
(1969) 08 MP CK 0006

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 132 of 1955

Balkrishna Bihari Lal

APPELLANT

Vs

Board of Revenue, M.P. and Others

RESPONDENT

Date of Decision : 11-08-1969

Acts Referred:

Stamp Act, 1899 — Section 2(15), 29, 36, 38(2), 40

Citation : (1969) MPLJ 827

Hon'ble Judges : Bishambhar Dayal, C.J; Shiv Dayal Shrivastava, J; A.P. Sen, J

Bench : Full Bench

Advocate : R.S. Dabir, for the Appellant; Rama Gupta, Government Advocate, for the Respondent

Judgement

Shiv Dayal, J.

This is a reference u/s 57(l)(a) of the Stamp Act. The questions referred have arisen on the following facts. Balkrishna instituted a suit against Nimasingh in the Court of the Civil Judge, Class I, Khargone, for the recovery of Rs. 1057.50 on foot of four promissory notes executed by him on May 26, 1957, in favour of Balkrishna Biharilal, a joint family firm. By amendment of the plaint, the plaintiff averred that in 1959 there was a partition between him and his sons under which the amount to be recovered on those promissory notes was allotted to him in his share. An issue was framed on July 16, 1962, whether the plaintiff alone had the right to sue. Balkrishna (plaintiff) was examined on July 2, 1963. He produced his Rokad Bahi (cash book) for Samvat 2016 in which there is an entry dated November 5, 1959, purporting to effect a partition and showing the shares allotted to the coparceners. Balkrishna proved this document and it was marked Ex. P-5.

When Hiralal (P. W. 2) was in the witness-box on the same day, and the document (Ex. P-5) was put to him, an objection was raised by the counsel for the defendant that it was a deed of partition and, as it did not bear the prescribed stamp, it was not admissible in evidence. There is a "note" saying that

the document (Ex. P-5) has not been admitted in evidence and the objection was raised at the appropriate stage. It is not known whether this "note" was the defendant's contention or the Court's observation. After hearing both the parties, the learned trial Judge held that this document is a deed of partition and it requires stamp duty. The plaintiff's counsel then sought 15 days' time to get the document validated by the Collector on payment of such duty or penalty as would be demanded from him. The trial Court accepted the plaintiff's request and gave him time.

Then the learned Civil Judge himself wrote a letter to the Collector of Khargone (No. 3743 dated July 5, 1963) with which he sent the document (Ex. P-5) with his remark that it effected a partition of the property worth about rupees one and a half lacs; that the plaintiff's share was Rs. 27,000/-; that it required stamp duty; and that a penalty was also liable to be imposed. He said in his letter that this was his opinion. In conclusion he said that the document (Ex. P-5) was being sent to him (Collector) for taking proceedings for its validation with the request that it be returned after the needful was done.

The Collector, purporting to exercise his powers u/s 40(l)(b) of the Stamp Act, passed an order directing the petitioner to pay Rs. 1,350/- as stamp duty and Rs. 13,500/- as penalty for validating the document. Aggrieved by this order, Balkrishna filed a revision before the Board of Revenue, which was dismissed. The plaintiff then moved this Court by a petition in *Balkrishna v. The Board of Revenue*, M. P. Misc. petn. No. 318 of 1964, D7- 16-9-1964 (M. P.), under Article 226 of the Constitution. A Division Bench of this Court (Dixit, C. J. and Pandey, J.) held that in its view important questions of law arose and the Board had unreasonably declined to make a reference u/s 57(1) of the Stamp Act. The order of the Board of Revenue was quashed and it was directed to state the case and to refer to this Court the following questions with its opinion thereon:--

"(i) Whether, after admitting Exhibit P-5 in evidence, the Civil Judge was competent to send it to the Collector u/s 38(2) of the Stamp Act?

(ii) Whether the Collector, who had not received Ex. P-5 under the provisions of Section 61 of the Stamp Act, had jurisdiction to pass the order dated 25th March, 1964?

(iii) Whether the plea that Ex. P-5 is merely a record or acknowledgment of a past fact can be shown by evidence aliunde?

(iv) Whether, on the facts and in the circumstances of the case, Ex. P-5 is an instrument of partition within the meaning of Section 2(15) of the Stamp Act?

(v) Whether, in the case of an instrument of partition, the entire stamp duty and penalty can be recovered from any one of the executors or whether only the pro rata share of the amounts can be recovered from each executant?

(vi) Whether the quantum of penalty leviable in a given case is entirely a matter of the Collector's discretion?"

Accordingly, this reference was made.

We propose to answer the fourth question first. In the entry, Ex. P-5, the names of the coparceners are stated. They are Balkrishna and his five sons. It is stated that they carry on business in the name and style of "Balkrishna Biharilal" that besides the joint family business, the joint family is possessed of moveable and Immovable properties; that all the coparceners have equal shares; that they are desirous of effecting a partition, which will also be beneficial to Ramakant a minor coparcener, and that according to their books of account, the total assets amount to Rs. 1,77,65571573. Then the shares allotted are described. In conclusion it is stated that by these entries they have effected a partial partition of the family assets; that the remaining property would continue to be joint; and that they have effected this partition of their free will and accord and have affixed their signatures in token thereof:

"Uparokta jama kharch dwara hamane hamari abhishta batware ki ichcha ko murtroop pradan kar diya hai. Ewam pariwarik poonji ka anshik batwara kar diya hai. Shesh sampati bhawishya men vibhajan hone tak purwawat sammilit hi" rahegi. Yah batwara hamane apani su-ichcha se kiya hai. Iski swikruti ewam pushti apane hastakshar dwara niche mujab kar dete hai."

The contents of the document (Ex. P-5) leave no manner of doubt that it is an instrument of partition within the meaning of Section 2(15) of the Stamp Act.

Shri Dabir's contention was that a partition had already taken place a few days earlier, that is, on October 31, 1959, and that the document (Ex. P-5) was merely a record or acknowledgment of a past fact. This argument is wholly untenable, having regard to the language of the document. There is not the slightest indication of any partition having taken place earlier. In fact, in so many words it is recorded in it that by this document itself a partition was being effected.

The following principles govern the application of the Stamp Act to instruments:--

(i) The first is that duty is payable on the instrument and not on the transaction. The leading case on this point is Commissioner of Inland Revenue v. Angus (1889) 25 Q.B.D. 579 at p. 589. In that case, Esher, M. R., observed thus:--

"The first , thing to be noticed is, that the thing which is made liable to the duty is an "instrument" It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at." It is not open to the revenue to say that the instrument should be deemed to be that which it is not on the record and that the object of the transaction was to achieve a purpose not disclosed in the instrument.

(ii) The second rule is that the Court is not (sic) by the apparent tenor of the instrument; it is the real nature of the transaction which will determine the stamp duty. See, for instance, Mortgage Insurance Corporation v. Commissioner of Inland Revenue, (1888) 21 Q.B.D. 352; Inland Revenue v. James John Oliver,

(1909) A.C. 427 and *Deddington Steamship Company, Ltd. v. Commissioners of Inland Revenue* (1911) 2 K.B. 1001. But the true meaning of this rule is really this that the recitals in the Instrument should not be lost sight of merely because the parties gave a particular description of its nature. But the rule does not go beyond this. Here may be recalled the weighty observations of Lord Cairns, who said many years ago in *Partington v. The Attorney-General* (1869) 4 H. L. 100 at p. 122:--

"As I understand the principle of all fiscal legislation, it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

It was observed in AIR 1940 183 (Privy Council) :--

"Their Lordships think It necessary once more to protest against the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal position."

Their Lordships then referred to *Inland Revenue Commissioners v. Duke of Westminster*, 1936 A.C. 1. See also *Board of Revenue, Madras Chief Controlling Revenue Authority, Madras Vs. N. Narasimhan and Another*, .

(iii) The third rule Is that the Court must look at the document itself as it stands and it is not permissible to show, by evidence, any collateral circumstances. The nature of the document can be determined only from the language it employs and the purpose which it is intended to serve. Although it is permissible to look behind the form and at the substance of the transaction, this can be done only by construing the instrument itself and not by taking into consideration any collateral or other evidence de hors the instrument. In *Chandrakant v. Kartickcharam* (1903) 5 Bom. L. R. 103, Peacock, C. J., said:--

"It appears to me that in applying the stamp law the stamp must be paid upon what is stated in the instrument and cannot depend upon collateral evidence....."

Thus, the question must be decided essentially with reference to the contents of the instrument and to the intention of the parties which is gathered from the contents.

(iv) The fourth rule is that in determining stamp duty, the substance of the transaction as disclosed by whole of the instrument has to be looked to, and not merely the operative part of the instrument.

(v) The fifth rule is that stamp duty is payable on an instrument according to its tenor and it does not matter that it cannot be given effect to for some independent cause.

(vi) The sixth rule is that there can be no objection to a device effectuating a

transaction in a manner that lower rate of duty is attracted. See, for instance, *Littlewoods Mail Order Stores Ltd. v. Inland Revenue Commissioners*, (1961) 1 Ch. 210.

The answer to the third question is to be found in the third and fourth rules enunciated in the foregoing paragraph.

We shall now advert to the first question. Having perused the record of the civil suit and the proceedings of the Court recorded in the order sheet, we have no doubt that the document was admitted in evidence. When Balkrishna was examined and cross-examined as P.W. 1, no objection was taken, either by the defendant or by the Court. Exhibit number was put on the document over the signature of the Presiding Officer of the Court. Objection was taken, for the first time, when Hiralal (P.W. 2) was being examined and the document was put to him in examination-in-chief. But, by virtue of Section 36 of the Stamp Act, admission of an instrument cannot be called in question on the ground that the instrument was not duly stamped.

It was an argument that there was no conscious admission of the document by the Court. It was mechanically produced when Balkrishna was in the witness-box and it was mechanically marked as an exhibit. The learned Judge of trial Court also wrote a remark to that effect when objection was taken to the admissibility of the document during the course of recording of Hiralal's evidence. But the law is quite clear on the point. When a document is tendered in evidence and before it is marked as exhibit in a case, the trial Court has to "judicially determine whether it is properly stamped or not. Once it has been marked as exhibit in a case and has been used by the parties in examination-in-chief or cross-examination of a witness. Section 36 steps in. See *Javer Chand and Others Vs. Pukhraj Surana*, .

The scheme of the Act is abundantly clear.

(i) Once an instrument chargeable with duty is tendered in a civil court, it shall impound it, if, after examining it, the Court is of the opinion that it is not duly stamped: Section 33 of the Act. The Court has, however, power u/s 35 of the Act to admit it (barring certain instruments) in evidence on payment of duty with which the instrument is chargeable, or the amount required to make up the deficiency, together with a penalty, limits of which are prescribed in the section. There is no third course open to the Court, once it finds that an instrument tendered in evidence is not duly stamped. The next step, which the Court has then to take, is provided in Section 38. If the Court has admitted in evidence an instrument upon payment of penalty and/or duty, it shall send to the Collector an authentic copy of such instrument together with a certificate stating the amount of duty and penalty levied in respect of that instrument and shall send such amount to the Collector. This is provided in Sub-section (1) of Section 38.

(ii) Then Sub-section (2) of Section 38 enacts thus:--

"In every other case, the person so impounding an instrument shall send it in original to the Collector."

This sub-section, therefore, clearly refers to a case where an instrument has been impounded u/s 33 of the Act but has not been admitted in evidence on payment of penalty and/or duty. The Collector has then to follow the procedure as specified in Sections 39 and 40 of the Act, according as the instrument is sent to him by the Civil Court under sub-section (1) or Sub-section (2) respectively of Section 38.

(iii) But when the Civil Court is of the opinion that an instrument is duly stamped, it does not impound it u/s 33 of the Act but admits it in evidence.

(iv) In a case where an instrument is tendered and the Civil Court just admits it in evidence, without its being questioned on the ground that it is not duly stamped, such validity cannot, by virtue of Section 36 of the Act, be subsequently questioned at any stage of the same suit or proceeding on the ground that it is not duly stamped. The only course then open is the one provided in Section 61 of the Act. Under that section, it is the Court, to which appeals lie from, or references are made by, the Court which admitted the instrument in evidence, which may, on its own motion or on the application of the Collector, take into consideration the order of the subordinate Court admitting the instrument in evidence. And, if such (appeal or reference) Court is of the opinion that such instrument should not have been admitted in evidence without payment of duty and penalty u/s 35, or that higher duty and penalty should have been paid, such Court may order the instrument to be produced and may impound it when produced. Such Court shall then send the instrument, along with its declaration, to the Collector.

On the above analysis, it is abundantly clear that an instrument can be sent to the Collector u/s 38(2) of the Stamp Act only when it is impounded u/s 33, but is not admitted in evidence on payment of penalty and/or duty with the aid of Section 35. Section 38(2) has no application to a case where the document has been admitted in evidence.

The second question referred to us relates to the vires of the order passed by the Collector on March 25, 1964. The opening paragraph of the order makes it abundantly clear that the order was passed on a misconception of the situation which existed in the eye of law. He says:--

"This case emanates out of a reference by the Civil Judge First Class, Khargone, who has impounded the document said to be a deed of partition. The Civil Judge impounded this document which was produced before him in Civil Suit No. 11 of 1960 (M. P.), Balkrishna v. Nemasingh on behalf of one of the co-sharers of the said property. The Civil Judge has observed that this document has not been properly stamped and therefore action under the Indian Stamp Act for recovery of stamp duty with penalty as provided under the Stamp Act be taken.

A notice was given to the non-applicant to show cause why the proper stamp duty and penalty may not be recovered from him."

He then says that after hearing the parties and for the reasons stated by him, he reached the conclusion that the instrument was chargeable under Article 45 of the Stamp Act. He directed a duty of Rs. 1350/- and penalty of Rs. 13500/-, total Rs. 14850/- to be paid for validating the instrument.

It is clear from the order of the Collector, dated March 25, 1964, that he had not received the instrument under the provisions of Section 61 of the Stamp Act. From what we have said in answer to the first question referred to us, it follows that the second question must be answered in the negative.

Adverting to the fifth question, Section 29 of the Stamp Act enacts that, in the absence of an agreement to the contrary, the expense of providing the proper stamp in the case of an instrument of partition, shall be borne by the parties thereto in proportion to their respective shares in the whole property partitioned. Accordingly, all the parties to Ex. P-5, in proportion to their respective shares, had to bear the stamp duty. But this section and Section 44, in effect, only regulate the liabilities as between the parties inter se. The Collector can proceed to recover the entire duty and penalty from any one or from all those parties in his discretion. This is because the liability to pay stamp duty as between the parties to an instrument on the one hand and the State on the other is joint and several. The parties to an instrument between themselves may have the right to contribution. The Collector is not bound to collect pro rata shares from all the parties. This was also the view taken in *Subramaniam Chettiar Vs. Revenue Divisional Officer and Another*, .

Turning now to the sixth question, the powers of the Collector u/s 40 of the Stamp Act are discretionary in respect of imposition of penalty. There are no provisions in the Stamp Act to guide his discretion. That being so, the general principle of law, that discretion must be exercised according to reason and justification, must be followed.

On the above discussion, we answer questions Nos. 1 and 2 in the negative, and questions Nos. 4 and 6 in the affirmative. We answer the first part of question No. 5 in the affirmative and the second part in the negative. Our answer to question No. 3 is as follows. The Court must look at the document itself as it stands and it is not permissible to show by evidence any collateral circumstances.

The nature of the document can be determined only from the language it employs and the purpose which it is intended to serve. The substance of the transaction as disclosed by whole of the instrument has to be looked to and not merely the operative part of the instrument.

The case shall now go back to the Board of Revenue, along with the entire record received from it. No order for costs.