(1955) 01 MAD CK 0020

In the Madras High Court

Case No : Writ Petition No. 697 and Application No. 5409 of 1954 in C.S. No. 30 of 1953

S. Rangaraju Naidu and Others APPELLANT

Vs

Collector of Madras RESPONDENT

Date of Decision : 18-01-1955

Acts Referred:
Stamp Act, 1899 — Section 29, 40(1), 44, 48

Citation : AIR 1955 Mad 425 : (1955) 68 LW 376

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Advocate : T.R. Srinivasan and K. Krishnaswami Aiyangar, for the Appellant; Special Govt. Pleader and T.R. Srinivasan, for the Respondent

Judgement

Ramaswami, J.—Application No. 5409 of 1954 is by the plaintiffs to give time for the defendant to pay the deficit stamp duty called for by

the Collector of Madras, and, on failure to pay the deficit within the extended time, to strike off the defence; and the writ of certiorari is by the

defendant for quashing the order of the Collector of Madras in B-2-14451/54 dated 8-10-1954.

2. The facts are: Sri S. Kamesam was the owner of a patent right for manufacturing a wood preservative by name ""ASCU"". This Kamesam

Pantulu conveyed this patent right to the defendant Rangaraju Naidu, Agent, Burma Shell, Salem, This conveyance dated 9-4-1945 was executed

in Bangalore where S. Kamesam Pantulu was residing; and, the entire stamp duty payable on that document as per the Mysore Stamp Act, viz.,

Rs. 4687-8-0 was paid by the grantee Rangaraju Naidu.

It is common ground that a counter-part has been executed and is in the possession of Kamesam Pantulu. The original stamped instrument as per

the Mysore Stamp Act has been in the possession of Rangaraju Naidu. On 12-3-1945 Rs. 50,000 was paid by cheque by tho defendant to

Kamesam Pantulu. On 29-3-45 Rs. 1,00,000, has been paid in cash out of the sum of four lakhs assured in favour of Kamesam Pantulu under the

deed of assignment dated 9-4-1945. On the date of execution, 9-4-1945, a sum of Rs. 50,000 has been paid. Kamesam Pantulu has thereafter

been pressing for the repayment of the balance of two lakhs assured under this document dated 9-4-1945.

3. On 3-7-19-16 the advocate for the defendant has replied alleging discharge of payment of Rs. 2,00,000, and staling that/the defendant was

liable only for a baJance of one lakh of rupees. On 9-9-1946 a reply has been made by the defendant that only one lakh of rupees was due and

that the deed was actually executed on 2-4-1945 and had been altered into 9-4-1945. Thereafter Kamesam Pantulu has filed a suit in the Court of

the Subordinate Judge of Salem, O. S. No. 8 of 1947, on 19-12-1946, producing the counter part along with the plaint.

The defence was that the assignment has been Brought about by undue influence and misrepresentation amounting to fraud, and, the transaction

was unfair and unconscionable in character and that advantage has been taken of the defendant''s youth and that the deed was insufficiently

stamped aspect the Madras Stamp Act and was inadmissible and unenforceable. On 24-6-1949 the defendant produced the original of the

assignment into Court on a subpoona issued by the Court at the instance of the plaintiffs who naturally wanted it to be marked in order to establish

their claim.

4. On 28-4-1950 the Subordinate Judge of Salem impounded the document and sent it to the Collector with a covering letter for levying the stamp

duty and the penal duty in connection with the same and for certifying and retransmitting the same to the Court.

5. Thereupon a civil revision petition was filed in the High Court against the order of the Subordinate Judge of Salem. I shall later refer to its

disposal by Govinda Menon J. in -- In Re: Dr. P.M. Kamath, .

6. The Sub-Court suit has been withdrawn to the original side of this Court and it got numbered as C. S. No. 30 of 1953, and, after the decision

of Govinda Menon J., Panchapakesa Aiyar J, forwarded the assignment deed to the Collector of Madras.

The Collector of Madras passed an order and communicated it to the defendant in the following terms;

The document dated 9-4-1945 executed between Dr. S. Kamesam and yourself has been impounded by the High Court of Judicature at Madras

and sent to me for the levy of the stamp duty and penalty. A stamp duty of Rs. 9000 and a penalty of Rs. 5 have been levied u/s 40-1(b), Madras

Stamp Act. Please remit the sum of Rs.''9005 (Rs. nine thousand and five only) into the Madras Taluk Treasury and send the chalan to me before

20-10-1954 so that the document may be returned to the Court duly certified under the Stamp Act.

7. The defendant has naturally refused to pay the amount within the time prescribed, and, thereafter these two applications have been filed for the

purposes mentioned above.

8. The short point for determination is who has got to pay the stamp duty and the penalty in regard to this impounded instrument.

9. It is instructive to follow the discussion of this debated point in the various commentaries on the Indian Stamp Act of which I have given extracts

below;

10. AIR Commentaries on Indian Stamp Act (Chitaley and Appu Rao), 2nd Edn., 1951 (p. 435): ""Where a person, who wishes a document to be

admitted in evidence in Court, is also one who is originally bound to bear the, expense of providing the stamp duty, and he does not choose to pay

tile stamp duty and penalty required under Sub-section (1) of Section 40, it is open to the Collector to recover such duty u/s 48 by distress and

sale of his moveable property. But, very often, the person wishing to admit the instrument in evidence is different from the person who is originally

bound to bear the expense of stamp. In such a case, if he does not choose to pay the requisite stamp duty and penalty, the question arises whether

he can be compelled to pay the same.

There is no distinct provision in this section or anywhere else in the Act empowering the Collector to demand the proper stamp duty and penalty

from the person who produces it in Court. Sub-section (1)(b), no doubt, empowers the Collector to ''require'' the stamp duty or deficiency to be paid, but it is silent as to the person or persons who can be required to pay the same. According to the High Court of Allahabad, it is the person

who wishes a document to be admitted in evidence in Court, who primarily is the person from whom the requisite duty and penalty should be

recovered in the first instance, and if it is due from a third person, he can recover it u/s 44: -- ''Secy, of State v. Basharat Ullah'', 30 All 271 (B).

The Lahore High Court, on the other hand, holds that Section 44 is not conclusive on the point. According to it, the Court or the Collector cannot

compel such person to pay the duty and penalty. The payment is left to his choice. If he chooses to pay, Section 14 enables him to recover the

same. But the stamp duty and penalty can compulsorily"" be recovered only from the person liable to pay the proper stamp duty in the first instance.

It was also observed that if in a particular case this Act did not fix the liability for payment on any particular person, the Collector should keep the

impounded document in his custody and no person interested in the deed would be able to make any use of it unless and until the necessary duty

and penalty were paid: --""Mahomed Hussain v. Emperor'', AIR 1940 Lah 315 (C).

11. Donough Indian Stamp Law, p. 448, Edn. 9, edited by K. Bustomji, 1935 (Butterworths):

There is no enactment which declares an unstamped writing to be void; the absence, therefore, of any such enactment, and the circumstances of

the provisions for stamping after execution, on certain conditions, are a sufficient indication of intention not to deprive an instrument of its due effect

and operation, but merely to prevent its being used as evidence whilst it is unstamped; so that an instrument, although not written upon a stamp, is

effective from its commencement, but is incapable of being made use of, to show its operation, until it is stamped; (Tilsley, p. 244); see also --

''Joyrnan Bawa v. Easin Sarkar'', AIR 1926 Cat 877 (D), (where it was held that, failure duty to stamp a document does not affect the validity of

any contract therein contained), and the observations of Lindley L.J. in -- Towell v. London and Provincial Bank, 1893 2 Ch 555 (E) ''No case

that I know of can be cited to show that an erroneous stamp would invalidate the deed''."" (p. 453).

There is no special direction, but those who desire the admission of the document in evidence should be charged the duty and penalty. This may be recovered afterwards from the proper person u/s 44: 30 All 271 (B).

For instance, if a plaintiff produces in Court in support of his claim an unstamped or improperly stamped document, he primarily is the person from

whom the requisite stamp, duty (and penalty) may be recovered u/s 40, Stamp Act; (ibid). -

The deficient duty and penalty may be levied from either party, the provisions of Section 29 notwithstanding: Bengal Stamp Manual, p. 102.

12. Abdul Hague P.C.S. (Punjab Civil Service;

The Indian Stamp Act, p. 161, First Edition, 1936:

Presumably it is the person who produces the document who must pay the penalty and duty (SO All 271 (B)). He can, however, subject to the

limitations-of Section 44 recover it from the person primarily liable to pay the same.

13. (K. Jaganonatha Aiyar, The Indian Stamp Act, p. 283, (3rd Edn.J; P. R. Rama Iyer and Co., Madras, 1916):

The duty and penalty arc primarily to be recovered from the person from whom they are due, & it would be unfair to compel him to pay; but they

may be levied from either, party, the provisions of Section 29 notwithstanding. The person from whose custody the document has come, if he is

not concerned in the execution of it, may pay them if he be interested, and recover them u/s 44 from the person bound to pay. Clause (1)(b) of this

section is silent as to the person from whom the payment of the proper duty & penalty is to be required. If the Collector requires it from the wrong

person, his procedure is open to review, as provided by Chap. VI of the Act.

14. (Basu, Indian Stamp Act, p. 153), 2nd Edition, 1926 (Eastern Law HOUSE):

Section 37(1)(b) (now Section 40), Stamp Act 1 of 1S79 determines the penally leviable in all eases. Reference under Stamp Act, Section 46, 5

Mad 394 (F).

Section 40, Clause 1(b) is silent as to the party from whom the payment of the proper duty and the penalty is to be required........

The plaintiffs who wished the document admitted in evidence in support of the claim, are the persons from whom the Collector in the first instance

can recover duty and penalty before the document can be admitted in evidence.

Under Section 40(1)(b) the Collector is to require payment of proper duty together with penalty, but that section is silent as to whom the Collector

is to require the payment. If the Collector requires it from a wrong person his procedure is open to review under Chap. VI, but if he is to recover

from a wrong person, the remedy of that person lies in a suit against the person from whom it ought to have been required: (30 All 271 (B)).

15. (Mulla and Pratt, Indian Stamp Act, pp. 128-129, 5th Edn., 1950) (Eastern Law House).

Clause (b) is silent as to the person from whom the payment of the proper duty and penalty is required. According to the High Court of Allahabad

30 All 271 (B), if a person produces in Court in support of his claim a document not duly stamped, he primarily is the person from'' whom the

requisite stamp duty and penalty may be recovered under this section: But if some other person was bound to bear, the expenses of providing the

proper stamp, the person who has paid the duty and penalty is entitled to recover the same from him u/s 44 of the Act.

The High Court of Lahore, AIR 1940 Lah 315 (C), has taken a different view and has held that there is no provision in the Act to compel a person

to pay penalty on an insufficiently stamped instrument when he was not originally -bound to pay the duty thereon"".

16. M. N. Murzban, Indian Stamp Act, p. 138, (Whiteaway and Laidlaw Chambers, Esplanade, Fort, Bombay).

Nothing specific has been laid down in the Act to which of the parties concerned the Collector ''shall require the payment of the property duty,

etc''. The Select Committee on the Bill for Act 1 of 1879 (Vide Gazette of India, 7-9-1878) remarked as follows: ''When the person, from whose

custody the instrument has come, has not been concerned in the execution of it, it would be unfair to compel him to pay and when he has been so

concerned, the proper course is clearly to prosecute him for the offence, he has so committed.

But the Madras Board of Revenue, in its Proceedings No. 15, of 6-1-1880, promulgated the following Order: ''A Collector can look for the

payment of the deficit duty and penalty to the person from whose custody the instrument was impounded, and it'' is to this person, or his agent, that

the instrument should be returned. The parties should be left to make their arrangements and seek redress, if necessary, as laid down in Section 41 (now Section 44, Stamp Act, 2 of 1899)"".

17. (Krishnaniurthi and Mathmbhutham, Indian Stamp Act, P. 267, 1950, M.L.J. Publication)

The section has to be read with Section 48 according to which the duty and penalty are to be recovered as arrears of land revenue from the

person from whom- the same is due. This would mean that the amount should be recovered from the person who ought to have paid the duty in

the first instance, and not the person who has produced the instrument. The latter may in order to validate the instrument, pay the duty and penalty

and recover the amount from the person bound to bear the expense of providing the stamp in the first instance--See Section 44.

It is presumably to enable this to be done that Clause (b) of Sub-section (1) docs riot mention the person who should be required to pay the duty

and penalty though ordinarily the Collector would notify every person interested about the requisition for payment of the duty and penalty. There is

nothing in Section 35 or Section 40 to enable either the Court or the Collector to compel a person who merely wishes to have an insufficiently

stamped document admitted in evidence to pay the duty or penalty, when he is not himself the executant. The payment of such duty and penalty is

left to his choice.

If he does not pay, he has to take the consequence of not being able to use the document.

But it would be obviously hard and unfair to compel such a person to pay the duty on the document merely because he attempted to produce it in

evidence; AIR 1940 Lah 315 (C). But the Allahabad High Court has held in one case that proceedings under Ss. 40 and 48 may be taken against

the person who produced the document in Court: 30 All 271 (B)"".

18. (S. Kashiri Rangachariar -- The Stamp Act, P. 121, The Lawyer''s Companion Series, 2nd Edn. 1925).

Certain documents insufficiently stamped, were put in evidence by the representative-ill-interest of the executants. The Collector recovered from

the persons filing them, the duty and penalty by sale of their property. Held, that the Collector''s order was open to review by Revenue authorities,

and no suit lay against the Secretary of State for refund of penalty, realised. Held further, that the persons, who wish a document to be admitted in evidence, are the persons from whom a Collector can realise the duty and penalty, and if it is due from a third person, they can bring a suit and

recover it from him (30 All 271 (B)"".

19. (K. Seshadri Aiyangar, Madras Registration Department; Stamp Law of British India, p. 207

(G. A. Natesan and Company,1901).

It is to be observed that this Section 40 gives the Collector power to require the payment of duty and penalty. Under the old Act, 1 of 1879 the

Collector had no power to recover the penalty by revenue or other process in the event of the person who is required to make the payment

refusing or omitting to comply with the demand nor was there any direction in it as to whom the demand for payment was to be addressed.

The practice was to demand it of the person from whose custody the document had come but there was no objection to any other person

interested in the validation of the document paying the required amount and recovering it from the individual who was bound by law or agreement

to bear the costs of providing the proper stamp on the instrument impounded, Very frequently the party required by the Collector to pay was not

necessarily the person who was bound by the law to see that the document was properly stamped at the time of execution. There was thus a flaw

in the Act and the defect has been remedied in the present Act by the introduction of Section 48 by which all duties and penalties required to be

paid under this section may be levied by the Collector in the same manner as an arrear of revenue from the person by whom the same are due, i.e.,

to say from the person who ought to have paid the duty in the first instance"".

20. In addition the following ancillary decisions may be noted. In -- ''Harjimal and Sons v. H. S. Palta and Sons'', AIR . 1947 Lah 319 (G),

Achhru Ram J., held:

Mere production of a document does not amount to a tendering of that document in evidence and if without being moved by a parry for issue of

notice to the other, party to admit or deny a certain document the Court suo motu and for its own facility calls upon each of the parties to admit or

deny documents produced by the other party, this act of the Court cannot be regarded as an implied tender by the party of the document in

evidence. In such a case, the party cannot be called upon to pay the stamp duty and penalty on the document if he is not otherwise the person by

whom the stamp duty is payable under the Act; AIR 1940 Lah 315 (C), Relied on"".

See ''Roopchand Motiram v. Secry. of State'', 1939 Nag LJ 364 (H), 1933 Mad SM p. 44 citing BPs 15, 6-1-1880: 2408 R. 28-11-1907: 521-

R Mis 27-3-1908 -- When documents arc impounded and sent to the Collector or Divisional Officers u/s 38, Act 1 of 1899, all that they need do

is to look for payment of the penalty and insufficient stamp duty to the person from whose custody the documents came into the hands of the

impounding officer. But stamp duty and penalty can be ''compulsorily'' levied u/s 48 only from the person liable to pay the proper duty in the first

instance ''(33) Mad SM p. 46 (citing BP 504, 30-8-1887).

21. In Chunduri Panakala Rao Vs. Penugonda Kumaraswami, , Venkataramana Rao J., held, ""Section 29, Stamp Act will only be applicable to a

case where the document is not produced before the Court; but when once the document has been produced before the Court and tendered in

evidence, the right of recovery is only by virtue of Section 44, Stamp Act,

22. In In Re: Dr. P.M. Kamath, '', Govinda Menon J., held:

A mere handing of a document, even if it is as a result of a summons from Court, cannot be said to be production. There must be volition on the

part of the person bringing it into Court to use it for some purpose. The mechanical act of carrying the document as a result of an order of Court

and handing it over to the officer of Court would not be production. But such act would come within the meaning of the term ''comes before the

Court in the performance of its judicial functions'' as laid down in -- ''King-Emperor v. Balu Kuppayan'', 25 Mad 525 (J)"".

The learned Judge relied on three Lahore'' cases: -- ''Ujjal Singh, Sunder Singh v. Ahmed Yarkhan'', AIR 1936 Lah 985 (K); -- ''Uttam Chand v.

Per-man Nand'', AIR 1942 Lah 265 (1); and AIR 1947. Lah 319 (G)'', for the proposition that the mere bringing into a Court of a document

would not be sufficient to make it a production. In order that there should be production it must be with the object of tendering it in evidence and

using it for the benefit of the party himself, The learned Judge also referred to the instructive case of AIR 1943 97 (Nagpur) , where Vivian Dose

J., (as he then was) held. that the word ""produced"" has a technical meaning and means either produced in response to a summons or produced

voluntarily for some judicial purpose such, for instance as evidence. A document which falls accidentally or incidentally into a Judge''s hand cannot

be said to be produced. The word ""produced"" carries with it, when used in this connection, a mental element. The mere physical act of production

is not enough when there is no intention to ""produce"".

23. In fact, it is on the foot of this reasoning that Civil Courts cannot impugn not properly stamped documents found in a book other than that

forming the basis of the claim in the instant controversy before the Court: -- ''Sashishi Mohan Saha v. Kumudkumar Biswas'', AIR 1918 Cal 1026

(N).

24. To sum up, the Stamp Act is siient as to front whom the Collector can demand the proper stamp duty and penalty in regard to the document

forwarded to him after coming to Court. Judicial Opinion is sharply divided in regard to initial recovery of stamp duty and penalty; one view

holding that it should be from the person who wishes the document to be admitted .in evidence in Court for the purpose of resting his claim in the

suit or proceedings upon it, the other view being that stamp duty and penalty are compulsorily recoverable only from the person liable to pay the

same in the first instance. This conflict, however, is not so deep seated as it appears to be. Carefully construed, it can be harmonised.

There is no difficulty if the person who produces or gets produced a document and wishes it to be admitted in evidence happens to be the same

person who has to pay proper stamp duty in the first instance. It is from him the duty has to be recovered. The difficulty arises only when the party

who gets the document produced be one other than himself who has to pay the proper stamp duty in the first instance and wishes it to be admitted

in evidence to rest his claim upon it, and the party compelled to produce it does not wish to get it admitted in evidence.

In such a case the language of Sections 40 and 48 of the Act and the provisions made u/s 44 and the balance of convenience and fairplay and the

purpose of stamping, viz., that an instrument although not written upon a stamp is effective from its commencement but is incapable of being made

use of to show its operation until it is stamped --all indicate that the recovery of the stamp duty and penalty should in the first instance be from the party wishing to use the document in evidence in support of his claim leaving it open to him to recover the same u/s 44 from the person liable in the

first instance u/s 29, of the Act.

25. Bearing these principles in mind, if we examine the facts of this case, the order of the Collector has got to be quashed and is hereby quashed in

the Writ Petition; and the application of the plaintiff has got to he dismissed and is hereby dismissed. No costs.

