(1954) 03 AP CK 0002

In the Andhra Pradesh High Court

Case No : Ref. No. 9/A/5/1/1352F

Jai Narayan and others APPELLANT

Vs

Yasin Khan and others RESPONDENT

Date of Decision : 04-03-1954

Acts Referred:

Hyderabad Stamp Act, 1331 — Section 55
Stamp Act, 1899 — Section 38, 57

Citation : (1954) 03 AP CK 0002

Hon'ble Judges : Qamar Hasan, J;Manohar Pershad, J;Deshpande, J

Bench : Full Bench

Advocate : B.N. Sastry, for the Appellant; Nandapurkar, Gopalrao Borgaonkar and Ramchander Rao Kurtudikar, for the Respondent

Judgement

Manohar Pershad, J.—This is a reference by the Chief Controlling Revenue Authority under S. 55, Hyderabad Stamp Act, corresponding to S. 57, Indian Stamp Act. The facts which have given rise to this reference are as follows:

On 22-6-1349F., a Division Bench of this Court impounded a document of award filed in the case of -- ''Jainarayan v. Yasin Khan'', and forwarded the same to the Inspector-General of Registration and Stamp for collecting the full stamp duty and ten times penalty of Rs. 6435/- from the party concerned. Since the parties are the residents of Raichur, the Inspector General of Registration and Stamps sent the document to the Collector, Raichur, who after instituting the requisite inquiry reported that the High Court had no power to assess the stamp duty and penalty while impounding the documents and that the order of the Court infringes the provisions of the Stamp Act. He, therefore, requested the Inspector General of Registration and Stamps to allow him to assess the stamp duty. The Inspector General of Registration and Stamps after hearing the case came to the following conclusion:

In my opinion the case is clear. The High Court has fixed the amount of stamp duty and penalty. This action of the High Court in fixing the amount is neither a violation nor is it an order to the Collector for compliance; on the other hand, it is helpful to the Officer to collect the amount. According to S. 38, Stamp Act, the Collector has got full authority to assess the duty and ten times penalty. If he differs from the opinion of the High Court, he can give the reasons in his judgment.

2. With regard to the main issue of the document in question, the Inspector-General of Registration and Stamps was of the opinion that it was a partition deed and as such it ought to have been written on a stamp paper of Rs. 205/- whereas it has been written on a stamp paper of Rs. 5/- and with this view he submitted the case to the then Hon''ble Minister for Stamps (The Chief Controlling Authority for stamp duty) from the Home Department for final orders. The Home Department called for the views of the Collector in the matter, who was also of the opinion that the document in question is a partition deed and ought to have been written on a stamp paper of Rs. 262-8-0 instead of on a stamp paper of Rs. 5/- and consequently Rs. 2625/- should be collected. After the receipt of this opinion of the Collector, the Home Department again called for the views of the Inspector General of Registration and Stamps. The Inspector General of Registration and Stamps agreeing with the above opinion of the Collector, further suggested that the penalty on the amount should be collected I.G. currency, or if preferred in O. S. currency equivalent to I. G.

3. The Assistant Home Secretary before whom the matter was for consideration, heard the case on 19-2-1357F., and gave the following opinion:

that (a share of) Rs. 64991/- was liable to stamp duty after deducting the larger share from the total amount, and for this a stamp of Rs. 325/- ought to have been used, but a stamp of Rs. 5/- has been used and therefore, a balance of Rs. 320/- in respect of the stamp duty should be collected. In addition to this, five times penalty on the above amount should further be collected in view of the fact that the levy of penalty is entirely within the discretion of the authority.

On this the Hon''ble Minister (the Chief Controlling Authority for stamp duty) endorsed that the case should be referred to the High Court under S. 55, Hyderabad Stamp Act, and hence this reference.

4. Shri Subbarayudu, the learned advocate for applicant, has advanced three arguments: His first contention is that the Division Bench of this Court has erred in determining the nature of the document and fixing the penalty thereon. The ascertainment of the nature of the document and the fixation of the penalty, he contends, is within the discretion of the Collector. In other words, it is contended that the decision of the High Court is in excess of jurisdiction and that therefore it should be declared to be a nullity. Reliance was placed on the case of -- ''Agar Chand v. Balak Rai''. 1887 All WN 21 (A).

5. His second contention is that even assuming that the High Court''s decision was valid, the assessment and the decision relating to the nature of the document are not final and are liable to be defeated by the Taluqdar exercising

his discretion.

6. His third contention is that the document in question is neither a partition-deed nor an award but an instrument relating to the dissolution of partnership and the Inspector General of Registration and Stamps and the Revenue Authorities have erred in holding that the document is a partition deed.

7. Shri Gopal Rao Tuljapurkar, who appeared on behalf of the State, urged that this Court is not competent to hear the reference in view of the decision of the Division Bench of this Court. His second contention is that the Division Bench of this Court was competent to determine the nature of the document and fix the penalty and that that decision is final and cannot be interfered with with regard to the question of the nature of the document it is contended that it is a partition-deed and not an instrument relating to the dissolution of partnership. The other parties are not represented before us.

8. The points to be determined in our opinion are:

1. What is the nature of the document? Whether it is a partition-deed or an award or an instrument relating to the dissolution of partnership as argued by the learned advocate for Jainarayan; and

2. What is the duty and penalty to be levied?

Before dealing with these points, we would like to decide the question whether this Court is competent to hear the reference in view of the decision of the Division Bench of this Court dated 22-6-1349F.

9. We may at the outset point out that the Division Bench of this Court decided the case on an appeal filed by Jainarayan and not on a reference under S. 55 of the Stamp Act. The question that falls for consideration is: What is the effect of the decision of the Division Bench and whether it is within the competence of this Bench to hear the reference. In order to decide this question a reference to Ss. 29, 31, 33, 36, 38 and 40, Hyderabad Stamp Act, corresponding to Ss. 31, 33, 35, 38, 40 and 42, Indian Stamp Act, is necessary.

10. Section 31 which runs thus refers to adjudication as to proper stamp duty:

When any instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of such amount (not exceeding five rupees and not less than eight annas) as the Collector may in each case direct, the Collector shall determine the duty (if any) with which, in his judgment, the instrument is chargeable.

11. Section 33 provides for the examination and the impounding of the documents which are not duly stamped and it is to the following effect:

(1) 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.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in British India when such instrument was executed or first executed:

Provided that--

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this Section, in cases of doubt,--

(a) the collecting Government may determine what offices shall be deemed to be public offices; and

(b) the collecting Government may determine who shall be deemed to be persons in charge of public offices.

Section 35 refers to the admissibility of the document.

12. Section 38 provides that where a document is admitted in evidence under S. 35 upon payment of penalty, the Court shall send an authenticated copy of such document to the Collector. It is as follows:

When the person impounding an instrument under S. 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by S. 35 or of duty as provided by S. 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

Section 40 relates to the powers of the Collector to stamp instruments impounded and is to the following effect:

When the Collector impounds any instrument under S. 33, or receives any instrument sent to him under S. 38, sub-s. (2), not being an instrument chargeable with a duty of one anna (or half an anna) only or a bill of exchange or promissory note, he shall adopt the following procedure:

(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable as the case may be;

(b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees:

Provided that when such instrument has been impounded only because it has been written in contravention of S. 13 or S. 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this section.

13. Section 42 relates to the endorsement of instruments on which duty has been paid under Ss. 35, 40 and 41.

13a. Thus it would follow from the above discussion that according to S. 33 of the said Act every person having by law or consent of the parties authority to receive evidence 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.

14. It is not disputed that the High Court before whom the document in question had come up for consideration in appeal had the power to determine the nature of the document and impound the same under S. 33. The argument is that the High Court could only impound the document and determine its nature but could not assess the penalty. We find sufficient force in this argument. Section 38 provides that when the person impounding an instrument under S. 33 admits such instrument in evidence upon payment of penalty as provided by S. 35 or a duty as provided by S. 37, he shall send an authenticated copy of such instrument together with a certificate in writing stating the amount of duty and penalty levied in respect thereof and shall send such amount to the Collector or such person as he may appoint in this behalf. Clause (2) of this Section provides that the person so impounding an instrument shall send it in original to the Collector.

15. Thus it is clear that it is the Collector alone who has the power to assess the penalty, though it is true that the Court or any other Officer having the authority by law may impound the document but after impounding the same the Court or the Officer has to send the original document to the Collector under S. 38, Cl. (2) and it is only then that the Collector adopts the procedure laid down in S. 40. If the Collector is of opinion that the instrument is duly stamped, he shall certify with an endorsement thereon that it is duly stamped or that it is not chargeable. Such endorsement is conclusive evidence under sub-s. (2). If he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the penalty as provided in Cl. (b). When the duty and penalty are paid,

he certifies by an endorsement thereon that the proper duty and penalty have been levied thereon and the instrument thereof shall be admissible in evidences.

16. In the previous judgment, the Division Bench of this Court not only impounded the document but assessed the amount of the penalty and sent it to the Collector for realising the amount. This last portion of the judgment which relates to the assessment of the penalty is, in our opinion, not warranted by the provisions of the Stamp Act. Further the Collector who is the final authority in this regard is not bound by the assessment made by the Court and such assessment is liable to be defeated by him (the Collector) exercising his discretion. We are, therefore, of the opinion that the previous judgment of this Court relating to the assessment is no bar to our hearing the reference and deciding the question.

17. The next question that has to be considered is what is the nature of the document. The document has been described as an award. The Division Bench of this Court also has held it to be an award. In para 1 the shares are defined. In para 2 it is stated that the said persons are members of a divided Hindu family and partition of the property has taken place except the ancestral shop at Raichur named ''Gopinath Jainarayan'', in which the shares of the persons are also fixed. The concluding para of this refers to the adjustment of shares held by each of the persons, and the profits and loss which have not been apportioned for the last 8 years. In the other paras of the document there is a mention of the Asamis (outstandings) given to the shares of each person.

18. In S. 2, Cl. 2, Stamp Act, (S. 2(15) of the Indian Act--Ed.) an instrument of partition is defined as:

Any instrument whereby co-owners of any property divide or agree to divide such property in severalty,..............and it includes also ''an award'' by an arbitrator directing a partition.

19. The contention of the petitioner is that in this very document it has been stated that partition has already taken place and the family is separate and therefore there was no question of another partition-deed being executed. We do not accept the contention in toto.

20. It is true that in this document it is stated that the family is separate, but there is also mention of the fact that the shop is ancestral and through this document the outstanding (Asamis) of the said shop have been divided and given to the shares of the respective persons. In other words, through this document, a division of the Asamis is made.

21. Relying on -- Kersaji Dhanjibhai Vs. Barjorji Bhikhaji Vandriwala, , it was contended that the word ''property'' used in S. 2, Cl. 15 means "present" divisible property and outstanding cannot be said to be property capable of being partitioned within the meaning of the Stamp Act until realised, as such the document in question cannot be called an instrument of partition. We are afraid

we cannot accept this contention either. Asamis (outstandings) is also property capable of being partitioned. The mere fact that the amounts have not been realised, would not take it out of the definition of property. In -- ''Choturam v. Ganesh'', 3 Bom LR 132 (C), the Bombay High Court has held a document dividing outstandings to be an instrument of partition. In the result, we do not agree with the view expressed in -- Kersaji Dhanjibhai Vs. Barjorji Bhikhaji Vandriwala, .

It is further contended by the petitioner that from the very terms of the document it cannot be deemed to be a partition-deed but one relating to the dissolution of the partnership. We do not agree with this contention. We may point out that an instrument of partition among partners is not the less such an instrument merely because it is part of a scheme for the dissolution of the partnership. In such a case the document may be both an instrument of partition and an instrument for the dissolution of the partnership. Section 6, Stamp Act, enacts that when an instrument is so framed as to come within two or more of the descriptions in Sch. 1, & the duties chargeable thereunder are different, the document will be chargeable only with the higher of such duties. It is therefore no argument to say that the instrument in question is one relating to the dissolution of the partnership of according to the terms of the deed it falls equally under the definition of an instrument of partition. Even according to the English practice where a dissolution of partnership is carried out by a document which in form effects an assignment of a partner''s share to another partner, the document is charged to stamp duty as a ''conveyance'' vide -- ''Christie v. Commr. of Inland Revenue'', (1866) 2 Ex 46 (D) and -- ''Phillips v. Commrs. of Inland Revenue'', (1866-67) 2 Ex 399 (E). This shows that the fact of its being part of a scheme for the dissolution of a partnership does not prevent its being chargeable to stamp duty under other heads as well, if the terms of the document fall under some other head. So far as the question of the payment of the stamp duty and the penalty to be levied is concerned, whether it is an instrument relating to the dissolution of the partnership or a partnership-deed, it does not become material. Thus having regard to the terms of the document we are of the opinion that it is a partition-deed and is liable to be charged to stamp duty as an instrument of partition.

22. The next question is what is the proper stamp duty payable on such a document? Under Art. 32, Hyderabad Stamp Act, corresponding to Art. 45, Indian Stamp Act, duly payable is the same as payable on a bond No. 16 of the Hyderabad Stamp Act corresponding to No. 15 of the Indian Stamp Act for the amount of value of the separated share or shares of the property. In the document the share of Mohanlal is shown as Rs. 30.451-11-0 and Madanlal''s share Rs. 22.006-11-9 and the other portion after deducting these two amounts will be Rs. 126996-11-5. According to Art. 32 of the Schedule to the Hyderabad Stamp Act, the above-mentioned larger portion has to be excluded from the total amount and the prescribed stamp duty has to be collected on the remaining portion of the property amounting to Rs. 52,458-6-9. In view of this, the

document in question ought to have been written on a stamp paper of Rs. 262-8-0 whereas it has been written on a stamp paper of Rs. 5/-. In the result the deficit duty of Rs. 257-8-0 has to be paid.

23. After this the question of penalty to be levied remains to be decided. The Revenue Authority is of opinion that ten times penalty should be collected. Under S. 40(2) the Collector has been given a discretion to charge a penalty of five rupees or if he thinks fit ten times the amount. But we find that he has not given any reasons for charging ten times. Thus after giving a careful consideration we are of the opinion that ten times penalty is too high inasmuch as we do not find that the document in question was written on Rs. 5/- stamp paper with a motive to deprive the State. As the partition had already taken place, parties might have well thought that Rs. 5/- stamp would be sufficient. In this view of the matter, in our opinion, it will serve the ends of justice if a penalty of equal amount, that is, Rs. 257-8-0, is collected: that is the petitioner will have to pay Rs. 257-8-0 by way of deficit stamp duty and Rs. 257-8-0 by way of penalty.

24. Opinion given accordingly.

