

(2017) 10 CAL CK 0006
In the Calcutta High Court
Case No : 308 of 2016

NAVEEN GOEL

APPELLANT

Vs

COMMISSIONER OF CUSTOMS(PORT) AND ANR.

RESPONDENT

Date of Decision : 02-10-2017

Acts Referred:

Constitution of India, Article 226, Article 225 - Power of High Courts to Issue certain writs - Jurisdiction of existing High Courts
Code of Civil Procedure, 1908, Code of Civil Procedure, 1908

Citation : (2017) 10 CAL CK 0006

Hon'ble Judges : Aniruddha Bose, Arindam Sinha

Bench : DIVISION BENCH

Advocate : PAYEL SAHA, J.P.KHAITAN

Judgement

1. This matter was listed today primarily for considering an objection note of the Stamp Reporter, High Court, Original Side in relation to registering the stay petition of the appellant taken out in connection with the appeal. This appeal is against an order of a learned Single Judge of this Court passed in exercise of jurisdiction under Article 226 of the Constitution of India. The stay petition is supported by an affidavit affirmed before the Attache(Passport), High Commission of India, Singapore on 14th December 2016. It is for this reason the department had declined to accept the petition for registering the same for subsequent listing. Under the provisions of Diplomatic and Consular Officers (Oaths and

Fees) Act, 1948 (Act 41 of 1948), authorities specified therein have been conferred with notarial power as also the power to administer oath. This matter was mentioned before us by Ms. Saha, learned counsel for the appellant bringing to our notice the fact that the department was not registering the stay petition and we sought a report from the department in that regard. In the report furnished before us, the Stamp Reporter, referring to a decision of an Hon'ble Single Judge of this Court in the case of Sudebi Sundari Mondal -vs- State of

West Bengal & Ors. (AIR1983 Cal 1), has recorded:- "On this point the undersigned has a doubt, with utmost respect to the amendment taken place, as to whether by an administrative order of amendment of rule, a judicial order passed by an Hon"ble Court can be overrode or not.

Be that as it may, again on 7th December, 1999 in G.A.No.41 of 1999(Award Case No.57 of 1994) The Great Eastern Shipping Co. Ltd. Vs. The Union of India represented by the Food Corporation of India, This Hon"ble Court by its order also excluded the writ jurisdiction of This Hon"ble Court while deciding the applicability of Notarial affidavits in the proceedings of Civil nature."

2. In the judgment of Sudebi Sundari (supra), it was held that in a writ petition, affirmation of an affidavit before a Notary Public was impermissible.

3. We had requested Mr.J.P.Khaitan, learned Senior Advocate to assist us in taking a decision on this point and today he has made his submissions and cited several authorities, to which we shall refer to later in this judgment. In Sudebi Sundari (supra), it was, inter-alia, observed:-

"7.....In a Punjab Full Bench decision, in the case of Teja Singh v. Union Territory of Chandigarh, AIR 1982 Punj & Har 169, which was also referred to by Mr.Bagchi, the fact of such an affidavit or affirmation thereof, in a proceeding under Art.226 of the Constitution came up for consideration and it was observed that in the matters, which have not been specifically dealt with by the writ jurisdiction (Punjab and Haryana) Rules (1976), the provisions of C.P.C., so far as they can be made applicable, would apply to the proceeding under Article 226 of the Constitution. It has further been observed that the explanation added to S.141 of the Code by the 1976 C.P.C. (Amendment) Act, does not in any way nullify the effect of Rule 32 of the Writ Rules. The views as expressed by the Full Bench determination as above, do really get support from the Supreme Court judgment as indicated bereinbeforfe. But, those views as expressed, would not certainly have any application in case of the Rules as in our case, the particulars whereof have been mentioned hereinbefore and more particularly when, our Rules are silent about affirmation before a Notary Public. It should be noted further that the question whether an application under Article 226 of the Constitution is a "proceeding in a Court of Civil Jurisdiction", within the meaning of Section 141, has been the subject matter of a judicial controversy. It has been observed by Andhra Pradesh High Court that Section 141 would apply in such proceeding, but on the other hand the Allahabad, Calcutta, Madras and Punjab High Courts have held that S.141 would not be applicable to such proceedings. Thus, it can be deduced that Section 141 is not applicable to proceeding under Article 226 of the Constitution. The Punjab Full Bench determination will not apply in this case as Writ R.32 as involved there contemplates application of the provisions of C.P.C., which is not so in our Rules."

4. At the point of time the said judgment was delivered, applications under Article 226 of the Constitution of India were guided by the Rules framed under

Article 225 of the Constitution of India, which was notified on 1st November 1960 under No.7586G. These Rules did not specifically provide for applicability of the provisions of Civil Procedure Code in relation to proceedings under Article 226 of the Constitution of India even in areas uncovered by the Writ Rules. This fact emerges from the passage of *Sudebi Sundari* (supra), which we have reproduced earlier in this judgment.

5. In the Full Bench decision of Punjab and Haryana High Court in *Teja Singh V. Union Territory of Chandigarh and Others* (AIR 1982 Punjab and Haryana 169), the course on which doubt has been expressed by the department on the basis of the ratio in the case of *Sudebi Sundari* (supra), was held to be permissible. Civil Procedure Code was made applicable to a writ proceeding in that Court in terms of Rules framed under Article 225 of the Constitution of India. This would be apparent from paragraph 18 of the report of the case of *Teja Singh* (supra):- "18. Coming to the point in issue, I find that R. 32, which has been reproduced in the earlier part of the judgment, clearly specifies that the provisions of the Civil P. C. would be applicable *mutatis mutandis* insofar as they are not inconsistent with the rules. In view of the specific rule there can be no gainsaying that the intention of this Court while framing Rule 32 was clear to the effect that all the provisions of the Civil P. C. would apply to the writ proceedings in so far as they could be made applicable and were not inconsistent with

the writ rules. For regulating the form and other details of procedure, rules had to be framed. In exercise of the power vested in this Court under Art. 225 writ rules have been framed. While framing the rules, this Court could have re-written certain provisions of the Civil P. C. in the shape of rules which were necessary for regulating the form and other details of procedure of writ petitions. But instead of unnecessarily wasting time, it was thought proper to apply all the relevant provisions of the Civil P. C. by enacting a rule of the kind of R. 32. It would be pertinent to observe here that it was not contended by Mr. Anand Swarup that in case a rule in the same terms as O. 23 R. 1 and O. 22 of the Code had been incorporated in the Writ Rules, then such a rule could be ignored on the ground that it curtailed the constitutional right of a party to approach this Court under Art. 226 of the Constitution. In other words, it was not controverted by the learned counsel that for the purpose of dealing with a petition under Art. 226, rules could be framed which could have had the same effect as the provisions of the Civil P. C. have. That being so, I fail to understand as to how the provision of R. 32 of the Writ Rules can be ignored on the ground that in case the provisions of Civil P.C. are made applicable, then it would result in curtailment of the constitutional right of a person to approach this Court under Article 226 of the Constitution."

6. The Writ Rules which prevailed at the time the judgment in *Sudebi Sundari* (supra) was delivered stands subsequently altered, and new Rules have been made with effect from 23rd May, 1986. These Rules further

underwent certain changes in the year 1999. Rule 53 thereof, *inter alia*,

provides:- "53. Save and except as provided by these Rules and subject thereto, the provisions of the Code of Civil Procedure (Act V of 1908) in regard to suits shall be followed, as far as it can be made applicable, in all proceedings under Article 226 and nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of this Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Courts."

Clause 36 of the prevailing Writ Rules, inter alia, provides -

"36(1). Except as otherwise specified in these Rules:- In respect of "Original Side" applications, the Rules of the Original Side relating to Interlocutory applications, and in respect of "Appellate Side" applications, the Rules of the Appellate Side relating to Civil Revision Cases shall apply mutatis mutandis, in respect of the following matters :-

- (a) .
- (b) .
- (c) .
- (d) .
- (e) .
- (f) Affirmation of affidavits.
- (g) .
- (h) .
- (i) .
- (j) .
- (k) .
- (l) ."

7. This appeal originates from a writ petition brought in Original Side of this Court. Clauses 4 and 5 of Chapter XV of the Original Side Rules of this Court deal with affirmation of affidavits, and stipulate :- "(4). Interpreting and explaining affidavits by Court Interpreting Officer. By other competent person. - All affidavits to be made in Calcutta or within 5 miles thereof, which require to be interpreted and explained to the deponent, shall be interpreted and

explained by one of the sworn Interpreting Officers (Court) or translators, of the Court, prior to being sworn. In the event of the deponent not knowingly any of the languages known to the Interpreting Officers (Court) or Translators, or in the event of the affidavit being sworn outside the limits above mentioned, the affidavit may be interpreted and explained to the deponent by some competent person, who shall make an affidavit that he is thoroughly conversant with English and

with the language spoken by the deponent, and that he truly and accurately interpreted and explained that affidavit.

5. Affidavits taken before authorised Commissioner.- Affidavits for use in any of the jurisdictions of the Court may be taken in Calcutta or within 5 miles thereof before a Commissioner generally or specially authorised by the Chief Justice for the purpose.

Every such Commissioner shall express in the jurat the place where he has taken any affidavit, in the event of the same being taken elsewhere than in the Court House."

8. The aforesaid provisions of the Original Side Rules deal with affidavits which are made in Kolkata or within the distance specified therein, and stipulate the manner in which those affidavits are to be affirmed. The said clauses do not mandate that affidavits to be used in Original jurisdiction of this Court could only be affirmed before the Oath Commissioner of this Court. Thus, we do not find any provision in the Writ Rules or the Original Side Rules which exclude permissibility of affirmation of an affidavit before a notary public or any other designated authority. Section 139 of the Code of Civil Procedure provides :-

"139. Oath on affidavit by whom to be administered.-In the case of any affidavit under this Code -

(a) any Court or Magistrate, or

[(aa) any notary appointed under the Notaries Act, 1952 (53 of 1952); or]

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the State Government has generally or specially empowered in this behalf, may administer the oath to the deponent.

10. The enactment on which the appellant has placed reliance to sustain his stand that the affirmation of the affidavit in support of the petition is in order for being registered is the Diplomatic and Consular Officer (Oath and Fees) Act, 1948. Specifically, Ms.Saha, has referred to Section 3 of the said Act, which stipulates- "3. Powers as to oaths and notarial acts abroad.- (1) Every diplomatic or consular officer may, in any foreign country or place where he is exercising his functions, administer any oath and take any affidavit and also do any notarial act which any notary public may do within [a State]; and every oath, affidavit and notarial act administered, sworn or done by or before any such person shall be as effectual as if duly administered, sworn or done by or before any lawful authority in [a State].

(2) Any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any person authorized by this Act to administer an oath in testimony of any oath, affidavit or act, being administered, taken or done by or before him, shall be admitted in evidence without proof of the seal or

signature being the seal or signature of that person, or of the official character of that person."

11. The applicability of that statute in a proceeding before this Court stands recognised by the decision of a learned single Judge in the case of *In Re: K.K.Ray (Private) Ltd.* (AIR 1967 Cal 636). In this judgement, it has been, *inter alia*, held : "On the ground that as the Indian Oaths Act did not provide for notarial attestation or affirmation by a notary public of foreign country, and on the wrong assumption that the Indian consulate or embassy had no power to certify or do any notarial act this Court's office expressed its views that such an affidavit as the present should not be admitted in this Court. The view of the office is not correct.

The position is made abundantly clear by Section 3 of THE DIPLOMATIC AND CONSULAR OFFICER (Oath and Fees) Act, 1948 which this Court's office missed and which provides *inter alia* as follows:

(1) "Every diplomatic or consular officer may, in any foreign country or place where he is exercising his functions administer any oath and take any affidavit and also do any notarial act which any notary public may do within a State; and every oath, affidavit and, notarial act administered, sworn or done by or before any such person shall be effectual as if duly administered, sworn or done by or before, any lawful authority in a State.

(2) Any document purporting to have affixed, impressed or subscribed thereon or thereto the seal and signature of any

person authorised by this Act to administer an oath in testimony of any oath, affidavit or act, being administered, taken or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, of the official character of that person."

Now that being the express statute in India, there is no difficulty here. The Notarial Act of Elizabeth Levy has not only been certified under the seal of the Country Clerk and Clerk of Supreme Court, New York, but has also been forwarded under the certificate of the Consulate General of India in New York for legalisation of the seal of the Clerk of the Country of New York. In that context of law and facts I see no difficulty whatever, legal or otherwise, in admitting this affidavit on the records of this Court."

12. This authority has been later followed by another learned Single Judge of this Court in the case of *Alan Kaye v. Recovery Officer, Employees' Provident Fund Organization, W.B.& Ors.* reported in AIR 2006 CAL. 158. In the case of *Ajit Sanyal v. Basiruddin Mondal* (1982(1) CLJ 483), it has been, *inter alia*, observed and held by a Division Bench of this Court: " It is, however, contended on behalf of the appellants that in view of the amendment of section 141 of the Code of Civil Procedure, the procedure provided in the Code for suits is no longer applicable to the writ proceedings. This contention is without any substance.

Even though the procedure regarding suits is not applicable to writ proceedings, there is no bar to the Court adopting such procedure, if thought necessary in the discretion of the court. The grant of relief under Article 226 of the Constitution is discretionary and in exercise of such discretion the Court will act in accordance with the principles of justice, equity and good conscience. The Court, in our opinion, should not be guided by technicalities, but by the spirit of doing justice."

13. In the note of the Stamp Reporter, there is reference to another unreported decision dated 7th December, 1999 of a learned single Judge of this court in G.A.No.41 of 1999 arising of Award Case No.57 of 1994 (The Great Eastern Shipping Co.Ltd. vs. The Union of India represented by the Food Corporation of India). But the said decision, in our opinion, does not directly apply in the facts of this case as in that case, the writ jurisdiction of this Court was not involved.

14. In the light of the aforesaid facts and circumstances of the case, and having regard to the ratio of different authorities to which we have referred, the decision of this Court reported in *Sudebi Sundari* (supra) can no longer be held to contain the guiding principles on this point at present. The position of law stands altered with introduction of Clause 53 of the Writ Rules. Now the provisions of the Civil Procedure Code pertaining to administration of oath for affirming an affidavit have become applicable in a writ proceeding as well, since the Writ Rules do not contain any contrary or exclusionary provision. We also do not find there is any conflict between the provisions Section 141 read with Section 139 of the Code of Civil Procedure and the Writ Rules. Section 141 of the Code of Civil Procedure excludes writ proceedings from the ambit of the expression "proceedings" as employed in that section. But so far as Writ Rules of this Court is concerned, Rule 53 contemplates applicability of the provisions of the Code in the manner specified in the said provision. The doubt expressed

by the Stamp Reporter in our opinion is unfounded, having regard to the provisions of Clause 53 of the Writ Rules. We are also conscious of the fact that we have decided this question ex-parte, without hearing the respondent on the subject controversy. But this was inevitable, considering the stage of the proceeding at which this issue was brought to our notice. In the event the respondents want to question our finding on this point, we would hear them after the petition is listed before us.

15. We accordingly direct the department to accept the application and register the same, if the petition otherwise in order. We would also like to point out at this stage that the question of power or jurisdiction of the Diplomatic Officer, who had made endorsement on the Affidavit, was not an issue which arose before us. In this perspective, we are issuing this direction. We record our appreciation for the assistance rendered to us by Mr.J.P.Khaitan, learned Senior Advocate as *Amicus Curiae*. Let the file be sent down to the department with this order.