
(1958) 04 PAT CK 0010
In the Patna High Court
Case No : A.F.A.D. No. 569 of 1954

Lal Kameshwari Singh

APPELLANT

Vs

Sarju Singh and Others

RESPONDENT

Date of Decision : 03-04-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100, 101
Stamp Act, 1899 — Section 33, 36, 61

Citation : AIR 1958 Patna 434

Hon'ble Judges : Ramaswami, C.J;R.K. Choudhary, J

Bench : Division Bench

Advocate : Mahabir Prasad, S.N. Dutta and Ugra Singh, for the Appellant;
Lalnarayan Sinha, H.K. Banerji and S.B. Sanyal, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Choudhary, J.—This appeal by the plaintiff is directed against the judgment and decree of the Additional District Judge of Monghyr, reversing the judgment and decree of the Additional Subordinate Judge there. The appellant instituted a suit for declaration of his title to and confirmation of possession over 4-37 acres of land which admittedly belonged to Chulho Singh and others, who executed a registered sale deed in respect thereof on 30-5-1943, in the name of the plaintiff.

Defendants first party asserted in certain criminal proceedings that the plaintiff was their farzidar with respect to the above land and as such he instituted the suit for the reliefs stated above. Defendants second party are the co-sharers of the plaintiff and the case of the plaintiff is that the suit land on partition between them was allotted to his share and a khista memorandum of partition was executed in support of the partition. The suit was contested by the defendants first party who pleaded that they had acquired the suit land in the farzi name of the plaintiff and that they were in possession thereof. The trial Court accepted the case of the plaintiff and decreed the suit. On appeal, the lower appellate court reversed the findings of the trial court and held that the defendants had

purchased the suit land by the sale deed, referred to above in the farzi name of the plaintiff. Accordingly, it dismissed the suit.

2. The khista memorandum of partition was admitted by the trial court in evidence, and, though the trial court accepted the case of the plaintiff as regards the partition, no reference was made to this document for coming to that conclusion. The lower appellate court, while considering the question of partition, referred to this document but did not place any reliance on it and held the story of partition to be an afterthought. It also came to the conclusion that the, being unstamped, should not have been admitted in evidence without having been impounded. It, therefore, started a proceeding for impounding the document.

3. In this appeal two points have been raised, namely, (1) that the decision of the court of appeal below that the sale deed in question was taken by the defendants in the farzi name of the plaintiff was wrong and (2) that the lower appellate court had no jurisdiction to start a proceeding for impounding the document. So far as the first point is concerned, Mr. Mahabir Prasad has argued the case for the appellant. His contention is that the court of appeal below has committed an error in coming to the conclusion that the plaintiff was a benamidar for the defendants. He has drawn our attention to the fact that the sale deed in question was produced from the custody of the plaintiff and, had he been a benamidar, the sale deed could not have been produced by him.

The court of appeal below has considered that aspect of the case and has accepted the story put forward by the defendants that the sale deed was lost and somehow or other it came in possession of the plaintiff. I need not refer to the circumstances which the court of appeal below has found as to how the document came into possession of the plaintiff. In determining the question of benami, motive for the transaction, relationship between the parties, payment of consideration, custody of the document land possession over the property are the main tests. The court of appeal below has considered all these aspects and has held on all these points, in favour of the defendants.

It is admitted that the parties are closely related. It has been held that there was motive for the defendants first party for acquiring the property in the farzi name of the plaintiff; consideration has been found to have been paid by the defendants and they have been held to be in possession of the property. With respect to the custody of the documents, the defendants first party have been found to be in possession of those documents which on redemption out of the consideration money came in their possession. With respect to the sale deed in question, as already observed, the court below has accepted the explanation of the defendants as to how it came in possession of the plaintiff. The decision on all these points is a decision on questions of fact and it is not possible to interfere with it in second appeal. On merit, therefore, the appellant has got no case.

4. The real contest in the appeal is on the second point, because a huge amount of the unpaid stamp and penalty has to be paid by the plaintiff for putting an

unstamped document in evidence. As the question relates to revenue, the learned Advocate General did not argue this point for the appellant and it was argued by Mr. S.N. Dutt. His contention is that the lower appellate court had no jurisdiction to start a proceeding for impounding the document. His argument is that, though the trial court admitted the document in evidence, it did not rely on it for coming to the decision on the point and that once the document had been admitted in evidence, its admissibility, according to the provisions of Section 36 of the Stamp Act, could not be questioned at a later stage except u/s 61 of the Act.

There is no dispute as to the correctness of the principle of law to this extent but his further contention is that in the present case Section 61 of the Stamp Act has no application and, therefore, the proceeding started for impounding the document is without jurisdiction. Section 35 of the Stamp Act provides that 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 and proviso (a) to that section states that any such instrument not being an instrument chargeable with a duty of one anna (or half an anna) 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.

It is not disputed in the present case that the document in question was chargeable with duty and it is also conceded on behalf of the appellant that the document could have been admitted into evidence only after paying the duty and the penalty required under the above proviso. Section 36 of that Act, however, enacts that where an instrument has been 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. In the present case, therefore, the admissibility of the document could not be questioned unless Section 61 of the Act had an application.

5. It has, therefore, to be seen whether Section 61 of the Act applies to this case or not. That section, so far as is relevant for the present purpose, is in these terms:

"(1) When any court in the exercise of its civil or revenue jurisdiction or any criminal court in any proceeding, under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898, makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp, or upon payment of duty and a penalty u/s 35, the court to which appeals lie from, or references are made by, such first-mentioned court may, of its own motion or on the application of the

Collector, take such order into consideration".

"(2) If such court, after such consideration, is of opinion that such instrument should not have been admitted in evidence without the payment of duty and penalty u/s 35, or without the payment of a higher duty and penalty than those paid, it may record a declaration to that effect, and determine the amount of duty with which such instrument is chargeable, and may require any person in whose possession or power such instrument then is, to produce the same, and may impound the same when produced",

6. Mr. Dutt has advanced an argument that for the application of this section there must be a specific order of the court of first instance admitting the instrument in evidence as duly stamped or as not requiring any stamp and as, in the present case, there is no specific order, this section has no application. In order to appreciate the point it has to be seen as to how the document was admitted in evidence. Plaintiff's witness No. 5 in his evidence proved this document before the court and the document was given an exhibit mark initialled by the court. In the order-sheet also it is stated that the document has been proved by P. W. 5 and marked as an exhibit. There is, therefore, no doubt that the document was admitted in evidence in accordance with law and that its admission is mentioned in the order passed by the court.

There is, however, no discussion whether the document required stamp or not and probably both the court and the parties missed the same. It is, therefore, contended on behalf of the appellant that there is no specific order holding this document not to be requiring any stamp and as such Section 61 of the Stamp Act has no application. Our attention has been drawn to Section 36 of the Act, in which the expression is "where an instrument has been admitted in evidence" and a distinction has been sought to be made with the expression used in Section 61 "makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp."

Counsel has advanced an argument that whereas for the purpose of Section 36 the mere fact of the document" being admitted in evidence is enough to give effect to it, for the purpose of Section 61 there must be a specific order as indicated above and if there is no such order, the appellate court has no jurisdiction to act under this section. The determination of the question is not free from difficulty and there is no direct authority on the point except two cases of the Lahore High Court supporting the contention put forward on behalf of the appellant and one case of the Judicial Commissioner's Court of Peshawar negating that contention. A reference to those cases will be made later on.

There are, however, decisions of the various High Courts with reference to Section 36 of the Act and they may have some relevancy to the principle involved in the contention raised in this case.

7. Section 33 of the Stamp Act prescribes for examination and impounding of an instrument by the court of first instance and Section 61 of the Act gives power to

the appellate court for revising the order of the court of first instance regarding the sufficiency of the stamp. The object of both these sections is to protect the revenue & under both these sections the courts have been given power to examine the question and impound the instrument of their own motion. The jurisdiction of the court in this regard, therefore, does not depend upon the raising of an objection by the parties. If the document has been admitted in evidence in the court of first instance without any objection being raised to its admissibility on the ground of its being unstamped or insufficiently stamped and if the court by inadvertence has not applied its mind to the question of admissibility.

I do not see how the protection afforded to the revenue by Section 61 is lost to the state simply on the ground that the court of first instance did not apply its mind to it. In my opinion, a plain reading of the various sections of the Stamp Act referred to above leaves an impression that the revenue has to be protected by the court of first instance while admitting the document in evidence and by the court of appeal if the document has been admitted in evidence which ought not to have been admitted without having been impounded.

To restrict the applicability of Section 61 to a case where the court of first instance has not been called upon by the contesting party to examine the admissibility or otherwise of the document for want of stamp and therefore the court has not written a specific order admitting the document or to a case where the court inadvertently has failed to apply its mind on its own motion towards the question of admissibility on the above ground, is, in my opinion, to put a very narrow construction on Section 61 of the Stamp Act which can never be justified in view of the fact that the above section was enacted for protection of the revenue by the appellate court where such protection has not been given or missed by the court of first instance.

8. I will now examine some of the decisions, in this connection. The earliest case which throws some light on this point is a Single Judge decision of the Punjab Chief Court in *Piran Ditta v. Mangal Singh*, 1908 Pun Re 108, p. 498 (A). In that case a promissory note, on which the suit was presented, was filed with the plaintiff and thereafter accepted in evidence both by the court and the parties. It was marked as an exhibit in the case and the claim of the plaintiff was decreed by the court of first instance. On appeal, before the District Judge, it was found for the first time that the stamp on the promissory note had not been only cancelled as required by law and the District Judge held that the stamp not having been cancelled, the document must be regarded as not stamped and, therefore, was inadmissible in evidence.

He, therefore, dismissed the suit of the plaintiff, who made an application in revision in the Chief Court of Punjab. The Chief Court held that the stamp was duly cancelled and that the objection to the admissibility of the document could not be raised in appeal in view of Section 36 of the Stamp Act. It was probably argued before that court that the District Judge might have acted u/s 61 of the

Act and it was observed that Section 61 of the Act has no application because in this case the court of first instance made no order with regard to the stamp. But in view of the fact that the document had been accepted in evidence, it was held, as already stated, that the District Judge had no power in appeal to reject the promissory note as unstamped and to hold that it was inadmissible in evidence.

Thus, it appears that the question that was under consideration in that case was a pure question coming under the purview of Section 36 of the Act and though there was an observation with respect to Section 61, as stated above, there was no question of that document having been impounded by the appellate court. That above observation, therefore was mere obiter.

9. The case of *Mirza Faridun Beg v. Emperor* AIR 1935 Lah 909 (B), however is exactly on the point. A single Judge of that court held that before the order of the trial court regarding the sufficiency or insufficiency of the stamp can be made the subject-matter of consideration by the appellate court for the purpose of making a declaration, such an order must have real existence and that an order by implication, cannot be taken into consideration by the appellate court and cannot validly form the subject-matter of consideration for the purpose of issuing a declaration.

It was further held that Section 61 has no applicability in a case where the court of the first instance makes no order with regard to the stamp. Similar view was taken in a Bench decision of that Court in *Emperor v. Gian Chand* AIR 1946 Lah 265 (C). Abdul Rashid, Acting C. J., who gave the leading judgment in this case was a judge who had decided the case of AIR 1935 Lah 909 (B), referred to above. He reiterated the view that he had taken in that case and Mahajan.J. (as he then was) agreed with him. The above decisions are based on the expression "makes any order admitting any instrument in evidence as duly stamped or as not requiring a stamp" as used in Section 61 of the Act. A contrary view has been taken in the case of *Collector of Peshawar v. Mohammad Ashraf Khan* AIR 1936 Pesh. 186 (D).

In that case the court endorsed the document which was produced as evidence with an endorsement) showing that it had been admitted, though it wrote no separate order admitting the document. It examined the defendant on the basis of the document and relied upon the document in its judgment. It was held that all this" amounted to an order admitting the document and therefore an order that can form the subject matter of proceedings u/s 61 of the stamp Act. It was further held that the reference to the document in the judgment merely afforded evidence that the court had previously admitted it into evidence. In my opinion, the view taken by the Peshawar Judicial Commissioner's Court is the correct view on the point. The present case is stronger than the Peshawar case inasmuch as in the present case the order sheet does mention that the document has been proved and marked as an exhibit whereas in the Peshawar case there was no such statement in the order sheet.

10. Dealing with Section 36 of the Act the view taken in some of the cases is that the term "admission" means the act of letting in documents as part of evidence as a result of judicial determination of the question whether it can be admitted in evidence or not, i e., after the Court had applied its mind to the question of admissibility of the document in question. A reference may be made in this connection to the cases of Maung Myo v. Ma Myin AIR 1928 Rang 263 (E), Attili Venkanna Vs. Parasuram Byas trading under the name of Parasuram Doulatram and Others, , Vavarthar Abdul Wahab Saheb Vs. Pallapotha Kanaka Anjaneyalu and Others, , Jagan Nath v. Mt. Chauhi AIR 1933 Lah 271 (H), Sitaram v. Thakurdas AIR 1919 Nag 141 (I) and Chunnilal Tulsiram v. Mulabai 6 Ind Cas 903 (Bom) (J).

A contrary view has been taken in the other cases. In the case of Bopanna Prakasam Vs. Maganti Nagabhushanam, it was held that if a document is let in, whether after deciding the objection or not, it has been admitted in evidence within the meaning of Section 36, Stamp Act, and the question for decision is not whether the person who initialled the endorsement is the clerk or the Judge, but the question is whether the document has been admitted in evidence. It was further held that Section 36 does not explicitly say that there must be a judicial determination of the question and what if) says is simply it must be admitted in evidence and if it is admitted in evidence as laid down in the rules of the Civil Procedure Code, the plain meaning of "the words is satisfied. In the case of Nirode Basini Mitra Vs. Sital Chandra Ghatak, Rankin C.J., with whom C.C. Ghose J. agreed, held that a document having once been admitted in evidence is not to be called in question at any stage of the same suit and that u/s 36 it matters nothing whether a document was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection.

It was further held in (that case that these stamp matters are really no concern of the parties and if the objection was taken at the time when the record was made up by the trial court, there it might be rejected, if not, the matter stopped there. In the case of M.K. Lodhi Vs. Zia-ul Haq, , it was held that there is nothing in Section 36 to warrant the conclusion that the section has application only to cases in which the court has admitted the document after "consciously" applying its mind to the question of admissibility and that if no objection to the admissibility of a document on the ground of insufficiency of stamp is raised before the document is admitted in evidence such objection cannot subsequently be raised.

The same view has been taken by the Lahore High Court in Gurdas Mal-Ram Chand v. Guranditta Mal ILR Lah 77 : AIR 1929 Lah 770 (N) where it was observed that nowhere it is laid down, that a document cannot be treated as admitted in evidence unless there is a separate written order deciding the document.

11. I may also refer to two decisions of this count though the question at issue has not been specifically decided therein. In case of Dasi Chamar Vs. Ram Autar

Singh certain chithas were admitted in evidence and exhibited by the trial court but subsequently when it was pointed out that they were not properly stamped, that court removed them from the record of the evidence. It was held that Section 36 of the Stamp Act was a bar to such a procedure and the admissibility of the document could not be challenged on the ground of their being unstamped. In the case of Krishna Kumar Chatterji Vs. Mt. Jagpati Kuer and Others, a hand note was admitted in evidence by endorsement but subsequently it was discovered that some of the stamps were not properly cancelled.

It was held that the document could not be open to objection from point of time of admission and the court could not reject it. Their Lordships, relying on the decision reported in Nirode Basini Mitra Vs. Sital Chandra Ghatak, , observed that u/s 36 it matters nothing whether a document was wrongly or rightly admitted or admitted without objection, or after hearing or without hearing such objection.

12. In my opinion, there is no justification, so far as the language of Section 36 of the Act is concerned, for the view taken that in order that a document should be said to have been admitted in evidence, there must have been a judicial determination of the question whether it could be admitted or not. The principle of law in this regard has, in my opinion, been correctly decided by this, court in Krishna Kumar Chatterji Vs. Mt. Jagpati Kuer and Others, and the other cases referred to above which have taken the contrary view and held that! it is not necessary to have a specific order of admission or to have a judicial determination of the question.

13. Assuming that in order that a document may be said to have been admitted in evidence, there must have been a judicial determination of the question of its admissibility or otherwise, the case of the appellant does not improve in the least. As held by a Bench decision of the Bombay High Court in 6 Ind Cas 903 (J), referred to above it may in some cases happen that a document which is not admissible for want of stamp is allowed by the Court to go in, the question of stamp escaping its notice as well as the attention of the parties. In such cases the admission is a judicial determination of the question because the court let in the document in the view that there was nothing against its admission. This is what seems to have happened in the present case.

The document admittedly required stamp but both the court as well the parties missed to notice it and the document was admitted in evidence and marked as an exhibit in the case. It must, therefore, be presumed that the document was marked and taken in evidence by the court because the court did not see any ground not to take that document in evidence for non-compliance of provisions of the Stamp Act.

14. In the above view of the matter as well in view of the fact that the document was not only marked as an exhibit by putting an endorsement on it but was also stated to have been taken into evidence in the order sheet, there can be no doubt that the document was admitted in evidence as requiring no stamp and

the order in the order sheet referred to above as well as the act of admission of document came within the meaning of the expression "makes any order admitting any instrument in evidence as duly stamped or as, not requiring a stamp" as used in Section 61 of the Stamp Act. The contention, therefore, raised on behalf of the appellant that the lower appellate court had no jurisdiction to start) proceedings for impounding the document under the above section has no merit and must be rejected,

15. The result, therefore, is that the appeal fails and is dismissed, but, in the circumstances of the case, there will be no order as to costs.

V. Ramaswami, C.J.

16. I agree.