(2017) 04 KAR CK 0028

In the Karnataka High Court

Case No : 481 of 2016

SRI H.ANANDA MURTHY S/O. SRI HUCHIRACHAR APPELLANT

Vs

SRI SHREEKANTACHAR S/O. LATE SRI CHENNAPPACHAR RESPONDENT

Date of Decision : 05-04-2017

Acts Referred:

Code of Civil Procedure, 1908, Section 151, Section 151, Section 49, Section 49, Order 8Rule 1-A, <a href=3859-Order 8R

Citation : (2017) 04 KAR CK 0028

Hon'ble Judges : A.N. Venugopala Gowda

Bench : SINGLE BENCH

Advocate : K.P. ASOKUMAR, R.B. SADASIVAPPA

Judgement

1. This is plaintiff''s Civil Revision Petition arising from a suit for ejectment. The suit was instituted for passing a decree of ejectment against the defendant to deliver possession of the plaint schedule premises. Suit is at the stage of trial. The defendant filed I.A.No.5 for recalling PW-2 for further cross-examination on the premise that there is need to produce an additional document to establish the defence. Application was rejected on the ground that the defendant had not stated in the written statement about the alleged mortgage. Assailing the said order a Civil Revision Petition was filed. In order to afford an opportunity to place all the material on record, the petition was allowed and the application was remanded for consideration afresh after the defendant produces the Mortgage Agreement to prove his case that there is no jural relationship of landlord and tenant. Trial Court was directed to consider both the applications i.e., application for production of the Mortgage Deed ''subject to admissibility of the same in evidence'' and also I.A.No.5. I.A.No.6 was filed under Order VIII Rule 1-A read with S.151 CPC for according permission to produce the Mortgage Agreement. A common order allowing I.A. Nos.5 and 6 having been passed by the Trial Judge, this petition was filed to set aside the order to the extent of allowing of I.A. No.6.

2. Sri K.P. Asokumar, learned advocate vehemently contended that the learned Trial Judge has lost sight of the fact that an unregistered Mortgage Deed, that was sought to be produced, is compulsorily registerable under S.17 of the Indian Registration Act and as such, is not admissible in evidence. Learned counsel submitted that the question of paying duty and penalty did not arise at all as the payment of duty and penalty would not cure the non-registration of the Deed. He submitted that while allowing I.A.No.6, the observation made in the order passed earlier i.e., in the revision petition filed assailing the order passed on I.A.No.5 has not been kept in view. He contended that the question of payment of duty and penalty would arise in respect of document which is compulsorily registerable and not properly stamped. He submitted that the Trial Judge has committed grave error in not considering the tenable objections filed to I.A.No.6 and there being miscarriage of justice, there is a need for interference.

3. Sri R.B. Sadasivappa, learned advocate on the other hand submitted that the Revision Petition field as against the order passed on I.A.No.5 having been allowed and the respondent given an opportunity to place all the materials available with him before the Trial Court, which was directed to consider the same, after the Mortgage Agreement dated 25.10.2005 is produced, Trial Judge is justified in allowing I.A.No.6. He made submissions in support of the order passed on I.A.No.6 and sought dismissal of this petition.

4. Perused the record and considered rival contentions. Point for consideration is, whether on account of permitting the production of a document, there is any miscarriage of justice?

5. While allowing CRP No.80/2016 and permitting the defendant to produce the Mortgage Agreement, it was made clear that ''the Trial Court shall consider the admissibility of the same in evidence''. Learned Trial Judge while allowing I.A.Nos.5 and 6 has specifically observed, "that the question of payment of duty and penalty will be considered as soon as the defendant produces the Mortgage Deed during the course of evidence and the order with regard to the imposition of duty and penalty would be passed".

6. S.33 of the Karnataka Stamp Act, 1957 (for short ''the Act'') provides for examination and impounding of an instrument not duly stamped. Once, on examination, it is found that the instrument is not duly stamped, S.34 comes into operation and places a complete embargo on the admissibility of such instrument in evidence.

7. In the case of RAM RATTAN (dead) BY L.Rs. Vs. BAJRANG LAL AND OTHERS, (1978) 3 SCC 236, Apex Court after considering the observation made in the order passed in the case of JAVER CHAND AND OTHERS Vs. PUKHRAJ SURANA, AIR 1961 SC 1655, has held that, if objection is raised with regard to the admissibility of the document on the ground that it is not duly stamped, the Court has a duty to decide the objection judicially, then and there itself, as the statute casts a duty on the Court in the matter of examination and impounding

of the instrument tendered in evidence, before it is marked as an exhibit.

8. In the case of SMS TEA ESTATES PRIVATE LIMITED Vs. CHANDMARI TEA COMPANY PRIVATE LIMITED, (2011) 14 SCC 66, Apex Court while considering a question ''whether an unregistered instrument (but compulsorily registerable) is valid and enforceable'', has held as follows: "10. Section 17(1)(d) of Registration Act and Section 107 of TP Act provides that leases of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument. Section 49 of the Registration Act, 1908, sets out the effect of non-registration of documents required to be registered. The said section is extracted below:

"49. Effect of non-registration of documents required to be registered.- No document required by Section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882),] to be registered shall--

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (1 of 1877), or as evidence of any collateral transaction not required to be effected by registered instrument"."

"11. Section 49 makes it clear that a document which is compulsorily registerable, if not registered, will not affect the immovable property comprised therein in any manner. It will also not be received as evidence of any transaction affecting such property, except for two limited purposes. First is as evidence of a contract in a suit for specific performance. Second is as evidence of any collateral transaction which by itself is not required to be effected by registered instrument. A collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction..."

(underlining for emphasis)

When a document which is not registered (but compulsorily registerable) is produced in evidence, the procedure to be adopted by the Court, has been summed up as follows:

"22.1. The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

22.2. If the document is found to be not duly stamped, Section 35 of the Stamp Act bars the said document being acted upon. Consequently, even the arbitration clause therein cannot be acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Section 35 and 38 of the Stamp Act.

22.3. If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in Section 35 or 40 of the Stamp Act), and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

22.4. Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registerable, the court can act upon the arbitration agreement, without any impediment.

22.5. If the document is not registered, but is compulsorily registerable, having regard to section 16(1)(a) of the Act, the court can delink the arbitration agreement from the main document, as an agreement independent of the other terms of the document, even if the document itself cannot in any way affect the property or cannot be received as evidence of any transaction affecting such property. The only exception is where the respondent in the application demonstrates that the arbitration agreement is also void and unenforceable, as pointed out in para 15 above. If the respondent raises any objection that the arbitration agreement was invalid, the court will consider the said objection before proceeding to appoint an arbitrator.

22.6. Where the document is compulsorily registerable, but is not registered, but the arbitration agreement is valid and separable, what is required to be borne in mind is that the arbitrator appointed in such a matter cannot rely upon the unregistered instrument except for two purposes, that is (a) as evidence of contract in a claim for specific performance, and (b) as evidence of any collateral transaction which does not require registration."

9. In the case of MAHADEVA Vs. THE COMMISSIONER, MYSORE CITY CORPORATION AND OTHERS, 2003(1) KLJ 518, the question that fell for consideration is, "whether the Trial Court was justified in demanding payment of duty and penalty in terms of S.34 of the Act on an unstamped and unregistered sale deed, relied upon by the petitioner, as a condition precedent for letting the same into evidence, in proof of collateral transaction?" It was held, that S.34 of the Act, which deals with the instruments not duly stamped has inter alia provided that no instrument shall be admissible in evidence for any purpose or shall be acted upon, registered or authenticated by any person or by a public officer unless such an instrument is duly stamped. It was found that expression "for any purpose" used in S.34 of the Act, "is wide enough to include use of any document for collateral purpose or transaction". The order passed by the Trial

Court demanding duty and penalty in terms of the proviso to S.34, before the document could be marked in token of it having been admitted in evidence was held to be not suffering from any error of law to warrant interference.

10. Mere production of a document along with pleading or an application does not amount to proof of the same. Its execution has to be proved by admissible evidence. When a document is tendered in evidence by either party and objection is raised against the same on the ground that it is not duly stamped under S.34 of the Act or for want of registration, as contemplated under S.17 read with S.49 of the Registration Act, 1908, it is obligatory on the part of the Court to apply its mind to the objections raised and decide the objections. No document could be admitted in evidence on its face value, irrespective of the fact whether it is not duly stamped or otherwise, nor it could be rejected as inadmissible for the same reason or otherwise for want of registration automatically. In other words, the Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an ''exhibit'' in the case.

11. Merely because the application filed to permit the production of a document was allowed, it does not mean or should not lead to the conclusion that the objection cannot be raised with regard to its inadmissibility when tendered in evidence i.e., before its marking as an exhibit. The objection" can be both on the grounds of the instrument having not been drawn on the requisite value stamp paper i.e., duly not stamped and also the nonregistration, if it is a compulsorily registerable instrument.

12. Having regard to the above and also the specific observation made by the Trial Judge, "that the question of payment of duty and penalty will be considered", there is no miscarriage of justice. Consequently, the impugned order does not call for interference. However, it is made clear that when the instrument is tendered in evidence or before it is received in evidence, if any objection with regard to its admissibility is raised, the same shall be dealt with judicially, keeping in view the observation made supra. Petition is disposed of accordingly with no order as to costs.

