

(2015) 03 KAR CK 0335

In the Karnataka High Court

Case No : Writ Petition No. 50764 of 2012 (GM-CPC)

The Secretary Flat Owners Association

APPELLANT

Vs

N. Thamboochetty and Others

RESPONDENT

Date of Decision : 02-03-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 13, Order 13 Rule 4, Order 13 Rule 4(1)
Evidence Act, 1872 — Section 145
Karnataka Stamp Act, 1957 — Section 33, 33, 34, 34, 35, 35
Registration Act, 1908 — Section 17, 49
Stamp Act, 1899 — Section 36

Citation : (2015) ILR Kar 2939 : (2015) 3 KCCR 2047

Hon'ble Judges : Ram Mohan Reddy, J

Bench : Single Bench

Advocate : G.L. Vishwanath, for the Appellant; Vijay Krishna Bhat M., Advocates for the Respondent

Judgement

Ram Mohan Reddy, J.—Defendant No. 2 in O.S. No. 10198/1998 on the file of the XXVIII Addl. City Civil Judge, Mayo Hall, Bengaluru, aggrieved by the order dated 16.11.2012 rejecting the application under Sections 33 and 34 of the Karnataka Stamp Act, 1957, for short "Act" has presented this petition.

2. Respondents jointly instituted O.S. No. 10198/1998 for recovery of vacant possession of "A" and "B" suit schedule properties, arraigning the lessee, as 1st defendant and those inducted by 1st defendant as tenants of portions of the suit schedule properties, as defendants 2 to 85, asserting that plaintiffs jointly executed a rental agreement in favour of 1st defendant extending lease of the vacant land for 99 years on payment of ground rent and permitting erection of a commercial complex and induct tenants and on expiry of the term of lease, possession be handed over to the plaintiffs. On the allegation that the 1st defendant committed breach of the terms of the rental agreement, the suit instituted.

3. Petitioner arraigned as 2nd defendant filed written statement opposing the suit, advancing amongst others, the plea that the suit was not properly valued for purpose of Court fee. An issue when not framed over proper court fee, led to filing a writ petition, whence, certain directions were issued, where afterwards , issue No. 10 was framed in that regard, casting burden on 2nd defendant. The Trial Court having answered the issue in the negative, against 2nd defendant, without recording evidence, was quashed in another writ petition and remitted for consideration, afresh. At that stage, petitioner was examined as D.W.1 over issue No. 10 by filing an affidavit in lieu of recording examination in chief. In the cross-examination on 28.01.2011, D.W.1 having answered the question that he had seen the agreements and plan, was shown the two rental agreements of even date 16.10.1983 and when he said that those were the documents seen by him, were marked as Exs. P.1 and 2, without objections.

4. On 14.9.2012 petitioner filed IA invoking Sections 33 and 34 of the "Act", to direct the plaintiff to pay duty and penalty on the two rental agreements of even date 16.10.1983, inter alia, contending that they are insufficiently stamped and though compulsorily registerable were not registered.

5. That application was opposed by filing statement of objections of the plaintiff asserting that the filing of the application at a belated stage was only to protract the proceeding and infact was not maintainable and further that since D.W.-1 in cross examination admitted the documents when confronted, without objections, were marked as Exs. P1 and P2. In addition, it was stated that Section 35 of the "Act" states that when an instrument is admitted in evidence, such admission shall not except as provided in Section 58 be called in question at any stage of the same suit or proceeding on the ground that the instrument was not duly stamped.

6. The trial Court having regard to the pleadings of the parties and the deposition of D.W.-1 observed thus: "the contents of the same including its execution was admitted by DW-1 during the cross-examination", and since neither D.W.-1 or the learned counsel though present did not raise objection of deficit duty on the said documents, the Court did not have jurisdiction to go into the question of adequacy of stamp duty at a subsequent stage of the suit, in the light of Sections 35 and 36 of the "Act", except, as provided under Section 58. The trial Court followed the observation of the Apex Court in *Javer Chand and Others Vs. Pukhraj Surana*, AIR 1961 SC 1655 : (1962) 2 SCR 333 that once document is marked as exhibit in the case and the trial has proceeded all along on the footing that the document exhibited has been used by the parties in the examination and cross-examination of their witnesses, Section 36 of the Act comes into operation and it is not open either for the court itself or court of appeal or revision to go behind the order. The trial court though made reference to particulars of reports relied upon by the applicant, nevertheless, without furnishing the names of the parties or the facts obtaining therein, muchless principles laid down, held that the said decisions were inapplicable and the application misconceived to reject it

by the order impugned.

7. Petition is not opposed by filing statement of objections.

8. Learned counsel for the petitioner submits that the trial Court did not comply with Order 13 Rule 4 CPC by making endorsements while marking the rental agreements as Exhibits P1 and P2; the order sheet dated 28.1.2011 does not disclose recording the marking of Exs. P1 and P2; the cross examination of D.W.-1 does not disclose admission of contents or execution of Exs. P1 and P2, since D.W.-1, was neither party to the documents nor admittedly had knowledge of its contents; neither D.W.-1 or his counsel objected to the marking of Exs. P1 and P2 when shown in cross-examination hence not confronted; documents are not admittedly adequately stamped; the failure on the part of the trial court should not prejudice the case of the petitioner. Learned counsel places reliance upon the following reported opinions:

"1) Mirza Sadik Husain Khan v. Nawab Saiyed Hashim Ali Khan and others 36 INDIAN CASES 104 (PRIVY COUNCIL) ;

2) Narasamma and another v. Arjun M.Menda and others 1995(5) Kar.L.J. 574;

3) K. Amarnath Vs. Smt. Puttamma, (1999) ILR (Kar) 4634 : (2000) 4 KarLJ 55 ;

4) Riyaz Khan and Others Vs. Modi Mohammed Ismail and Others, AIR 2003 Kar 3 : (2002) ILR (Kar) 3369 : (2002) 3 KarLJ 551 : (2002) 2 KCCR 1275 ;

5) Lakshamma and Others Vs. Riyaz Khan and Others, AIR 2003 Kar 197 : (2003) 3 KCCR 1891 ;

6) Krishna v. Sanjeev 2003(7) Kar.L.J. 38"

9. Learned counsel for the respondents seeks to sustain the order impugned as being well merited, fully justified and not calling for interference while placing reliance on the opinion of this Court in Javer Chand and Others Vs. Pukhraj Surana, AIR 1961 SC 1655 : (1962) 2 SCR 333

10. To better appreciate the submissions of the learned counsel, it is useful to extract relevant portion of the testimony of D.W.-1 in cross-examination on 28.1.2011 which runs thus:

The English translation reads thus:

"Before taking our flat on rent, I have perused the documents. I have seen the Agreement deed and site plan. I have seen the agreements dated 16.10.1983 between Plaintiffs and 1st defendant. What is shown to me now are the very same agreements marked as Ex. P1 and Ex. P2."

11. The order sheet dated 28.1.2011 reads thus:

"DW-1 fully cross examined. Defendants closed-their evidence on issue No. 10. For evi of pltt. 21.2."

12. In view the allegations of the petitioner over noncompliance of Rule 4 of Order 13 CPC in respect of Exs. P1 and P2, on 29.1.2015 it was ordered thus:

"Regard being had to the fact that certified copies of Exs. P1 and P2 do not disclose compliance of Order 13 Rule 4 CPC, registry to secure original records and re-list."

13. Having secured the records, on the facing sheet of Exs. P1 and 2 there is a marking in red ink as "Ex.P1" and "Ex.P2" respectively with another mark (scribbling) in black ink. There is nothing on Exs. P1 and P2 to record the particulars, tide of the suit; the name of the person producing the document; the date on which it was produced and; a statement of it so having been admitted as also an endorsement signed or initialed by the Judge.

14. Order 13 Rule 4 of CPC reads thus:

"4. Endorsements on documents admitted in evidence- (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely:--

a) the number and title of the suit,

b) the name of the person producing the documents,

c) the date on which it was produced, and d) a statement of its having been so admitted, and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge."

15. The core question for decision making is, "Whether the trial court did comply with Order 13 Rule 4 Of CPC in the matter of admitting in evidence and marking the documents as Exs. P1 and P2?"

16. The facts obtaining in Javier Chand's case are that Hundis when marked as Ex. P1 and P2 bore the endorsement "admitted in evidence" under the signature of the Court marked as exhibits had been used by the parties in examination and cross-examination of their witnesses and admitted in evidence. In the circumstances it was held that Section 36 of the Indian Stamp Act would come into play and the trial Court would not have jurisdiction to open the matter relating to adequacy or inadequacy of the payment of stamp duty on the said documents, observing that "once the court rightly or wrongly decides to admit the document in evidence, so far as the parties are concerned, the matter is closed". In the light of the observations, supra, what emanates is that the words "rightly or wrongly decides to admit the document in evidence" must depend upon the facts and circumstances of each case.

17. In *Mirza Sadiq Husain Khan* (supra) the Privy Council having made reference to Order 13 Rule 4 CPC felt bound to criticize, adversely, the practice followed by the trial courts in not complying with the said provision of law, observing that Order 13 Rule 4 CPC provides that a Presiding Judge shall endorse with his own hand a statement that the documents proved or admitted in evidence, was proved against or admitted by the person against whom it was used. That course in many instances when not followed resulted in embarrassing and perplexing controversies on the hearing of the appeals and hence the further observation that there is no plausible excuse for the neglect of the duty imposed by the Statute.

18. In *Narasamma* (supra), a learned Single Judge noticing a line of reported opinions of this Court, as also *Javer Chand*'s case (supra) and regard being had to Order 13 Rule 4 CPC in the matter of instruments to be admitted in evidence requiring to be endorsed with particulars mentioned in Rule 4 of Order 13 rejected the plea that under Order 13 Rule 4(1) CPC since action taken by the Court in admitting the document precedes the act of making the endorsement on the document, being a ministerial act, the omission is curable. Having regard to the facts obtaining therein it is noticed that there was nothing on the record that the court applied its mind to the prior act of examining whether the document Ex. P1 is admissible in evidence. Secondly the act namely making the endorsement under Order 13, Rule 4(1) C.P.C. admittedly was not made, although defendants did not object to marking the document in question. It was further observed that Order 13 Rule 4(1) CPC does not absolve the responsibility placed on the Court in examining the document over admissibility.

19. In *K. Amarnath* (supra), *R.V. Raveendran, J.*, in the premise of facts therein, held that the agreement relating to usufructus mortgage executed on a stamp paper, when marked as Ex. R4, for identification, was clearly irregular, though the dispute was over the jural relationship of landlord and tenant. In addition it was noticed that since D.W. 1 in cross examination when confronted with Ex. R4, by the counsel for the respondent denied not only the document but the signature of his father thereon, hence though not admitted in evidence, was assigned Ex. R4 for identification purpose only. Order 13 CPC it is held requires that all documents on which parties intend to rely on as substantive evidence, should be produced either with the pleadings or before settlement of issues, (In summary proceedings, where issues are not framed, the documents should be produced before commencement of evidence), or thereafter with an application assigning reasons for non-production and that parties may however produce a document for the limited purpose of confronting it to the witness during his cross-examination to "contradict him or to refresh the memory of a witness". Regard being had to Order 13 Rule 4 CPC r/w Section 145 of the Indian Evidence Act, 1972, it was observed thus:

"A witness cannot therefore be confronted in cross-examination (without previous production as per law) a document executed by someone else. In this

case, therefore, the document allegedly executed by petitioner's father, ought not to have been permitted to be confronted to petitioner in his cross-examination, without prior production as required by law."

The further observation is that Court was bound to consider the following three aspects: (a) what is the nature of the document; (b) whether it bears the requisite stamp duty under the relevant Stamp Act; (c) whether registration of the document is compulsory, while the decision on the first question, that is identifying or deciding the nature of the document is necessary to decide the other two questions relating to Stamp duty and registration. Though the observation of the Apex Court in Javerchand's case was restated i.e. "once the court admits a document even wrongly, such admissions become final and cannot be reopened," nevertheless in the light of the fact that Ex. R4 was admitted in evidence only for a limited purpose of identification, it was held, that the marking of the document was irregular.

At paragraph 12 it is held thus:

"12. The admissibility of the document should also be examined with reference to Section 49 of Indian Registration Act, that is whether it relates to an immovable property requiring registration under Section 17 of Registration Act or any provision of Transfer of Property Act or whether it confers any power to adopt."

20. In Riaz Khan (supra), learned Single Judge having regard to Order 13 Rule 4 CPC as also the observations of the Apex Court in Javerchand concluded thus:

"15. Keeping in view the procedural requirements provided under the CPC and the law laid down by the Supreme Court, it has to be held that whenever there is an objection to admissibility of a document on the ground that the document is not stamped, it is the bounden duty of Trial Courts to decide admissibility aspect of the document as soon as it is tendered and objected on the said ground by the other side. But, it needs to be clarified that if the document is inadvertently marked without judicially determining the objection, then marking of a document as an exhibit has to be treated merely as tentative and taking a decision on the objection at a later stage by the Trial Court cannot be said to be impermissible or without jurisdiction. It is so because, non-consideration of objections by Trial Courts and marking it as exhibit is a mistake of the Court and the litigating parties cannot be made to suffer for the same. It is well-settled that there is no higher principle for guidance of the Court than the one that no act of Court should harm a litigant and it is the bounden duty of Courts to see that if a person is harmed by a mistake of the Court then he should be restored to the position he would have occupied but for that mistake (See Jang Singh v. Brij Lal and Ors., But, lapse on the part of Trial Judges to determine the objection to the admissibility of a document of the nature involved herein has to be taken as failure on his part to discharge his judicial duty in the manner required by law and such instances as and when found has to be dealt with in the administrative side in order to maintain the discipline in the judiciary." In other words applied

the legal maxim "actus curiae neminem gravabit" i.e., the act of Court shall prejudice no man.

(emphasis supplied)

21. The decision in Riaz Khan (supra) case is said to affirmed by the Apex Court, as observed in the reported opinion of V. Gopala Gowda J., as he then was in Lakshmamma (supra).

22. So also in Krishna (supra), N. Kumar, J., having regard to Order 13 Rule 4(1) CPC reiterated the opinion of learned Single Judges in the Judgments referred to supra.

23. In Lakshmaiah Setty (supra) the learned Single Judge having appreciated the material on record, more appropriately the testimony of PW-2 that he had in fact paid Rs. 1200 and obtained an assignment deed dated 20.4.1962 marked as Ex. P1, also recorded the same in the order sheet with the endorsement observed that the document in fact and in law was admitted, while Section 35 of the then Mysore Stamp Act having come into operation, it was no longer open for the trial Court to act under Section 35 and levy duty and penalty.

24. Having noticed the aforesaid observations, and applying the same to the facts and circumstances of this case, evidently the two unregistered, inadequately stamped agreements, of even date 16.10.1983 shown to D.W.-1 in cross-examination by the plaintiff, was preceded by the answer to the question, whether D.W.-1 had perused documents; seen the agreements, where afterwards , it is elicited that the documents shown are the agreements marked as Exs. P1 and P2. It is important to notice that neither of them are the site plan, but are two agreements, admittedly not produced by the plaintiff, at or before the settlement of the issues, so as to extend an opportunity to the parties, more appropriately the defendants to have their say over those two documents but plaintiff, for the first time, showed the two documents to D.W. 1 in cross examination.

25. The evidence of D.W. 1 is not in the direction of establishing, in fact and in law, admission of the contents of Ex. P1 and Ex. P2. D.W. 1 is neither a party to the said agreements nor a witness or has special knowledge of the contents therein. D.W. 1 speaks of having perused Ex. P1 and Ex. P2 at the time of taking on rent the flat and nothing more. Therefore, there was nothing to confront D.W. 1 with so as to contradict him or refresh his memory over contents thereof, except to refresh his memory of seeing and perusing its contents. Not being the author or party or a witness to Ex. P1 and P2, the documents cannot be said to be admitted in fact and in law. Assuming that the marking was for identification, even then the same is irregular as held in K. Amarnath (supra).

26. The agreements Ex. P1 and P2 were not produced by the plaintiff, admittedly before or at the settlement of issues and therefore, could not be "confronted" to D.W. 1 in cross-examination without prior production as required by law, as held

in K. Amarnath.

27. The trial Court was bound to consider the three aspects observed in KAmarnath (supra) i.e.,

"(a) What is the nature of document;

(b) Whether it bears the requisite stamp duty under the relevant Stamp Act;

(c) Whether registration of the document is compulsory;"

The decision on the first question since necessary to decide the other two questions, when not apparently done, has occasioned grave miscarriage of justice.

28. The Court below, as is apparent, from Exs. P1 and P2 did neither make the endorsement as contemplated by Order 13 Rule 4 CPC, nor record in the order sheet dated 28.1.2011 the marking of the two documents in the testimony of D.W. 1, indicating thereby, that there is nothing to substantiate, in fact and in law, admission of the two agreements of lease Exs. P1 and P2.

29. The observation of the Privy Council in Mirza (supra) that there is no plausible excuse for the neglect of duty imposed by statute applies on all is fours to the facts of this case. So also in Narasamma (supra), the rejection of the plea that recording the particulars in the endorsement, a requirement of Order 13 Rule 4 is a ministerial act, an omission curable, applies equally to the facts of this case.

30. The trial Court without noticing the aforesaid infirmities/inaccuracies appears to be carried away on a misunderstanding and a misconception of law that after marking the documents as Exs. P1 and P2, was denuded of jurisdiction to examine compliance with the "Act" including inadequacy of stamp duty, thereon, a statutory obligation under Sections 33 to 35 of the "Act", including impounding the documents admittedly unregistered and inadequately stamped. Trial Court on an assumption that the two agreements, in fact and in law, were admitted as Exs. P1 and P2, followed the observation of the Apex Court in Javer Chand (supra).

31. The plea of the learned counsel for plaintiff's that N.S. Lakshmaiah Setty's case has application, is but a specious plea. The facts in that case was a clear admission of fact and in law leading to marking the assignment as Ex. P1.

32. So also the submission that observation in Javer Chand (supra) has application since rightly or wrongly the documents are marked as Exs. P1 and P2 and therefore, the trial Court is denuded of the jurisdiction to reopen the action to examine the question of deficiency in the stamp duty under the "Act" cannot be countenanced, in the absence of the documents, in fact and in law being admitted.

33. In the result, the order impugned deserves to be quashed and is accordingly

quashed. IA under Section 33 and 34 of the Stamp Act is allowed. The trial Court is directed to impound the said documents and proceed thereafter in accordance with law. In the peculiar facts and circumstances there shall be no order as to costs.

Registry to forward the record forthwith to the trial Court.