

Karnataka High Court

Karnataka High Court

Sri J. Prakash vs Smt. M.T. Kamalamma And Anr. on 12 October, 2007

Equivalent citations: AIR 2008 Kant 26, ILR 2007 KAR 4752, 2008 (2) KarLJ 202

Author: S A Nazeer

Bench: S A Nazeer

JUDGMENT

S. Abdul Nazeer, J.

1. In this case, petitioner has called in question the order on I.A. No. 3 dated 18.1.2007 in O.S. No. 2305/2006 on the file of the 11th Additional City Civil and Sessions Judge, Bangalore, whereby the court below has directed the petitioner to pay necessary duty and penalty on the agreement to sell dated 8.10.2005.

2. The petitioner is the plaintiff in the aforesaid suit and the respondent is the defendant. The plaintiff filed the said suit for specific performance of an agreement to sell dated 8.10.2005 in respect of the suit schedule property and for permanent injunction restraining the defendant from interfering with his peaceful possession and enjoyment of the said property. The defendant has filed her written statement. During the pendency of the matter, the defendant filed I.A. No. 3 under Section 34 of the Karnataka Stamp Act, 1957 (for short 'the Act') read with Section 151 of the Code of Civil Procedure seeking a direction to the plaintiff to pay duty and penalty of Rs. 11,30,780/- on the suit document, namely, agreement to sell dated 8.10.2005. It is the case of the defendant that she has not executed the aforesaid agreement in favour of the plaintiff. Since the plaintiff is asserting his possession of the suit schedule property in furtherance of the said agreement to sell, he is required to pay proper stamp duty as per Article 5 of the Schedule to the Act as amended on 1.4.1995. The plaintiffs also required to pay the penalty as per Section 34 of the Act as he has not paid the duty.

3. The plaintiff has filed objections to the application. It is his specific contention that possession of the property has not been delivered to him under the said agreement. Therefore, he is not liable to pay stamp duty as per Article 5 of the Schedule to the Act nor he is liable to pay any penalty.

4. The court below on consideration of the rival contentions of the parties, has directed the plaintiff to pay stamp duty and penalty in a total sum of Rs. 11,30,780/- as per Article 5(e)(i) of the Schedule to the Act read with Section 34 of the Act.

5. Learned Counsel for the petitioner/plaintiff submits that the plaintiff was not put in possession of the suit schedule property in part performance of the contract. It is contended that the petitioner was already in possession of the property prior to the date of the agreement as a permissive occupier. He submits that the defendant has admitted this position in her written statement. Secondly, it is contended that the court below has not followed proper procedure while levying the duty and penalty. Thirdly, it is contended that the penalty levied by the court below is excessive. Lastly, it is contended that the court below was not right in directing the petitioner to pay stamp duty without there being proper adjudication of the market value of the property. He has relied on the decision of this Court in the case of *Danappagouda Fakkiragouda Patil v. Kamalawwa and Anr.* 2006 (4) KCCR 2439 in support of his contention.

6. On the other hand, learned Counsel for the first respondent submits that though the petitioner was put in possession of the suit schedule property as permissive occupier earlier to the date of the agreement. The recitals in the agreement indicate that the vendor has agreed to put the purchaser in possession of the said property in part performance of the agreement to sell upon fulfillment of certain conditions. Therefore, the petitioner is liable to pay duty and penalty. He further submits that the alleged agreement itself shows that the petitioner has agreed to purchase and the respondent has agreed to sell the property in question for a total consideration of Rs. 10,27,982/-. Therefore, further enquiry with regard to market value of the property is not necessary. In support of his contentions, he has relied on the following decisions:

i) Jayalakshmi Reddy v. Thippanna and Ors. ?

ii) C.K. Ravi Prasanna v. T.K. Gowramma ILR 2007 Kar 2807

7. I have carefully considered the arguments of the learned Counsel made at the bar and perused the materials placed on record.

8. As noticed above, the suit filed by the plaintiff is for specific performance of an agreement of sale dated 8.10.2005. The total consideration agreed by the parties for sale of the property in question is Rs. 10,27,982/-. The agreement is typed on a stamp paper of Rs. 260/-. The court below has directed the plaintiff to pay deficit stamp duty as also penalty on the said agreement as provided under Section 34 of the Act.

9. Section 34 of the Act lays down that 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 any public officer, unless such instrument is duly stamped.

The first proviso to Section 34 of the Act states that any such instrument not being an instrument chargeable with a duty not exceeding fifteen paise only, or a mortgage of crop chargeable under clauses (a) and (b) of Section 3 with a duty of twenty five paise shall, subject to all just exceptions, 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.

The other provisos are not relevant for the purpose of this case.

10. Article 5(e)(i) of the Schedule to the Act substituted by Act No. 8/1995, which has come into force w.e.f. 1.4.1995 states that an agreement or memorandum of an agreement relating to sale of immovable property wherein part performance of the contract, possession of the property is delivered or is agreed to be delivered without executing the conveyance, the stamp duty is the same as conveyance on the market value of the property.

11. The expression 'conveyance' is defined under clause (d) of Section 2 of the Act, which is as under:

(d) 'Conveyance' includes,-

(i) a conveyance on sale;

(ii) every instrument;

(iii) every decree or final order of any Civil Court;

(iv) every order made by the High Court under Section 394 of the Companies Act, 1956 in respect of amalgamation of companies,

by which property, whether movable or immovable or any estate is transferred to, or vested in, any other person, and which is not otherwise specifically provided for by the Schedule.

12. Article 20 of the Schedule to the Act provides for payment of proper stamp duty for the 'conveyance' as defined by clause (d) of Section 2 of the Act. The agreement of sale in question was executed on 8.10.2005. The stamp duty payable on a conveyance is on the market value of the property which is the subject matter of

conveyance, is 8% of the value as per Act No. 8/2003 which has come into force w.e.f. 1.4.2003.

13. The main contention of the learned Counsel for the petitioner is that the possession of the property in question has not been delivered to the plaintiff under the agreement. He is already, in possession of the property as a permissive occupier. Therefore, plaintiff is not liable to pay stamp duty on the said agreement as a conveyance. This argument of the learned Counsel is fallacious. As per clause 5(e)(i) of the Schedule to the Act, stamp duty is payable not only on an agreement relating to sale of immovable property whereby possession of the property is delivered in part performance of the contract, but also possession of the property is agreed to be delivered without executing the conveyance. The recitals in the agreement make it clear that the vendor has agreed to hand over possession of the property without executing the conveyance. Clause (2) of the agreement is as under:

2. In pursuance of this agreement purchaser has this day paid a sum of Rs. 30,000/- (Rs. Thirty thousand only) to the vendor by way of Cheque, vide Cheque No. 490239, on 10th October 2005, drawn on Vijaya Bank, K.R. Puram, Bangalore-36, before the under mentioned witnesses and Rs. 3,70,000/- (Rs. Three Lakhs Seventy thousand only) will be paid within seventy days i.e. 20th December 2005, towards sale consideration as 2nd installment to the vendor and vendor has hereby agreed to hand over the schedule premises to the purchaser and execute the GPA. Thus, the vendor is hereby acknowledges the receipt of the same.

(emphasis supplied by me)

14. In Jayalakshmireddys case (supra), this Court has held that the sale agreement is regarded as a conveyance, as the instrument in question is covered by Article 5(e)(i) of the Act by which the proper duty payable under the Karnataka Stamp Act is the same duty as the conveyance as defined under Section 2(d) of the Act on the market value of the property.

15. C.K. Ravi Rasanna's case (supra) is a similar case where the petitioner was in possession of the schedule property prior to the agreement of sale. However, under the agreement of sale, petitioner was put in possession of the property in part performance of the agreement for sale. It is held that the nature of possession of the petitioner prior to the agreement was entirely different and the same came to be destroyed by the agreement of sale dated 27.11.2004. The nature of possession of the petitioner under the agreement of sale is in part performance of the agreement of sale and the terms and conditions are different. Therefore, petitioner is not entitled to contend that he is in possession of schedule property even prior to the agreement of sale and he continues even after the agreement of sale. Prior to the agreement of sale, the nature of petitioner's possession and enjoyment of the schedule property was on different terms and conditions. On the other hand, the present possession of the petitioner under the agreement of sale is entirely on a different footing and on different terms and conditions.

16. In the present case also, the petitioner may be in permissive occupation of the property prior to the date of agreement. The agreement stipulates that the vendor has agreed to hand over schedule property to the purchaser and execute a general power of attorney. For the purpose of construction of a document, the true nature of the transaction has to be ascertained on reading the recitals in the document. The document in question is clearly covered by Article 5(e)(i) of the Schedule to the Act. Article 5(e)(i) of the Schedule to the Act not only applies where possession of the property is delivered in part performance of the contract but also where possession of the immovable property is agreed to be delivered without executing the conveyance. The respondent has agreed to put the petitioner in part performance of the contract. In other words, the nature of possession prior to the agreement is on different terms and conditions. Once he is put in possession of the property in part performance of the contract, the terms and conditions are entirely different. Admittedly, the plaintiff has not paid proper duty on the agreement. He ought to have paid duty on the said document as a conveyance under Article 20 of the Schedule to the Act. Therefore, he is liable to pay deficient portion of the duty and a sum equal to ten times of such deficient portion of duty as a penalty.

17. In Danappagouda's case (supra), relied on by the learned Counsel for the petitioner, this Court has held that when the agreement in question does not speak about delivery of possession of the property thereon and when the intended purchaser was already in possession of that property even prior to the agreement for sale, no question of payment of duty and penalty would arise. In the present case, the agreement speaks of delivery of possession without executing a conveyance. Therefore, this decision is not applicable to the facts of the present case.

18. Coming to the second contention urged by the learned Counsel for the petitioner, it is nodoubt true that Article 20(1) of the Schedule to the Act contemplates levy of stamp duty on the market value of the property which is the subject matter of conveyance. 'Market value' has been defined in Sub-section (mm) of Section 2 of the Act. Market value in relation to any property which is the subject matter of an instrument means the price which such property could have fetched in the opinion of the Deputy Commissioner or the Appellate Authority or the Chief Controlling Revenue Authority, if sold in open market on the date of execution of such instrument or the consideration stated in the instrument, whichever is higher. The parties have agreed the sale consideration of the property at Rs. 10,27,982/-.

19. Section 33 of the Act deals with examination and impounding of instruments. It states that every person having by law or consent of parties authority to receive evidence, and every person incharge 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. To impound means, to keep in the custody of the law.

Section 34 of the Act deals with a different situation. It states that instruments not duly stamped are inadmissible in evidence. However, such document may be admitted in evidence on payment of 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 rupees five, or, when ten times the amount of proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion. Section 37 of the Act lays down the procedure to deal with the instruments impounded under Section 33, or the instruments admitted in evidence upon payment of duty and penalty under Section 34; or the documents dealt with under Section 36 of the Act. In respect of the documents admitted in evidence upon payment of duty and penalty as provided under Section 34, Section 37 mandates the authority who receives the instrument in evidence and admits such instrument in evidence, to send an authenticated copy of such instrument together with a certificate in writing stating the amount of duty and penalty levied in respect of the said document and send such amount to the Deputy Commissioner or to such person as he may appoint in this behalf. In so far as the impounded document under Section 33 is concerned, Sub-section (2) of Section 37 mandates that the person so impounding an instrument has to send it in original to the Deputy Commissioner.

Section 38 of the Act deals with the power to refund the penalty paid under Sub-section (1) of Section 37 of the Act. It states that when a copy of an instrument is sent to the Deputy Commissioner under Sub-section (1) of Section 37, he may, if he thinks fit, refund any portion of the penalty in excess of five rupees which has been paid in respect of such instrument.

Section 39 of the Act deals with the power of the Deputy Commissioner to stamp instruments impounded under Section 33 of the Act. It states that when the Deputy Commissioner impounds any instrument under Section 33, or receives any instrument sent to him under Sub-section (2) of Section 37, not being an instrument chargeable with duty of not exceeding fifteen naye paise only or mortgage of crop chargeable under clause (a) or (b) of Section 3 with a duty of twenty-five paise, he shall adopt the following procedures:

(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement therein that it is duly stamped, or that is not so chargeable, as the case may be;

(b) if he is of the opinion that such instrument is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or if he thinks fit; an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees.

20. From the aforesaid provisions, it is clear that the procedure prescribed for levy of duty and penalty in respect of an impounded instrument under Section 33 of the Act is different from levy of duty and penalty on a document admitted in evidence. In the present case, the suit is based on the agreement for sale dated 8.10.2005. The said document is yet to be tendered for admitting in evidence. Therefore, the document could have been impounded under Section 33 of the Act and sent the same to the Deputy Commissioner under Section 37(2) of the Act. Thereafter, the Deputy Commissioner has to levy the duty and penalty under Section 39 of the Act and return the document to the impounding Officer. This will delay the suit. Instead of that, the Court itself can deal with the instrument under Section 34 of the Act. In *Laxminarayanachar v. Narayana* 1969(2) My.L.J 299 this Court has held that when the document is produced before the Court for being used in evidence, the first jurisdiction of determining the duty and penalty is that of the Court. It is only when that stage is crossed and the document is not tendered in evidence, the provisions of Sub-section (2) of Section 37 of the Act are attracted. Therefore, the court below is justified in determining duty and penalty on the document in question.

21. In so far as the third contention of the learned Counsel for the petitioner is concerned, once the Court determines the duty and penalty under Section 34 of the Act, the plaintiff has to deposit the same in the Court. Thereafter, the document can be admitted in evidence as provided under Order 13 Rule 4(1) of the Code of Civil Procedure subject to other objection raised by the opposite party. On payment of duty and penalty, the Court has to send an authenticated copy of the instrument together with a certificate in writing stating the amount of duty and penalty levied in respect of the said document and send such amount to the Deputy Commissioner or to such person as he may appoint in this behalf. When a copy of the instrument is sent as above, the Deputy Commissioner, may, if he thinks fit, refund any portion of the penalty paid in respect of such instrument. Therefore, petitioner can plead before the Deputy Commissioner that the penalty levied under Section 34 of the Act is excessive and seek its refund under Section 38(1) of the Act.

22. Now, let me consider the last contention of the learned Counsel for the petitioner with regard to the adjudication of the proper market value of the property in question. As noticed above, the market value in relation to any property which is the subject matter of the instrument means, the price which such property could have fetched in the opinion of the Deputy Commissioner or the appellate authority or the Chief Controlling Revenue Authority, if sold in open market on the date of execution of such instrument or the consideration mentioned in the instrument whichever is higher. The consideration mentioned in the agreement is Rs. 10,27,982/-. Section 45A of the Act prescribes the procedure to deal with the under valued instrument of conveyance. Sub-section (3) of Section 45A of the Act grants suo-moto power to the Deputy Commissioner to call for and examine an instrument specified in Sub-section (1) of Section 45A for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject matter of any instrument specified in Sub-section (1) and the duty payable thereon. If after such examination, he has reason to believe that the market value of such property has not been truly set forth in the instrument, he may determine by order the market value of such property and the duty payable thereon in accordance with the procedure provided in Sub-section (2) of Section 45A of the Act.

23. The Court after levying duty and penalty has to send an authenticated copy of the instrument to the Deputy Commissioner together with a certificate in writing stating the amount of duty and penalty levied in respect thereof. If the Deputy Commissioner is of the view that the instrument has been under valued, he may determine the market value of such property. However, the Court has to levy duty and penalty on the basis of the total consideration mentioned in the instrument subject to determination of market value by the competent authorities under the Act. The market value of the property cannot be less than the total consideration mentioned in the instrument having regard to Section 2(mm) of the Act. If in the opinion of the competent

authority, the instrument of conveyance has been undervalued, then only the authority concerned has to take steps to determine the market value of the property as provided under Section 45A of the Act.

24. The duty payable on the market value of the property, which is the subject matter of conveyance when the agreement was executed, is 8%. The agreement is typed on a stamp paper of Rs. 260/-. The duty payable on the instrument is Rs. 82,239/-. If the duty already paid in a sum of Rs. 260/- is deducted, the balance of duty payable is Rs. 81,979/-. First proviso to Section 34 of the Act states that in order to admit in evidence an instrument insufficiently stamped, the person seeking its admission in evidence has to pay the amount required to make up such duty or deficient portion of the duty and a sum equal to ten times of such duty or deficient portion thereof. The deficient portion of duty is Rs. 81,979/-. Petitioner has to pay ten times of the deficient portion of the duty towards penalty which comes to Rs. 8,19,790/-. Thus, the total duty and penalty payable is Rs. 9,01,769/-.

25. In the result, I pass the following:

ORDER

- i) The writ petition fails and it is accordingly dismissed.
- ii) The petitioner/plaintiff is directed to deposit a sum of Rs. 9,01,769/- with the court below towards duty and penalty. On deposit of the said amount, the court below is directed to permit the petitioner/plaintiff to mark the document in question in evidence, subject to other objections which may be raised by the respondent/defendant.
- iii) After deposit of the aforesaid amount, the court below is directed to send an authenticated copy of the document in question to the concerned Deputy Commissioner together with a certificate in writing stating the amount of duty and penalty in respect of the said instrument and send the said amount to the concerned Deputy Commissioner as provided under Section 37 of the Act.
- iv) The petitioner/plaintiff can seek refund of the penalty by making an appropriate application before the Deputy Commissioner under Section 38(1) of the Act. If such an application is filed, the concerned Deputy Commissioner is directed to consider the same in accordance with law. No costs.