

### *Omprakash v. Laxminarayan & ors*

**CHANDRAMAULI KR. PRASAD, J.** Plaintiffs filed a suit for specific performance of contract, possession and permanent injunction in respect of un-irrigated land having an area of 0.506 hectares bearing Survey No. 16012 in Village Arniapitha situated within Tahsil Jaora in District Ratlam in the State of Madhya Pradesh. It is founded on an agreement to sell dated 27<sup>th</sup> December, 2000. It is the case of the plaintiffs that the properties in question were delivered to them on payment of the part consideration money in pursuance of the agreement to sell and such a recital finds place in the said agreement. Paragraph 1 of the agreement to sell reads as under:

“1. That while selling the aforesaid land I the seller, have received Rs. 1,15,000/- (Rupees one lac fifteen thousand) cash as a token amount before the witnesses and, by remaining present at the spot, actual physical possession has been handed over to the purchaser, and after receiving remaining sale consideration amount Rs. 25,000/- (Rupees twenty five thousand) from the purchaser within a year I, the purchaser, will get the sale deed of the said land registered in the name of the purchaser.”

The defendants in the written statement, however, denied the assertion of the plaintiffs and stated that no agreement to sell was ever executed and possession given. On the basis of the pleading and the written statement, the trial court framed several issues. During the course of the trial the agreement to sell was sought to be proved and admitted in evidence by the plaintiffs' witness Shankarlal. This was objected to by defendant no.

1. Its admissibility was questioned on the ground that the agreement to sell in question contains a recital that possession has been handed over to the purchaser and, therefore, it is a conveyance over which the stamp duty as indicated in Schedule 1A of the Indian Stamp Act, 1899 as substituted by M.P. Act 22 of 1990 is required to be affixed. It is pointed out that the agreement to sell in question is on a stamp paper of Rs. 50 only. The submission made by defendant no. 1 found favour with the trial court and it held the agreement to sell to be inadmissible in evidence as it has not been sufficiently stamped. It further observed that if the plaintiffs want to produce the said document in evidence then they can make proper application as envisaged under Section 35 of the Indian Stamp Act, hereinafter referred to as 'the Act'. While doing so, the trial court observed as follows:

“.....Therefore, it is found that sale agreement dated 27.12.2000 due to mention of possession being handed over, should be stamped like a conveyance. In the sale agreement the cost of the land is mentioned as Rs.1,40,000 and its 7 ½ per cent comes to Rs. 10,500/-. Therefore, it is concluded that the sale agreement can be admissible in evidence only on being on stamp of Rs. 10,500/-. Therefore, it is concluded that the sale agreement is not properly stamped, therefore, not admissible in evidence. Thus, objection of defendant No. 1 is allowed sale agreement dated 27.12.2000 is refused to be admitted in evidence. If the plaintiff wants to produce the said documents in evidence then he may make proper application under Section 35 of the Stamp Act on the next date.”

Plaintiffs challenged the aforesaid order before the High Court in a writ petition filed under Article 227 of the Constitution of India, inter alia, contending that when defendants themselves have asserted that possession of the property was not delivered, the recital in agreement is of no consequence. It was also pointed out that plaintiffs themselves have claimed relief of possession, which obviously means that they are not in possession and when this fact is taken into consideration, the view taken by the trial court appears to be erroneous. The High Court by its order dated 27th February, 2008 passed in Writ Petition No. 7237 of 2007 accepted this contention and held the agreement to sell to be admissible in evidence. The High Court, in this connection, has observed as follows:

“Although there is no dispute with regard to the fact that in the document in question, which is an agreement alleged to have been executed by the defendants in favour of the plaintiffs, and which is basis of the suit, it is recited that possession of the property in question had been delivered to the plaintiffs, but the fact cannot be ignored that a specific plea has been raised by the defendants in their written statement denying the execution of the said agreement and also specifically denying that the possession of the property had ever been delivered to the plaintiff-petitioners. In these circumstances, once, the defendants themselves have claimed that possession of the property had not been delivered, then the recital in agreement loses all significance. In such a situation, the document cannot be held to be insufficiently stamped merely because it was not stamped in accordance with Article 23 of Stamp Act.”

Defendant no. 1 assails this order in the present special leave petition.

Leave granted.

We have heard Mr. Niraj Sharma on behalf of the appellant and Mr. Fakhruddin, Senior Counsel on behalf of the respondents.

Mr. Sharma contends that for admissibility of the document what is relevant is the recital therein. He submits that agreement to sell is “conveyance” as defined under Section 2(10) of the Act and shall be chargeable with duty as contemplated under Section 3 of the Act. According to him, as the agreement in question is not duly stamped, it shall be inadmissible in evidence under Section 35 of the Act. Mr. Fakhruddin, however, submits that the defendants having joined the issue with regard to the possession of the plaintiffs in terms of the agreement to sell, the document in question shall not come within the expression “conveyance” as defined under the Act and, hence, it cannot be said that it is not duly stamped.

In view of the rival submission, the question which falls for our determination is as to whether the admissibility of a document produced by the party would depend upon the recital in the document or the plea of the adversary in the suit and whether the document in question is “conveyance” as defined under the Act and is duly stamped.

As stated earlier, the plaintiffs filed a suit for specific performance of contract and their case is founded on the agreement to sell executed on 27th December, 2000. The agreement to sell acknowledges payment of the part of consideration money and further giving actual physical possession to the purchaser by the seller. Though the defendants dispute that, but in our opinion, for determination of the question of admissibility of a document, it is the recital therein which shall be decisive. Whether the possession in fact was given or not in terms of the agreement to sell is a question of fact which requires adjudication. But, at the time of considering the question of admissibility of document, it is the recital therein which shall govern the issue. It does not mean that the recital in the document shall be conclusive but for the purpose of admissibility it is the terms and conditions incorporated therein which shall hold the field. Having said that, we proceed to consider as to whether the document in question is “conveyance” within the meaning of Section 2(10) of the Act. Section 2(10) of the Act reads as follows:

**2. Definitions.** -In this Act, unless there is something repugnant in the subject or context, -

xxx xxx xxx

(10)“Conveyance” includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred *inter vivos* and which is not otherwise specifically provided for by Schedule I;

xxx xxx xxx”

From a plain reading of the aforesaid provision, it is evident that an instrument by which movable or immovable property is transferred, comes within the expression “conveyance”. In the present case, an immovable property is transferred on payment of part of the consideration and handing over the possession of the property. It is relevant here to state that by the Indian Stamp (Madhya Pradesh Second Amendment) Act, 1990 (Act No.22 of 1990) few Articles including Article 23 of Schedule 1-A has been substituted and Explanation has been added to Article 23. The Explanation appended to Article 23 of Schedule 1-A of the Stamp Act as substituted by Section (6) of Act 22 of 1990 reads as follows:

“**Explanation.**—For the purpose of this article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or after execution of, such agreement without executing the conveyance in respect thereof then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly:

Provided that, the provisions of Section 47-A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section:

Provided further that where subsequently a conveyance is effected in pursuance of such agreement of sale the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance, subject to a minimum of Rs. 10.” The aforesaid Explanation has come into effect with effect from 26th September, 1990. The Explanation, therefore, creates a legal fiction.

The agreement to sell shall be deemed to be a conveyance and stamp duty is leviable on an instrument whereby possession has been transferred. Thus the agreement to sell in question is a conveyance within the meaning of Section 2(10) of the Act and is to be duly stamped. Section 35 of the Act makes instruments not duly stamped inadmissible in evidence, the relevant portion whereof reads as follows:

**“35. 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-

(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;

xxx xxx xxx.”

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. The view which we have taken finds support from a decision of this Court in the case of **Avinash Kumar Chauhan v. Vijay Krishna Mishra, (2009) 2 SCC 532**, in which it has been held as follows:

**“21.** It is not in dispute that the possession of the property had been delivered in favour of the appellant. He has, thus, been exercising some right in or over the land in question.

We are not concerned with the enforcement of the said agreement. Although the same was not registered, but registration of the document has nothing to do with the validity thereof as provided for under the provisions of the Registration Act, 1908.

**22.** We have noticed heretofore 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. The unregistered deed of sale was an instrument which required payment of the stamp duty applicable to a deed of conveyance. Adequate stamp duty admittedly was not paid. The court, therefore, was empowered to pass an order in terms of Section 35 of the Act.”

To put the record straight, the correctness of the impugned judgment (**Laxminarayan & Ors. v. Omprakash & Ors., 2008 (2) MPLJ 416**) came up for consideration before a Division Bench of the High Court itself in Writ Petition No. 6464 of 2008 (**Man Singh (deceased) through Legal Representatives Smt. Sumranbai & Ors. v. Rameshwar**) and same has been overruled by judgment dated January 22, 2010. The High Court observed as follows:

“8. A document would be admissible on basis of the recitals made in the document and not on basis of the pleadings raised by the parties. In the matter of **Laxminarayan (supra)**, the learned Single Judge with due respect to his authority we don't think that he did look into the legal position but it appears that he was simply swayed away by the argument that as the defendant was denying the delivery of possession, the endorsement/recital in the document lost all its effect and efficacy.

9. It would be trite to say that if in a document certain recitals are made then the Court would decide the admissibility of the document on the strength of such recitals and not otherwise. In a given case, if there is an absolute unregistered sale deed and the parties say that the same is not required to be registered then we don't think that the Court would be entitled to admit the document because simply the parties say so. The jurisdiction of the Court flows from Sections 33, 35 and 38 of the Indian Stamp Act and the Court has to decide the question of admissibility. With all humility at our command we overrule the judgment in the matter of **Laxminarayan (supra)**.”

We respectfully agree with the conclusion of the High Court in this regard. In view of what we have observed above, the order of the High Court is unsustainable and cannot be allowed to stand. In the result, the appeal is allowed, the impugned order of the High Court is set aside and that of the trial court is restored but without any order as to costs.