[2020] 1 S.C.R. 644

A M/S. Z. ENGINEERS CONSTRUCTION PVT. LTD. & ANR.

v.

BIPIN BIHARI BEHERA & ORS.

(Civil Appeal No. 1627 of 2020)

B FEBRUARY 14, 2020

[S. ABDUL NAZEER AND HEMANT GUPTA, JJ.]

Stamp Act, 1899 (as amended by Orissa Act no.1 of 2003 w.e.f 20.01.2003): s.35; Art.23 – Code of Civil Procedure, 1908 –
C *Or.XIII r.8 – Impounding of a document (power of attorney) for insufficient stamp duty – Suit for partition filed by plaintiffs-respondents through power of attorney holders (PW-1) – During cross-examination of PW-1, appellants filed application under Or.XIII r.8 to impound the power of attorneys (POAs) on the ground that such POAs ought to be treated as conveyance within the meaning*
D *of Art.23 of Stamp Act as amended in Orissa State and in view of that they were insufficiently stamped and, therefore, in terms of s.35 of Stamp Act, the POAs are liable to be impounded and cannot be admitted in evidence unless an appropriate stamp duty is paid – Trial court and High Court dismissed the application observing that*
E *since it is a registered document, therefore, it is properly stamped – Held: The question whether possession was transferred at the time or after execution of such POA is a question of fact which is required to be decided by the Court at the time of final decision, after evidence is led by the parties and not merely on the basis of recitals in POA – Such process would be fair and reasonable keeping in view the*
F *provisions of Orissa Act – In the facts of the instant case, the objection relating to deficiency in stamp duty on POA which the appellants claimed to be conveyance, would depend upon the finding regarding delivery of possession in terms of POA – Generally speaking, such objection is required to be decided before*
G *proceeding further – However, in a case where evidence is required to determine the nature of the document, it is reasonable to defer the admissibility of a document for insufficient stamp duty at the time of final decision in the suit – Therefore, order passed by trial court and High Court set aside – Matter remitted to the trial court to decide the objection of admissibility of the document on account*

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of being insufficiently stamped – Indian Stamp Orissa Amendment Act, 2003.

Disposing of the appeal and remitting the matter to trial court, the Court

HELD: The trial court as well as the High Court returned the findings on the bare reading of the power of attorney and observed that since it is a registered document, therefore, it is properly stamped. But the question as to whether in terms of the explanation inserted by the Orissa Act, such power of attorney is liable to be stamped as conveyance, on account of the delivery of possession at the time of execution of power of attorney or thereafter was not examined. The question whether possession was transferred at the time or after execution of such power of attorney is a question of fact which is required to be decided by the Court at the time of final decision being adjudicated, after evidence is led by the parties and not merely on the basis of recitals in the power of attorney. Such process would be fair and reasonable keeping in view the provisions of Orissa Act. [Paras 11, 12][650-E-G]

R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Anr. **(2003) 8 SCC 752 : [2003] 4 Suppl. SCR 450 – held inapplicable.**

Ram Rattan (Dead) by LRs. v. Bajrang Lal & Ors. **(1978) 3 SCC 236 : [1978] 3 SCR 963;** *Omprakash v. Laxminarayan & Ors.* **(2014) 1 SCC 618 : [2013] 9 SCR 923;** *Bipin Shantilal Panchal v. State of Gujarat & Anr.* **(2001) 3 SCC 1 : [2001] 2 SCR 29 – referred to.**

Case Law Reference

[1978] 3 SCR 963	**referred to**	**Para 7**
[2013] 9 SCR 923	**referred to**	**Para 8**
[2003] 4 Suppl. SCR 450	**held inapplicable**	**Para 9**
[2001] 2 SCR 29	**referred to**	**Para 10**

A CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1627 of 2020.

From the Judgment and Order dated 24.01.2019 of the High Court of Orissa at Cuttack in C.M.P. No. 1534 of 2018.

B Shyam Divan, Sr. Adv., Anirudh Sanganeria, Satya Smruti Mohanty, Ms. Shruti Agarwal, Advs. for the Appellants.

Vikas Dhawan, S.P. Das, Lakshay, Kaustubh Shukla, Advs. for the Respondents.

The Judgment of the Court was delivered by

C **HEMANT GUPTA, J.**

1. Leave granted.

2. The challenge in the present appeal is to an order passed by the High Court of Orissa on 24th January, 2019 whereby the petition filed by the appellant under Article 227 of the Constitution of India, dismissing an application filed by the appellant under Order XIII Rule 8 of the Code of Civil Procedure, 1908[1] to impound the power of attorneys (Exts. 4 and 5), was dismissed.

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3. The plaintiffs-respondents instituted a suit for partition through their power of attorney holder Kishore Chandra Behera (PW-1). During the cross-examination of PW-1, the present appellants filed an application under Order XIII Rule 8 of the Code to impound the power of attorneys, Exts. 4 and 5, *inter alia*, for the reason that such power of attorney is to be treated as Conveyance within the meaning of Article 23 of the Indian Stamp Act, 1899[2] as amended by Orissa Act No. 1 of 2003 w.e.f. 20th

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F January, 2003. The amended Schedule IA reads as under:

Schedule IA

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.

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[1] for short, 'Code'

[2] for short, 'Act'

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(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 marked value of the property whichever is higher.
xxx	xxx
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 or 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.	

4. Similarly, clause (f) of Article 48 was substituted by the amending Act, contemplating levy of stamp duty as conveyance when such power of attorney is given for consideration and authorising the attorney to sell any immovable property.

5. The power of attorney dated 21st February, 2011 was produced in evidence as Ex.4 on 9th July, 2008 by PW 1- Kishore Chandra Behera. It was objected to by the present appellants. The other power of attorney dated 4th October, 2008 was produced as Ex.5 in evidence on 7th August, 2018 which was again objected to by the present appellants. The relevant part of the evidence from the statement of PW 1 reads as under:

> "15. …This is the original general power of attorney dtd.21.02.2011 marked Ext-4 (with obj.).
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> 16. This is the original general power of attorney bearing No. 10676 dtd.04.10.2008 marked Ext-5 (with obj.)."

6. It is thereafter an application was filed by the appellants on 3rd September, 2018 seeking direction to impound the two power of attorneys on the ground that they were insufficiently stamped. Therefore, in terms of Section 35 of the Act, the same were liable to be impounded and can

be admitted in evidence only if appropriate stamp duty and penalty is paid. It is argued that in terms of the Act as amended in the Orissa State, the power of attorney shall be treated to be conveyance if the possession is transferred before or at the time or after the execution of a power of attorney. It is contended though, that the cumulative reading of the power of attorneys shows that the intention is to give an unequivocal right to the attorney to sell the land. However, the fact that the possession was transferred to the attorney was admitted when the attorney appeared as PW-1. Therefore, in terms of explanation to Article 23, the power of attorney is liable to be impounded and cannot be admitted unless an appropriate stamp duty is paid.

7. In a judgment reported as ***Ram Rattan (Dead) by LRs.*** v. ***Bajrang Lal & Ors.***[3]**,** the question regarding admissibility of a document was examined for the reason that it was not duly stamped and registered. The learned trial court made an endorsement that the document was "Objected, allowed subject to objection". However, the learned trial court at the stage of arguments rejected the documents to be admitted for consideration, by taking recourse to Section 36 of the Act. This Court found that Section 36 of the Act could come into play only when an objection regarding insufficient stamp duty was judicially determined. Since an objection was raised which was not still judicially determined, the recourse to Section 36 of the Act was found to be not tenable, though an objection was raised at the time of evidence.

8. In ***Omprakash*** v. ***Laxminarayan & Ors.***[4], the plaintiff claimed that possession was delivered to him on the basis of an agreement to sell. The defendant denied the delivery of possession. The question examined was as to whether the admissibility of document produced by party would depend upon recitals in the documents or whether documents are to be considered as conveyance as defined under the Act as amended by Stamp (Madhya Pradesh Second Amendment) Act, 1990. The amendment in the Madhya Pradesh Act is similar to that made in Orissa Act No. 1 of 2003. The High Court accepted the plaintiff's petition and set aside the demand of stamp duty treating the document to be conveyance as ordered by the trial court.The distinguishing factor is that, in the aforesaid case, possession was said to be delivered to the prospective vendee in the agreement to sell itself. This Court held as under:

[3] (1978) 3 SCC 236
[4] (2014) 1 SCC 618

"16. From a plain reading of the aforesaid provision, it is evident that an authority to receive evidence shall not admit any instrument unless it is duly stamped. An instrument not duly stamped 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 penalty. As we have observed earlier, the deed of agreement having been insufficiently stamped, the same was inadmissible in evidence. The court being an authority to receive a document in evidence to give effect thereto, the agreement to sell with possession is an instrument which requires payment of the stamp duty applicable to a deed of conveyance. Duty as required, has not been paid and, hence, the trial court rightly held the same to be inadmissible in evidence."

9. Learned counsel for the respondents referred to a judgment of this Court reported as ***R.V.E. Venkatachala Gounder*** v. ***Arulmigu Viswesaraswami & V.P. Temple & Anr.***[5] to contend that admissibility of document in evidence can be classified in two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. It was held that such objections are required to be raised when the document has been admitted in evidence in terms of provisions of Order XIII Rule 4 of the Code. However, the said judgment does not deal with the objection regarding impounding of a document for insufficient stamp duty as required under the Act. Therefore, such judgment has no applicability to the facts of the present case.

10. Learned counsel for the respondents refers to another judgment reported as ***Bipin Shantilal Panchal*** v. ***State of Gujarat & Anr.***[6] wherein the appellant was facing a trial for the offences under the Narcotic Drugs and Psychotropic Substances (NDPS) Act. During the course of trial, the trial court had chosen to decide questions of admissibility of documents or other items of evidence, as and when objections thereto were raised. This Court found that it is an archaic practice that whenever any objection is raised regarding the admissibility of any material in

[5] (2003) 8 SCC 752
[6] (2001) 3 SCC 1

A evidence, the Court does not proceed further without passing an order on such objection. This Court found that any decision on objection is challenged in appeal or revision which unnecessarily prolongs the trial. Such practices proved to be hindrance which impede and restrict the progress of trial proceedings. Such proceedings must be recast and remodeled to give way to the acceleration of trial proceedings. It is thereafter, the Court held as under:

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> "14. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence-taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)"

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11. We find that the trial court as well as the High Court returned the findings on the bare reading of the power of attorney and observed that since it is a registered document, therefore, it is properly stamped. But the question as to whether in terms of the explanation inserted by the Orissa Act, such power of attorney is liable to be stamped as conveyance, on account of the delivery of possession at the time of execution of power of attorney or thereafter has not been examined.

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12. We find that the question whether possession was transferred at the time or after execution of such power of attorney is a question of fact which is required to be decided by the Court at the time of final decision being adjudicated, after evidence is led by the parties and not merely on the basis of recitals in the power of attorney. Such process would be fair and reasonable keeping in view the provisions of Orissa Act.

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13. We find that in the facts of the present case, the objection related to deficiency in stamp duty on a power of attorney which the

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appellants claim to be conveyance, depends upon the finding regarding delivery of possession in terms of the power of attorney. Generally speaking, such objection is required to be decided before proceeding further. However, in a case where evidence is required to determine the nature of the document, it is reasonable to defer the admissibility of a document for insufficient stamp duty at the time of final decision in the suit.

14. Therefore, we find that the order passed by the trial court on 14th December, 2018 and the High Court on 24th January, 2019 are liable to be set aside and are, thus, set aside. The matter is remitted to the trial court to decide the objection of admissibility of the document on account of being insufficiently stamped in light of the findings recorded, after evidence is led by the parties. The application dated 3rd September, 2018 filed by the appellants shall be decided along with the main suit, when the question of delivery of possession at the time of the execution of the power of attorney or thereafter shall be determined.

15. In view of the above, the appeal is disposed of.

Devika Gujral

Appeal disposed of.