(2019) 01 OHC CK 0028

In the Orissa High Court

Case No : Civil Miscellaneous Petition No. 1534 Of 2018

Z. Engineers Construction Private Limited And Another — APPELLANT

Vs

Bipin Bihari Behera And Others — RESPONDENT

Date of Decision : 24-01-2019

Acts Referred:

Powers Of Attorney Act, 1882 — Section 1A, 2, 33(1)
Stamp Act, 1899 — Section 33, 33(1), 35, 38
Code Of Civil Procedure, 1908 — Order 13 Rule 8,

Citation : (2019) 195 AIC 771

Hon'ble Judges : A.K. Rath, J

Bench : Single Bench

Advocate : Banshidhar Baug, Rati Ranjan Jethi, Md. Akhtar Alam, Sidheswar Rath

Final Decision : Dismissed

Judgement

A.K. Rath, J

1. This petition under Article 227 of the Constitution of India seeks to laciniate the order dated 14.12.2018 passed by the learned Civil Judge (Sr.

Divn.), Bhubaneswar in C.S. No. 245 of 2010, whereby and whereunder the learned trial court has rejected the petition of the defendant nos. 11 and

12, petitioners herein, under Order 13 Rule 8 C.P.C. to impound the power of attorneys, Exts.4 and 5.

2. Since the dispute lies in a narrow compass, it is not necessary to recount in detail the cases of the parties. Pithily put, Pathani Behera, predecessor-

in-interest of the opposite party nos. 1 to 5 and opposite party no. 6 instituted the suit for partition through their power of attorney holder, Kishore

Chandra Behera, impleading opposite party nos. 7 to 16 as well as the petitioners as defendants. Defendant nos. 11 and 12 filed their written statement denying the assertions made in the plaint. In course of hearing of the suit, Kishore Chandra Behera, power of attorney holder, was

examined as P.W.1. During examination of P.W.1, the defendant nos. 11 and 12, petitioners herein, filed a petition under Order 13 Rule 8 C.P.C.

praying inter alia to impound the power of attorneys, Exts.4 and 5. It was stated that the original plaintiffs, Pathani Behera and Dunguri Behera had

executed two registered power of attorneys in favour of Kishore Chandra Behera. In the General Power of Attorney (in short â??GPAâ??)

dtd.04.10.2008, Ext.5, they had given power to P.W.1 in respect of an area Ac.0.833 dec. out of a big patch of land to deal with the property. Again

they had executed another GPA, Ext.4, in the name of P.W.1 on 21.02.2011 in respect of an area Ac.0.415.6 dec. out of the suit land. In Exts.4 and

5, P.W.1 has got the power to sale, gift, mortgage and lease the property mentioned in the GPA. Possession of the land was delivered to him. P.W.1

stated that he had taken possession of the suit land by virtue of Exts.4 and 5. He further stated that when Exts.4 and 5 were executed in the year

2008 and 2011, the value of the suit property was more than two crores. Thus, as per the Indian Stamp Act, when possession of the land is delivered

to the power of attorney holder to sale the property, the same is to be treated as deed of conveyance. The stamp duty and fee has to be paid as per

Indian Stamp Act provided for execution of a deed of conveyance. In the instant case, even though the plaintiffs executed the power of attorneys vide

Exts.4 and 5 in favour of P.W.1 to remain in possession of the suit land and to sale the land, but no fee has been paid as per deed of conveyance.

Exts.4 & 5 are insufficiently stamped. The documents cannot be marked as exhibits by the court, unless impounded and impounded fees are

recovered from the plaintiffs. Exts.4 and 5 are to be impounded. The court shall recover ten times penalty fees thereon from the plaintiffs within a fix

period, failing which, Exts.4 and 5 may be unmarked as exhibits for the interest of justice.

3. The plaintiffs filed objection to the petition. It is stated that the petition is not maintainable. The defendants have raised the question of valuation of

the suit and its improper adjudication. The petition is hit under Rule 20 of G.R.C.O. (Civil). It is further stated that both the GPAs have been admitted

in evidence by the court and marked as Exts.4 and 5. The document once admitted by the court, cannot be questioned. The provision of Indian Stamp

Act pertaining to impound of a document is not applicable to this case. Exts.4 and 5 are prepared, executed and registered as per the provisions of

Indian Contract Act and Indian Registration Act with all legal impediment. Had it not been properly stamped or under valued, then the registering

authority could have referred both Exts.4 and 5 to the Stamp Collector for realization of deficit fees. But both the documents were properly valued and

stamped. Defendant nos. 11 and 12 are estopped to raise the question of deficit court fee relating to the execution of Exts.4 and 5.

4. Learned trial court came to hold that Exts.4 and 5 have been registered as per provision under Sec.17 of Indian Registration Act. It is not a deed of

conveyance in terms of Sec.2(10) of Indian Stamp Act. The documents have been proved in evidence, admitted by the court and marked as exhibits.

Sec.36 of the Indian Stamp Act comes into play. Once an instrument is admitted in evidence, the same cannot be questioned at later stage of

proceeding. Exts.4 and 5 are no more in status of mere instruments. Held so, it rejected the petition.

5. Heard Mr. Banshidhar Baug along with Mr. Rati Ranjan Jethi, learned Advocates for the petitioners and Md. Akhtar Alam along with Mr.

Sidheswar Rath, learned Advocates for the opposite party nos. 1 to 6.

6. Mr. Baug, learned Advocate for the petitioners, argues with vehemence that power of attorney is an instrument. Article 1-A/23 of Schedule 1-A of

the Stamp Duty on Instruments Odisha Amendments prescribes mode of payment of stamp duty on conveyance. Explanation appended to the Article

1-A/23 states that if in a power of attorney, possession is given or intended to be given to the power of attorney, it will be deemed to be a conveyance

and the stamp duty thereon shall be chargeable accordingly. In Exts.4 and 5, as per Clause-22, possession of the land has been delivered to the power

of attorney. The power of attorney holder, P.W.1, in his evidence has admitted that under Exts.4 and 5 he has taken delivery of possession of the

lands. In Clause-17 of the Exts.4 and 5, the power of attorney holder has been authorized to make construction over the lands. Unless the power of

attorney holder is given possession and enters into the land, he cannot make any construction thereon. The Entry No. 1-A/23 has been amended by

the State of Odisha pursuant to the order of the Revenue and Disaster Management Department No. Stamp-10/06-3327/RDM dated 05.08.2008, wherein the percentage of stamp payable as per the schedule in the Indian Stamp Act has been reduced from 5% to 7%. In Clause-5 of both the

power of attorneys, i.e., Exts.4 and 5, power of sale has been given to the power of attorney holder. As per Clauses 22 & 5 of the power of attorney,

not only possession has been delivered, but also power of sale with consideration has been given to the power of attorney holder. Under Exts.4 and 5,

duties and responsibilities have been entrusted to the attorney holder and the said responsibilities/powers are to be considered as consideration. The

power of attorneys containing power of sale and power to make construction along with other powers, stamp duties are to be paid as conveyance.

Thus as per Clause (f) of Article 1-A/48 of the Stamp Act (Odisha Amendment), Exts.4 and 5 are to be treated as conveyance and stamp duty is

payable as per Article 1-A/48 of the Stamp Act (Odisha Amendment). The stamp duty is to be paid @7% on the market value of the property

involved in the power of attorney. But in both the Exts.4 and 5, stamp duty worth Rs. 150/- on each has been paid. Exts.4 and 5 are insufficiently

stamped. He further submits that Exts.4 and 5 have been produced in court. When the power of attorneys vide EXts.4 and 5 are produced before the

learned court below and those being insufficiently stamped, the learned trial court ought to have exercised jurisdiction under Sec.33 of the Stamp Act

to impound the same. Secs.33 and 35 of the Stamp Act operates in different fields. Sec.33 comes into play the moment an insufficiently stamped

instrument is produced before an authority having power to take evidence, whereas Sec.35 shall come into play only when the insufficient instruments

are attempted to be brought in evidence and marked as exhibit. As per Sec.35 unless a required stamp duty and 10 times penalty thereon is paid, the

said insufficiently instrument cannot be accepted in evidence. In the instant case, when two power of attorneys are produced, Sec.33 shall come into

play. So, in exercise of power under Sec.33 of the Stamp Act, both the power of attorneys being insufficiently stamped, are to be impounded and

impounding fees along with 10 times penalty thereon are to be recovered. Ext.4 is marked without objection, whereas Ext.5 is marked with objection.

If this Court finds that Sec.33 of the Stamp Act is not applicable to both the power of attorneys, then as per Sec.35 of the Stamp Act, those would

have been impounded. Ext.5 has been marked with objection. Hence, the question of admitting Ext.5 into evidence waiving the objection is to be considered keeping in view the fact that it is insufficiently stamped and the same can only be admitted in evidence when impounding fees and 10 times

penalty thereon is paid by the plaintiffs. He further submits that under Sec.36 of the Indian Stamp Act, once an instrument has been admitted in

evidence, the admission thereof shall not be called in question at any stage of the same suit or proceeding on the ground that the instrument has not

been duly stamped except as provided under Sec.61 of the Stamp Act. Sec.61 of the Stamp Act provides that once an instrument is admitted in

evidence as duly stamped or as not requiring a stamp or upon payment of duty and penalty under Sec.35 of the Act, the Court, to which appeals lie

from or references are made can re-consider the same. In order to invoke Sec.35 of the Stamp Act, objection has to be raised at the time when the

instrument is tendered in evidence. When Ext.4 was tendered in evidence, although objection was raised, but then the trial court has not noted the

objection thereto, whereas Ext.5 has been marked with objection. When Ext.5 is marked with objection, the same can not be admitted in evidence.

The objection is raised with regard to insufficiency of stamp duty. Hence, Ext.5 can only be admitted in evidence after the adequate stamp duty and

10 times penalty is paid thereon. To buttress the submission, he places reliance to the decisions of the apex Court in the case of Javer

Chand v. Pukhraj Surana, AIR 1961 SC 1655, Ram Rattan (dead) by L.Rs. v. Bajrang Lal, (1978) 3 SCC 236, R.V.E. Venkatachala

Gounder v. Arulmigu Viswesaraswami & V.P. Temple, (2003) 8 SCC 752, Government of Andhra Pradesh v. P. Laxmi Devi (Smt.), (2008) 4

SCC 720, Avinash Kumar Chauhan v. Vijay Krishna Mishra, (2009) 2 SCC 532, SMS Tea Estates Private Limited v. Chandmari Tea Company

Private Limited, (2011) 14 SCC 66, and the decision of the Karnataka High Court in the case ofM iss Sandra Lesley Anna Bartels v. Miss P.

Gunavath, AIR 2013 Karnataka 52.

7. Per contra, Md. Alam, learned Advocate for the opposite party nos. 1 to 6, submits that plaintiffs have executed the power of attorney in favour of

Kishore Chandra Behera, P.W.1. Stamp duty as per the Stamp Act has been paid. The same is not an instrument. No stamp duty is payable. He

further submits that the registering authority could have referred the matter to the Collector. Exts.4 and 5 have been marked as exhibits. With regard to Ext.4, the same has been marked as exhibit without objection. Once documents had been marked as exhibits, the court cannot unmark the said

documents. He places reliance to the decision of the apex Court in the case of Javer Chand v. Pukhraj Surana, AIR 1961 SC 1655.

8. Before adverting to the contentions raised by the learned counsel for the parties, it will necessary to set out some of the provisions of the Indian

Stamp Act, 1899. Secs.2(10), 2(21), 33, 35 and 36 of the Stamp Act are quoted hereunder.

â??2(10) â??Conveyanceâ? - â??Conveyanceâ? includes a conveyance on sale and every instrument by which property, whether moveable or

immoveable, is transferred inter vivos and which is not otherwise specifically provided for by Sch.I;

xxx xxx xxx

2(21) â??Power-of-attorneyâ? - â??Power-of-attorneyâ? includes any instrument (not chargeable with a fee under the law relating to Court-fees

for the time being in force) empowering a specified person to act for and in the name of the person executing it;

xxx xxx xxx

33. Examination and impounding of instruments - (1) Every person having by law or consent of parties authority to receive evidence, and every person

in charge of a public office except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the

performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced on coming before him, in order to ascertain

whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first

executed:

xxx xxx xxx

35. Instruments not duly stamped inadmissible in evidence, etc.â?"No instrument chargeable with duty shall be admitted in evidence for any purpose

by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person

or by any public officer, unless such instrument is duty stamped :

Provided that-

(a) any such instrument [shall] be admitted in evidence on payment of the duty with which the same is chargeable or, in the case of an instrument

insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the

proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion.

(b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such, receipt, if stamped, would

be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person

tendering it;

(c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the

proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d) nothing herein contained shall prevent the admission of any instrument in evidence in any preceding in a Criminal Court, other than a proceeding

under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898 (5 of 1898);

(e) nothing herein contain shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the

Government) or where it bears the certificate of the Collector as provided by Sec.32 or any other provision of this Act.

36. Admission of instrument, where not to be questioned - Where an instrument has been admitted in evidence, such admission shall, not, except as

provided in Sec.61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped.â??

9. Schedule-I-A of the Indian Stamp Act, 1899 provides stamp duty on instruments (Orissa Amendments). Articles I-A/23 and I-A/48(f), which are

relevant, are quoted hereunder:

Schl/Art.Description of Instrument Proper Stamp Duty

I-A/23 Conveyance, as defined by Section 2(10) not being a transfer charged or exempted under No. 62:

(a) in respect of movable property. Four per centum of the amount or value of the consideration as set forth in the instrument.

(b) in respect of immovable property. Eight per centum of the amount or value of the

consideration for such conveyance as set forth therein

or the market value of the property whichever is

higher.

(c) in respect of a multi-unit house or unit of apartment/feat/portion of a multi-storeyed building or part of such structure

to which the provisions of the Orissa Apartment Ownership Act, 1982 apply

(i) where the amount or value of the consideration for such conveyance as set forth therein or market value of theThree per centum of the amount.

property whichever is higher, does not exceed rupee 5 lakhs.

(ii) where it exceeds rupees 5 lakhs but does not exceed rupees 15 lakhs. Four per centum of the amount.

(iii) where it exceeds rupees 15 lakhs. Seven per centum of the amount.

Explanation- For the purpose of this article, an agreement to sell any immovable property or a power of attorney shall, in

case of transfer of the possession of such property before or at the time of or after the execution of such agreement for

power of attorney, be deemed to be a conveyance and the stamp duty thereon shall be chargeable accordingly.

Provided that the stamp duty already paid on such agreement or power of attorney shall, at the time of the execution of a

conveyance in pursuance of such agreement or power of attorney, be adjusted towards the total amount of duty chargeable

on the conveyance.

Provided further that Section 47-A shall not apply to such agreement and power of attorney.

xxx xxx xxx

I-A/48 Power-of-attorney, as defined by section 2(21) not being a proxy-

(a) to (e)xxx xxx

xxx

(f) when given for consideration and authorising the attorney to sell any immovable property; The same duty as a Conveyance [under Division (A),

(B) or (C), as the case may be, of Article 23] for the

amount of consideration.

xxx xxx xxx

10. Much emphasis has been laid by Mr. Baug, learned Advocate for the petitioners, with regard to Clause (f) of Art.I-A/48 that when power of

attorney is given for consideration and authorising the attorney to sell any immovable property, stamp duty is payable under Division (A), (B) or (C) as

the case may be of Article 23 for the amount of consideration.

11. The submission though at a first flush appears to be very attractive, but on a deeper scrutiny, it is like a billabong.

12. Instrument as defined in Sec.2(14) of the Indian Stamp Act, 1899 (in short â??Actâ??) is a generic term. It includes every document by which

any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. Sec.2(21) of the Act defines power of

attorney. It provides that the power of attorney includes any instrument (not chargeable with a fee under the law relating to Court-fees for the time

being in force) empowering a specified person to act for and in the name of the person executing it.

13. On a bare reading of Clause (f) of Article I-A/48 (Orissa Amendment), it is evident that when a power of attorney is given for consideration and

authorising the attorney to sell any immovable property, the stamp duty is payable as a conveyance under Division (A), (B) or (C), as the case may be,

of Article 23 for the amount of consideration.

14. Consideration has been defined under Sec.2(d) of the Indian Contract Act, 1872. It means, when, at the desire of the promisor, the promise or any

other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or

abstinence or promise is called a consideration for the promise. The consideration may be past, present and future.

15. The word â??considerationâ? appearing in Article I-A/48 of the Indian Stamp Act is vital. If the power of attorney is given for consideration and

authorising the attorney to sell any immovable property, then the stamp duty is payable as a conveyance [under Division (A), (B) or (C), as the case may be, of Article 23] for the amount of consideration.

16. On a conspectus of Exts.4 and 5, it is evident that the plaintiffs have executed the power of attorney in favour of Kishore Chandra Behera, P.W.1

and appointed him as attorney holder to look after 1/3rd share of schedule property of Late Uchhaba Behera with certain terms and conditions as

enumerated in Clause-1 to 23 thereof. The power of attorney holder is empowered to apply for demarcation and mutation of the said property. He will

gift/mortgage/sale/lease the schedule property to anybody and execute necessary documents. He will negotiate to sale the schedule property and

receive consideration. He will apply to the concerned authority and also do the necessary requirements for transfer of the schedule property in favour

of the intending purchasers. He will construct house on any portion of the schedule property on their behalf. The principals undertook not to sale, lease

and mortgage contract for sale or deliver possession or deal with the properties in any manner during subsistence of this power of attorney.

17. There is no clause in the power of attorney that in the event the power of attorney sales the property, he will receive consideration. By no stretch

of imagination, it can be said that the power of attorney has been given to Kishore Chandra Behera, P.W.1, for consideration.

18. In Suraj Lamp and Industries Private Limited (2) through Director v. State of Haryana, (2012) 1 SCC 656, the apex Court had the occasion

to consider the scope of power of attorney. The apex Court held:

â??Scope of Power of Attorney

20. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is

creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be

binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time

unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.

21. In State of Rajasthan v. Basant Nehata - (2005) 12 SCC 77, this Court held :

â??13. A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is

formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring

necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to

use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by

the donor. A power of attorney is, as is well known, a document of convenience.

52. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney,

we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is

coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of

course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any

act of infidelity or breach of trust is a matter between the donor and the donee.â??

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on

behalf of the grantor.â??

(Emphasis laid)

19. The ratio in the case of Suraj Lamp and Industries Private Limited (2) through Director proprio vigore apply to the facts of the case.

20. The logical sequitur of the analysis made in the preceding paragraphs is that the power of attorney is a document of convenience, not conveyance.

21. The decisions cited by Mr. Baug, learned Advocate for the petitioners, are distinguishable on facts.

22. In Javer Chand (supra), the apex Court held that Sec.36 of the Stamp Act is categorical in its terms that when a document has once been

admitted in evidence, such admission cannot be called in question at any stage of the suit or the proceeding on the ground that the instrument had not

been duly stamped. Sec.36 does not admit of other exceptions. Where a question as to the admissibility of a document is raised on the ground that it

has not been stamped, or has not been properly stamped it has to be decided then and there when the document is tendered in evidence. Once the

Court rightly or wrongly, decides to admit the document in evidence so far as the parties are concerned the matter is closed. Sec.35 is in the nature of

a penal provision and has far-reaching effects. Parties to a litigation, where such a controversy is raised, have to be circumspect and the party

challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. 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. Once a document

has been admitted in evidence, it is not open either to the trial court itself or to a Court of appeal or revision to go behind that order. Such an order is

not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction. There is no quarrel

over the proposition of law. As held above, the power of attorneys, Exts.4 and 5 are documents of convenience, not conveyance.

23. In Ram Rattan (supra), the apex Court held that if a person having by law authority to receive evidence and the Civil Court is one such person

before whom any instrument chargeable with duty is produced and it is found that such instrument is not duly stamped, the same has to be impounded.

The duty and penalty has to be recovered according to law.

24. Section 35, however, prohibits its admission in evidence till such duty and penalty is paid.

25. In Avinash Kumar Chauhan (supra), the apex Court held that Section 33 of the Act casts a statutory obligation on all the authorities to impound a

document. The court being an authority to receive a document in evidence is bound to give effect thereto.

26. In P. Laxmi Devi (supra), the apex Court held that When a document is produced (or comes in the performance of his functions) before a person

who is authorised to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instruction

chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instruction is

produced to impound the document if it is not duly stamped. The use of the word shall in Section 33(1) shows that there is no discretion in the

authority mentioned in Section 33(1) to impound a document or not to do so. The word shall in Section 33(1) does not mean may but means shall. In

other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions.

27. In SMS Tea Estates Pvt. Ltd. (supra), the apex Court held that 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.

28. In R.V.E. Venkatachala Gounder (supra), the apex Court held that for every document admitted in evidence in the suit being endorsed by or on

behalf of the court, which endorsement signed or initialled by the Judge amounts to admission of the document in evidence. An objection to the

admissibility of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of

admissibility and express the same on which opinion would depend the document being endorsed as admitted or not, admitted in evidence. In the latter

case, the document may be returned by the court to the person from whose custody it was produced.

29. Miss Sandra Lesley Anna Bartels case is distinguishable to the facts of the present case.

30. In the wake of aforesaid, the petition, sans merit, deserves dismissal. Accordingly, the same is dismissed. No costs.