

(2015) 02 BOM CK 0265
In the Bombay High Court
Case No : Writ Petition No. 848 of 2015

Rajiv Laxminarayan Jaju

APPELLANT

Vs

Gopal Motilal Baheti and Others

RESPONDENT

Date of Decision : 11-02-2015

Acts Referred:

Bombay Stamp Act, 1958 — Section 34, 35
Civil Procedure Code, 1908 (CPC) — Order 13 Rule 13, Order 13 Rule 13, Order 13
Rule 3, Order 13 Rule 4, Order 18 Rule 18
Registration Act, 1908 — Section 17, 18, 49

Citation : (2015) 6 ALLMR 300 : (2015) 3 BomCR 653

Hon'ble Judges : R.V. Ghuge, J

Bench : Single Bench

Advocate : Uday S. Malte, for the Appellant

Final Decision : Disposed off

Judgement

R.V. Ghuge, J.—I have heard Mr. Uday S. Malte, learned Counsel appearing for the petitioner for quite sometime. The petitioner takes an exception to the impugned order dated 11.11.2014 passed by the trial Court below Exhibit-147 in RCS No. 159/2001.

2. The grievance is that an objection raised under Order XIII, Rule 3 of the Code of Civil Procedure has not been considered by the trial Court in it's proper perspective and has, therefore, led to the passing of the impugned order, which is erroneous.

3. The factual matrix reveals that the second witness of the plaintiff filed an affidavit in lieu of the examination-in-chief at Exhibit-145 under Order XVIII, Rule 4 of the Code of Civil Procedure, which is dated 16.9.2014. On the same date, the said witness before the trial Court, verified the contents of the said affidavit. Further examination-in-chief was conducted. The "Sammati Patra" (consent deed/letter) dated 22.9.1993 was placed on record. The said document was shown to the said witness who identified the said document. He

identified his signature as well as signatures appearing on the said document. He stated that the signatories have signed upon the said document in his presence. He, therefore, accepted the contents of the said document to be true and correct. Thereafter, the said consent deed, which is at issue in this petition, was allotted an Exhibit No. 146.

4. The defendant No. 1 did not desire to cross-examine the said witness and as such, it was observed that there was no cross-examination on his behalf.

5. The defendant No. 2, who is the petitioner herein, sought an adjournment. It needs mention that the examination-in-chief and the events following thereafter, as are recorded in the above paragraphs, reveal that the petitioner had not raised an objection to the consent deed Exhibit-146 prior to it being confronted to the plaintiffs witness No. 2. It also appears that when it was shown to the said witness, there has been no objection on behalf of any of the defendants much less the petitioner. In this backdrop, the said witness, as observed above, has identified the contents of the said document and signatories and thereafter, the trial Court has granted an Exhibit No. 146 to the said document.

6. After the matter was adjourned on 16.9.2014, the petitioner raised an objection below Exhibit-147 on 1.10.2014 under Order XIII, Rule 3 of the Code of Civil Procedure r/w sections 34 and 35 of the Maharashtra Stamp Act, 1950. As such, it was prayed that Exhibit-146 be held to be inadmissible in evidence. The respondents herein opposed the said application.

7. Order XIII, Rule 3 of the Code of Civil Procedure reads as under:

"Order XIII: Production, Impounding and Return of Documents:-

(3) Rejection of irrelevant or inadmissible documents:-

The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection."

8. By the impugned order dated 11.11.2014 which resulted in the rejection of application Exhibit-147, the trial Court has noted that the defendant No. 2/ petitioner herein, had not raised any objection while exhibiting the said document when the examination-in-chief of the plaintiffs witness was being recorded. It is also noted that once the document was exhibited, there is no provision to de-exhibit it. While drawing such conclusions, the trial Court has secured the interest of the petitioner by observing that whether, the said document was admissible or not, and as to whether, it needs to be rejected under Order XIII, Rule 3, could not be decided at that stage in the suit. The trial Court has, therefore, noted that the said document cannot be rejected without recording evidence of the parties.

9. I, therefore, find that though the trial Court has rejected the said application, it is left open for the petitioner to address the trial Court at an appropriate stage so as to enable the trial Court to consider such objections after hearing all sides

and in the light of the evidence recorded.

10. Mr. Malte has relied upon the judgment of this Court in the matter of KBC Pictures Vs. A.R. Murgadoss and Others, (2009) 111 BOMLR 598 : (2009) 40 PTC 627 . Mr. Malte has pointed out paragraph 14 of this judgment, which reads as under:

"14. Perusal of the agreement dated 29th December 2004 shows that it has been written on a stamp paper which has been purchased in the name of Mr. S.B. Sharma. Mr. Sharma is not a party to the agreement. Under section 34 of the Bombay Stamp Act (as amended by Maharashtra Amendment Act 29 of 1994 with effect from 1st May 1994) an instrument which is written on an impressed stamp, is required to be written on a stamp paper which is purchased in the name of one of the parties to the instrument. The present stamp paper has not been purchased in the name of any of the parties to the instrument. The agreement dated 29th December 2004 is therefore not properly stamped and is inadmissible in evidence."

11. Mr. Malte has further relied upon the judgment of this Court in the case of Conwood Agencies Pvt. Ltd. Vs. Namdeo Pandurang Panchal and Another, (2005) 1 ALLMR 335 : (2005) 107 BOMLR 319 . Paragraph 5 (5.1, 5.2 and 5.3) reads as under:

"5. Order 18, Rule 4 of the Code of Civil Procedure (for short, CPC) contemplates that the examination-in-chief of a witness has to be on affidavit and a copy of the affidavit has to be supplied to the opposite party who calls him for evidence. The proviso to sub-rule (1) provides that the question of the roof and admissibility of the documents which are sought to be relied upon is subject to the orders of the Court. Order 18 does not exclude the application of the provisions of Order 13 which speaks of the production, impounding and return of documents. Under Rule 3, the Court is, at any stage of the suit, empowered to reject a document which it considers irrelevant or otherwise inadmissible recording the grounds of rejection. A document which is admitted in evidence has to be enforced by the Court in the manner specified under Rule 4 of Order 13. Under Rule 7, every document which is admitted in evidence or a copy whereof has been submitted shall form part of the record of the suit.

5.1 After considering the aforementioned provisions of the CPC, this Court in Shri Durgashankar S. Trivedi, Shri Ramshankar Magilal Trivedi, Shri Bhogilal Vishvanath Pandya, Shri Ganpatram Sunderji Joshi, Shri Vasu Shetty and Shri Maddu Kannappa Shetty Vs. Shri Babubhai Bhulabhai Parekh, AIR 2003 Bom 487 : (2003) 2 ALLMR 565 : (2003) 4 BomCR 626 : (2003) 2 MhLj 576 in paragraphs 9 and 10 observed thus:-

"9. While allowing the parties to lead evidence in the form of affidavits, the Courts, therefore, have to bear in mind that though the parties are entitled to produce documents alongwith affidavit, the admissibility of such document is to be decided by the Court before documents are being exhibited in evidence and

the decision cannot be postponed till the final disposal of the case or any time after the documents are exhibited in accordance with Order XVIII, Rule 4, CPC. The objection to the admissibility of the document should be dealt with and decided at the time the affidavit with documents is produced and being taken on record.

10. The admissibility of the document cannot be established by mere filing of the affidavit by the parties but the documents are necessarily required to be tendered by the deponent, while allowing the other side to have an opportunity to contest the admissibility of the document and an appropriate decision of the Court on such contest by the parties is necessary. Undoubtedly, this decision has to be prior to exhibition of the documents in evidence as already stated above. Merely because under Rule 4 of Order 18 the parties are allowed to produce documents along with affidavit it cannot be construed that such documents are to be exhibited without testing the admissibility of such documents. In fact, proviso to sub-rule (1) of Rule 4 of the CPC itself discloses that the Court has to decide about the admissibility of documents before they are being exhibited in the evidence."

5.2 In *Bharat R. Desai and Another Vs. Naina Mohanlal Bhal*, AIR 2005 Bom 38 : (2004) 2 ALLMR 291 : (2004) 2 BomCR 695 : (2004) 2 MhLj 901 . This Court reiterated the principle of law laid down in *Durgashankar Trivedi* case. The relevant observations in the said judgment read thus:-

...The question of proof and admissibility must be resolved by the Court in order to ensure that the cross-examination and re-examination, if any, then proceeds to take place on the basis of documents which have been held to be proved and which have been admitted in evidence. Referring the question of proof and admissibility of documents to an uncertain date in the future is neither in the interests of justice nor does it subserve the object of expedition. The Court must therefore at the outset determine the question of proof of admissibility of documents.

5.3 Considering the dictum in the aforementioned judgments of this Court and the provisions of sections 33, 34, 36 and 37 of the Act of 1958 and sections 17, 18 and 49 of the Registration Act, in my opinion, if the admissibility of the instrument is being objected to on the ground that it is insufficiently stamped the Court must at the outset, determine the question of its admissibility before allowing the party to rely on such document even for collateral purpose. Insufficiently stamped document cannot be received in evidence for any purpose whatsoever. The question of proof and admissibility must be resolved by the Court in order to ensure that the cross-examination or re-examination, if any, then proceeds to take place on the basis of documents which have been held to be proved and which have been admitted in evidence. Allowing the party to prove such document by examination of a witness or inviting the opposite party to cross-examine such witness in respect of such document cannot be permitted without determining the question of proof or admissibility of document."

12. Mr. Malte has, thereafter, placed reliance upon the judgment of this Court in the case of Nilkanth Khandade Vs. Bhaurao Khandade and Smt. Vimal Zode, (2008) 4 ALLMR 383 : (2008) 3 BomCR 282 : (2008) 4 MhLj 215 . Paragraph 7 of this decision reads as under:-

"7. As already stated that in view of the provision of section 34 of the Bombay Stamp Act and in view of section 17 read with section 49 of Indian Registration Act read with the provision of the Indian Stamp Act, the said document cannot be permitted to be shown to the witness and the objection in this regard needs to be decided as early as possible and before further evidence of defendant No. 1. It does not bear the signature of the plaintiff."

13. The ratio laid down in KBC Pictures case (supra), is as regards the inadmissibility of a document under section 34 of the Maharashtra Stamp Act on the ground that the stamp paper has not been purchased in the name of any of the parties to such an instrument.

14. Prima facie, Mr. Malte appears to be correct in contending that the paper on which the consent has been reduced into writing does not appear to have been purchased in the name of any of the signatories and that it is purchased in the name of the mother of the plaintiff. Needless to state, the petitioner is at liberty to cross-examine the said plaintiff's witness and confront him with these aspects inasmuch as to lead evidence to establish his case. Naturally, the trial Court would then have to consider this aspect while deciding the suit.

15. In M/s. Conwood Agencies Pvt. Ltd. judgment (supra), this Court has noted that an objection to the admissibility of a document is to be decided by the Court before such a document is exhibited in evidence (see paragraph 9 of the said judgment). So also in paragraph 10 it has been observed that "Undoubtedly, this decision has to be prior to exhibition of the documents in evidence as already stated above." Similar are the observations in paragraphs 5.2 and 5.3 of the said decision.

16. In such circumstances, I do not find that the trial Court has shunted out the objections of the petitioner by passing the impugned order. Had such objections been raised before the said document was confronted to the said witness, who has deposed to prove it and subsequently which was granted an exhibit number, the trial Court would have been obliged to consider such objections of the petitioner in the light of the ratio laid down in the judgments of this Court in the matters of KBC Pictures and M/s. Conwood Agencies (supra). Since these objections have been raised after the document was referred to and was granted an exhibit number, that the trial Court has rightly observed that it's admissibility cannot be decided at that stage without recording evidence of the parties.

17. In the light of the above, this writ petition is disposed of without causing any interference in the impugned order dated 11.11.2014. Needless to state, as are the observations of the trial Court in the impugned order dated 11.11.2014, the petitioner would be at liberty to cross-examine the said witness and lead

evidence in support of his objections. In this situation, the trial Court is obliged to consider the rival contentions of the parties and decide the issue while adjudicating the suit. No order as to costs.