of the Act questioning the admissibility of the said document on the premise that in the alleged agreement to sale, it is stated that sale consideration was Rs.1,27,000,00/- and, therefore, as per law 1% stamp duty amounting to Rs.1,27,000/- was required to be paid. That having not been done, plaintiff be directed to make good the default of stamp duty with penalty under the Act.

6. Plaintiff, in reply to the aforesaid application, contended that permission for leading secondary evidence had been granted by the Court and, thereafter, document was exhibited. Plaintiff was examined and cross-examined, therefore, the petitioners-defendants were estopped from raising such an objection as regards admissibility of the document in the teeth

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of provisions contained under S.36 of the Act.

7. Petitioners-defendants had also filed an application under Order 6 Rule 17, CPC for amendment of written statement for incorporating the pleadings as regards non payment of stamp duty and inadmissibility of copy of agreement to sale in evidence. Both the applications were taken up for consideration by the trial Court simultaneously and rejected by the impugned order.

8. Before advertng to the order impugned, it is considered apposite to review the legal position as regards admissibility of copy of an unstamped or insufficiently stamped "instrument" and contents thereof in the context of Ss.35 and 36 of the Act.

9. Stamp Act is a fiscal measure with an object to secure revenue for the State on certain classes of "Instruments". Provisions contained therein have been held to be stringent in nature with threefold object namely (a) to raise revenue by taxing instruments; (b) to penalize by rendering unduly stamped instruments to be inadmissible in evidence; (c) to provide for penalty against evasion of stamp duty by (i) impounding the instrument, (ii) imposing penalty under S.35 of the Act and (iii) by prosecuting the defaulter for evasion (Manavala Naicker vs. K.R. Gopal Krishnaiah, AIR 1969 AP 417) , referred to). S.2(14) of the Act defines "Instrument". "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded. S.3 of the Act provides a list of instruments which shall be chargeable with duty of the amount indicated in Schedule I of the Act. As applicable in State of Madhya Pradesh, Article 22 of Schedule I prescribes stamp duty payable on conveyance and Article 5 of Schedule I-

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A provides for (i) stamp duty payable on agreement to sale when possession of the property is delivered or is agreed to be delivered without executing the conveyance, to be the same duty as conveyance on the market value of property and (ii) agreement to sale when possession of the property is not given at the rate of 1% of the total consideration of the property set forth in the agreement or memorandum of agreement.

Chapter IV deals with **Instruments Not Duly Stamped**. S.33 provides for impounding of instrument by a person in-charge of a public office except an officer of police, if upon examination, the instrument placed before him is found to be chargeable with stamp duty, but the same is either unstamped or value of stamp is less than as prescribed for under the law. S.35 of the Act reads as under:-

“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)
- (c)
- (d)
- (e)”

Section 36 provides for Admission of instruments, where not to be questioned. The same reads as under:-

36. Admission of instruments, where not to be questioned - Where an instrument has been

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admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

10. A careful reading of S.35 suggests that – (i) it does not allow any instrument for evidence chargeable with duty, unless the same is duly stamped; (ii) such instruments shall not be acted upon, registered or authenticated by any person having by law or consent of parties authority to receive evidence or by any public officer, unless such instrument is duly stamped. Therefore, it does not allow any secondary evidence of such instrument for the reason that the original, admittedly chargeable with duty, was not stamped or was insufficiently stamped.

In view of proviso (a) to S.35 of the Act, if the original instrument is actually before the Court of law, the defect of deficiency in stamp, with penalty provision may be ordered to be cured for permission to rely upon the said document. Therefore, secondary evidence, either by way of oral evidence of the contents of unstamped instrument, or, copy of it governed by S.63 of the Evidence Act, would not fulfill the requirement of the proviso which enjoins upon the Authority to receive in evidence the original instrument itself and nothing else. Therefore, a party can only be allowed to rely upon a document which is an instrument within the meaning of S.2(14) of the Act for the purpose of S.35 and there is no scope for inclusion of copy of an instrument for the purposes of the Act. Hence, as S.35 deals with original instruments and not their copies, S.36 cannot be interpreted so as to allow secondary evidence of an instrument as the word "Instrument" used in S.36 has the same meaning as in S.35 for the reason that word "Instrument" has been defined in dictionary clause S.2(14) of the Act. Therefore, the exception carved out in S.36

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as against the rigor of S.35 is only in respect of such original "instruments" which are insufficiently and unduly stamped and admitted in evidence without objection at the initial stage of suit or proceedings and not otherwise. In other words, if the objection to admissibility of an "instrument" is based upon the same being insufficiently stamped or unstamped, party is required to object to reception of such instrument in evidence when it is first tendered, but, after the instrument is admitted, then at later stages, no objection of that nature can be raised. Applicability of S.36 does not extend to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped (*Jupudi Kesava Rao Vs. Pulavarthi Venkata Subbarao*, AIR 1971 SC 1070 and *Hariom Agrawal Vs. Prakash Chand Malviya*, AIR 2008 SC 166, referred to).

11. The trial Court referring to the order dated 10/7/09 passed by Division Bench of this Court, has held that permission to lead secondary evidence in relation to agreement to sale has been granted by this Court. Thereafter evidence on affidavit has been submitted by plaintiff and during cross-examination plaintiff has also been cross-examined in detail in relation to agreement to sale dated 3/8/06 and the same was marked as exhibit. No objection as regards admissibility of copy of agreement to sale was raised, therefore, in the light of provisions contained under S.36 of the Act, petitioners-defendants were not entitled to raise objection against admissibility of secondary evidence of agreement to sale. It has further been held that secondary evidence; copy of agreement to sale since does not fall within the definition of S.2(14) of the Act, hence objection of defendants as to its admissibility cannot be accepted. The trial Court has also consequently rejected the application for amendment filed by

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defendants under Order 6 Rule 17 for amendment in written statement in the context of aforesaid objection on the premise that the facts sought to be pleaded since were in the knowledge of defendants and the same were not incorporated while filing written statement, therefore, at this belated stage, amendment cannot be permitted in the light of proviso to Order 6 Rule 17, CPC.

12. The moot question that arises for consideration is as to whether petitioners-defendants are entitled to raise objection on the admissibility of secondary evidence of unstamped agreement to sale dated 3/8/06, placed on record *pursuant to* the order passed by Division Bench of this Court and also in view of the fact that plaintiff was cross-examined in the context of said agreement on the point of stamp duty and it was also marked as exhibit OR the petitioners-defendants are precluded from raising the said objection in view of S.36 of the Act?

13. True it is that the Division Bench has allowed the respondents-plaintiffs to prove the existence and contents of the agreement to sale dated 3/8/2006, but the aforesaid liberty is always subject to statutory provisions as contained under S.35 of the Act and the law laid down by the Apex Court in the case of Jupudi Kesava Rao (Supra), as clearly the observations/directions of the Division Bench are in the realm of Evidence Act. The Evidence Act, under various chapters, deals with matters as to how facts are to be proved and which facts need not be proved. Section 59 of the Evidence Act lays down that all facts except contents of documents can be proved by oral evidence. S.61 of the Evidence Act provides that contents of the documents can be proved either by primary evidence or secondary evidence. However, the Indian Evidence Act does not purport to deal with admissibility of

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documents in evidence which are required to be stamped under the provisions of the Indian Stamp Act. The document in question is copy of agreement to sale. The agreement to sale is an "Instrument" as defined under S.2(14) of the Act chargeable with stamp duty, as provided for under Article 5 of Schedule I-A of the Act. Therefore, the rigor of S.35 of the Act has full application to the document in question i.e. copy of the unstamped agreement to sale. Hence, the order of the Division Bench has to be understood subject to provisions of S.35 of the Act. As laid down by the Apex Court in Jupudi Kesava Rao (Supra) wherein it is held that S.35 shuts out from evidence any instrument chargeable with duty unless it is duly stamped and shuts out any secondary evidence of such instrument when the original admittedly chargeable with duty was not stamped or insufficiently stamped. Therefore, the secondary evidence, either by way of oral evidence of the contents of unstamped document or copy of it governed by S.63 of the Indian Evidence Act, will not fulfill the requirement of the proviso which enjoins upon the Authority to receive nothing in evidence except the instrument itself. S.35 of the Act is not concerned with the copy of the "Instrument" and a party can only rely on a document which is instrument for the purposes of S.35 of the Act. Therefore, the trial Court was not justified having accepted the secondary evidence of unstamped agreement to sale dated 3/8/2006 while rejecting the objection raised under S.35 of the Act. Further, the fact that petitioners-defendants had cross-examined the plaintiff on the copy of agreement to sale and the same was marked as exhibit, shall not dilute the rigor of S.35 with the help of provision of S.36 of the Act, for the reason that exception carved out in S.36 is in relation to "Instrument" defined under S.2(14) of the Act and not copy thereof.

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14. In view of the aforesaid, the order impugned rejecting the objection raised by the petitioners-defendants deserves to be, and is accordingly, set aside. The petition stands allowed.

(Rohit Arya)
Judge

(and)