

Karnataka High Court
Karnataka High Court
Tukaram Ganu Pawar vs Chandra Atma Pawar on 8 July, 2005
Author: A Byrareddy
Bench: A Byrareddy
JUDGMENT

Anand Byrareddy, J.

1. This appeal is by the defendant in the suit. The appellant contends that he is the owner of the land in RS No. 231/2B measuring 7 acres 29 guntas in Kokatanur Village, Athani Taluk, Belgaum District. Out of this extent of land, it is the contention of the appellant, that 2 acres 23 guntas was mortgaged with a Bank, it is his case that he is an illiterate and aged person and for the purpose of availing the loan he had taken the assistance of the respondent, who is his nephew, for the preparation of the papers seeking extension of loan. It is alleged that the respondent had surreptitiously obtained his signatures on an agreement of sale in respect of the land measuring 2 acres 23 guntas while preparing the documentation for the loan as aforesaid. It is this agreement, which is set up by him in the suit seeking specific performance and with an interlocutory application seeking temporary injunction restraining the appellant from interfering with his possession. The Trial Court having granted the prayed for temporary injunction, the appellant is before this Court.

2. The contentions of the appellant are as follows.

Firstly, though it is admitted by the appellant, that the signatures appearing on the agreement of sale, set up by the respondent herein, are his signatures, it is his case that the same were obtained by deception and this fraudulent act was carried out in the manner stated above and therefore, there being no intention to convey the land, there was no consensus ad idem and the document could not be used against him.

3. The next contention is that under the agreement of sale, which is dated 20-8-1999, possession is said to have been delivered in respect of the land. When this is so, the stamp duty attracted in respect of such an agreement evidencing delivery of possession, is as provided with effect from 15-4-1995, under Article 5(e) read with Article 20 of the Schedule to the Karnataka Stamp Act, 1957 (hereinafter referred to as 'the Stamp Act'). The requisite stamp duty as prescribed not having been paid, it is his contention that Under Sections 33 and 34 of the Stamp Act and the judgments rendered by this Court in the case of KB, Jayaram v. Navineethamma and in the case of

Jayalakshmi Reddy v. Thippanna, the agreement could not have been looked into by the Trial Court for purposes of consideration of the application for temporary injunction.

4. It is his further contention that insofar as the affidavits of the neighbouring landowners in support of the respondent's possession is concerned, there are equal number of affidavits of the neighbouring landowners filed in the Trial Court in favour of the appellant also. Hence, the Trial Court could not have considered the affidavits filed in support of the respondent for grant of injunction.

5. It is also contended that the revenue entries continue to stand in the name of the appellant and hence the respondent was not entitled to an order of injunction.

6. Per contra, the learned Counsel for the respondent would submit that the present suit being one for specific performance and actual physical possession of the property having been delivered under the agreement, which is apparent from the document and the fact that the signatures on the document are not denied, the allegations that the same were obtained fraudulently, is a matter for trial and in terms of Section 53-A of the Transfer of Property Act, 1882, respondent's possession of the property cannot be disturbed at this point of time and the Trial Court has rightly granted the injunction to protect the same. The Counsel for the respondent would rely

upon the judgment in the case of Venkat Dharmaji Gontalwar v. Vishwanath in this

regard.

7. Insofar as the contention that the document was not duly stamped and therefore, could not be looked into, is concerned, he submits that the matter was at the stage of consideration of an interlocutory application and the question whether it could or could not be looked into for purposes of the application for injunction are not contemplated Under Sections 33 and 34 of the Stamp Act. The question may arise, if at all, only at the stage of admitting the document in evidence.

8. In the light of these rival contentions, the appeal is considered. The signatures on the agreement of sale are not denied. This would entitle the respondent to rely upon the same. The claim of the appellant that it was executed under deception, is a matter to be considered at the trial. The document reciting that possession is delivered, would entitle the plaintiff to protect that right of possession Under Section 53-A of the Transfer of Property Act, 1882. The entries in the revenue records in favour of the appellant would not dislodge the agreement of sale, where under possession has been delivered. The affidavits of the neighbouring landowners to acknowledge the fact that the agreement was in fact, executed and monies parted with, is yet another circumstance that would be answered in favour of the respondent.

9. The contention that the agreement was not duly stamped and therefore, could not be looked into insofar as the judgment rendered in Jayalakshmi Reddy's case, is concerned, the challenge in that case was to the order of the Trial Court upholding the objection to the marking of an insufficiently stamped agreement of sale, under which possession was delivered and one to which Article 5(e) of the Schedule to the Stamp Act was applicable. This Court held that the document could not be admitted, without payment of duty and penalty, even for a collateral purpose. That judgment would not have any bearing on the present case. The second judgment in the case of KB, Jayaram, is again a case where the Trial Court had impounded the document when the same was produced in the first instance and the Court had called upon the party to pay duty and penalty, if the same was to be considered for purposes of arguments on an application for temporary injunction and it is in this light of the matter, the Trial Court had proceeded to interpret Sections 33 and 34 of the Karnataka Stamp Act, to hold that if the document is not duly stamped, the same cannot be looked into for any purpose including the consideration of an application for temporary injunction.

10. In the present case the contention as regards the agreement of sale being insufficiently stamped is raised for the first time in appeal. If such an objection had been raised before the Trial Court, the Court would have been duty-bound to impound the document in terms of Sections 33 of the Karnataka Stamp Act. Since there was no objection, the Trial Court may have overlooked the fact that the document was not sufficiently stamped, though there was a duty cast on the Court in this regard.

11. Section 34 of the Karnataka Stamp Act reads as follows:

34. Instruments not duly stamped inadmissible in evidence, etc.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 duly stamped:

Provided that x x x x x.

(emphasis supplied)

This Court, in K.B. Jayaram's case, has held that the phrase "admitted in evidence for any purpose by any person" to be wide enough to include within its amplitude, use of the document in support of an application for temporary injunction.

12. It is to be noted that the further phrase "or shall be acted upon... by any such person" would certainly place an embargo on the Court from granting an order of temporary injunction on the basis of the document, unless it is duly stamped. However, the question is whether in the present appeal the order of the Trial Court is to be set aside in view of the document which was insufficiently stamped, having" been acted upon.

13. In my opinion, the document has not been "admitted in evidence" as contemplated Under Sections 33 and 34. It may at best have been "acted upon". It would therefore, be open to the Trial Court to call upon the respondent to pay duty and penalty when the document is actually sought to be admitted in evidence and marked as an exhibit. For if the document is treated as having been admitted in evidence Section 35 would apply. The Section reads as follows:

35. Admission of instrument where not to be questioned.- Where an instrument has been 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 has not been duly stamped.

The following passages from judgment of this Court in the case of K. Amarnath v. Smt. Puttamma , are illuminating on the question of admission of documents in evidence:

6. The manner in which the Trial Court has considered the matter is clearly irregular. Whenever the document is sought to be marked in evidence, the Court is 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 Law? and (c) Whether the registration of the document is compulsory? 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. In this case, the "Bhogyada Kararu" was confronted by the respondent's Counsel to the petitioner in his cross-examination. P.W. 1 (petitioner) denied the said document and denied that his father had signed the document. Therefore, it was not admitted in evidence, but was assigned an Exhibit number (Ex. Rule 4) for identification purpose only. The following portion of petitioner's cross-examination is relevant.

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required.)

Thus, the admissibility of the document was not decided and left open. Even when the respondent was examined, no attempt was made to have the said document admitted in evidence through her. The following answer was elicited in her Examination-in-Chief without attempting to exhibit the document through her:

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required.)

Thus, the "Bhogyada Kararu" was not exhibited at all.

7. However, the Trial Court has referred to an relied on the said document in its order, as if it is admitted in evidence.

The respondent has taken the possession of the Schedule premises under Ex. Rule 4. Ex. Rule 4 may not be a valid document, because it is not registered under law. The said document can be looked into to verify about the nature of possession of the Schedule premises by the respondent.

A document which has been marked only for the purpose of identification, is not admitted in evidence and cannot be looked into for any purpose. It cannot even be used for deciding the manner of entry into possession

or for determining the nature of possession. Assigning an exhibit number only for identification purposes without admitting it in evidence and without deciding on the question of admissibility and leaving the question open for decision at a later stage, is a procedure neither contemplated under the Indian Evidence Act, nor under the Code of Civil Procedure. The Courts should desist from adopting such a procedure. Such a procedure is as irregular as marking a document subject to objection, reserving the question of admissibility to be heard at the stage of arguments. Order 13 of the CPC makes it clear that all documents on which the 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. Parties may however, produce a document for the limited purpose of confronting it to a witness during his cross-examination to contradict him or to refresh the memory of a witness. It is clear from Order 13, Rule 2 of the CPC read with Section 145 of the Indian Evidence Act, 1872 that what can be produced during cross-examination, to confront a witness to contradict him, is only his previous statement in writing or reduced into writing. 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.

8. When a document is admitted in evidence, it is marked in the manner prescribed in Order 13, Rule 4 of the CPC. When a document is rejected as inadmissible in evidence, an endorsement has to be made as prescribed under Order 13, Rule 6 of the CPC. When a document is not admitted, but is assigned a number only for identification purposes, then an endorsement to that effect should be made on the document. Such identification number should not be in the regular series of exhibit numbers, that is Ex. P. series of plaintiff or petitioner, or Ex. D. (or R) series of defendant or respondent, but should be in a completely different series. The Court shall also note in the evidence, and in the order sheet that such document is not admitted in evidence, but is assigned a number of purposes of identification only. In this case, the Trial Court has not noted on the document that it is marked for identification purposes only. In the order sheet for the day (21-10-1997), the Trial Court has recorded "P.W. 1 fully cross-examined, Exs. Rule 4 to Rule 7 are marked during cross-examination". The procedure adopted, to say the least, is irregular.

9. When a document is produced and sought to be exhibited, the Court should decide whether it is admissible or not immediately, so that the parties will know whether such document could be relied on or not. If a document is not admitted, by refusing to mark it, the party may take steps to let in other relevant and permissible evidence to prove the document. On the other hand, if the document is marked in evidence, the parties may not choose to let in further evidence on that aspect. When the question of marking of the document is left upon, the parties will have to proceed with the evidence with considerable uncertainty. Therefore, Courts should consider and decide the question of admissibility of a document sought to be exhibited, before proceeding further with the evidence. If the Court has any doubt, it may hear arguments on the question.

10. A duty is cast upon every Judge to examine every document that is sought to be marked in evidence. The nomenclature of the document is not decisive. The question of admissibility (with reference to Section 34 of the Karnataka Stamp Act, 1957 or Section 35 of the Indian Stamp Act, 1899 and Section 49 of the Registration Act, 1908) will have to be decided by reading the document and deciding its nature and classification. The tendency to mark documents without inspection and verification should be eschewed. Even while recording ex parte evidence or while recording evidence in the absence of the Counsel for the other side, the Court should be vigilant and examine and ascertain the nature of the document proposed to be marked and ensure that it is a document which is admissible. The Court should not depend on objections of the other Counsel before considering whether the document is admissible in evidence or not. Section 33 of the Stamp Act casts a duty on the Court to examine the document to find out whether it is duly stamped or not, irrespective of the fact whether an objection to its marking is raised or not. It should be borne in mind that once a document is admitted in evidence, it cannot be called in question thereafter on the ground that it was

not duly stamped. Once the Court admits a document even wrongly, such admission becomes final and cannot be reopened. Hence, the need for diligence not only on the part of the opposite Counsel, but also on the part of the Court having regard to the statutory obligation Under Section 33 of the Karnataka Stamp Act.

11. A combined reading of Sections 33, 34, 35, 37 and 41 of the Karnataka Stamp Act requires the following procedure to be adopted by a Court while considering the question of admissibility of a document with reference to the Stamp Act: (a) when a document comes up before the Court, it has to examine and determine whether it is properly stamped. When the other side objects to it, the Court should consider such objection and hear both sides; (b) after hearing, if the Court comes to the conclusion that the document has been duly stamped, it shall proceed to admit the document into evidence; (c) on the other hand, if the Court comes to the conclusion that the document is not stamped or insufficiently stamped, it shall pass an order holding that the document is not duly stamped and determine the stamp duty/deficit stamp duty and penalty to be paid and fix a date to enable the party who produces the document to pay the stamp duty/deficit stamp duty plus penalty; (d) if the party pays the duty and penalty the Court shall certify that proper amount of duty and penalty has been levied and record the name and address of the person paying the said duty and penalty and then admit the document in evidence as provided Under Section 41(2); and the Court shall send an authenticated copy of the instrument to the District Registrar together with a certificate and the amount collected as duty and penalty, as provided Under Section 37(1); (e) if the party does not pay the duty and penalty, the Court will have to pass an order impounding the document and send the instrument in original, to the District Registrar for being dealt with in accordance with law as per Section 37(2) of the Karnataka Stamp Act.

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

13. The difference between Section 34 of the Karnataka Stamp Act and Section 49 of the Registration Act should also be borne in mind. Section 34 says, "no instrument chargeable with duty shall be admitted in evidence for any purpose, or shall be acted upon, registered or authenticated by.....unless such instrument is duly stamped". Subject to the provision enabling the Court to collect the deficit stamp duty, the bar Under Section 34 of is absolute and an instrument which is not duly stamped cannot be admitted at all in evidence for any purpose. On the other hand, Section 49 of the Registration Act which deals with the effect of non-registration of documents provides that if a document which is required to be registered under law is not registered, then such document shall not affect any immovable property comprised therein, nor can it confer any power to adopt, nor can it be received as evidence of any transaction affecting such property or conferring such power. But the proviso to Section 49 provides that an unregistered instrument may be received as evidence of a contract in suit for specific performance or as evidence of part performance of a contract for the purpose of Section 53-A of the Transfer of Property Act or as evidence of any collateral transaction not required to be effected by registered instrument. For example, if a sale deed is executed on a white paper and is not stamped, it can neither be admitted in evidence nor be used for any purpose. But if a sale deed is executed on requisite stamp paper but is not registered and the executant refuses to admit registration, then the purchaser has a right to file a suit for specific performance, and rely on the sale deed, even though it was not registered, as evidence of the contract for sale. Thus, though both Section 34 of the Stamp Act (corresponding to Section 35 of the Indian Stamp Act) and Section 49 of the Registration Act, both bar the document being received as evidence, the bar is absolute under Stamp Act (unless deficit duty and penalty is paid) and the bar is not absolute under Registration Act".

14. Before parting with this case one further plea of the appellant is taken note of. The appellant contended that this Court should direct the respondent to pay duty and penalty. This question arose in the case of N.S. Lakshmaiah Setty v. R. Govindappa sic, wherein a document which was admitted by the Trial Court in evidence and at a later point of time duty and penalty was sought to be levied. This Court following the judgment of the Supreme Court in Javer Chand v. Pukhraj Surana , held that once a document is admitted in evidence Section 35 would come into operation and it would not be possible for the Court to direct payment

of duty and penalty at a later date. And that it would not be possible either for the Trial Court or a Court of appeal to go behind that order.

15. However, it needs to be reiterated that in the present case the document is neither impounded or admitted in evidence by the Trial Court. It is open for the Trial Court to take appropriate steps at the relevant point of time. Hence, the request of the Counsel is negated.

16. For the reasons stated above, I pass the following judgment:

The appeal is dismissed. The order passed by the Trial Court is confirmed.