

Gangappa vs Fakkirappa on 14 December, 2018

Equivalent citations: AIR 2019 SUPREME COURT 90, AIRONLINE 2018 SC 862, 2019 (1) AKR 511, (2019) 194 ALLINDCAS 25 (SC), (2019) 127 CUT LT 689, 2019 (137) ALR SOC 18 (SC), (2019) 194 ALLINDCAS 25, (2019) 1 CAL HN 143, (2019) 1 CLR 468 (SC), (2019) 1 KCCR 481, (2019) 1 ORISSA LR 262, (2019) 1 SCALE 1, (2019) 2 ICC 343, (2019) 2 JCR 90 (SC), (2019) 3 CIVLJ 79, 2019 (3) SCC 788, AIR 2019 SC (CIV) 924

Author: Ashok Bhushan

Bench: Ajay Rastogi, Ashok Bhushan

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REPORTABLE

IN
THE

SUPREME

COURT

OF INDIA

CIVIL

APPELLATE

JURISDICTION

CIVIL

APPEAL

NO.11932

Of 2018

GANGAPPA AND ANR.

...APPELLANT(S)

VERSUS

FAKKIRAPPA

...RESPONDENT(S)

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ASHOK

BHUSHAN, J .

This appeal has been filed against the judgment of Karnataka High Court, Dharwad Bench dated 17.07.2014 disposing of the writ petition filed by the respondent herein.

2. Brief facts of the case necessary to be noticed for deciding this appeal are:

The appellants/plaintiffs entered into agreements to sell with respondent ☐ defendant dated 12.04.2005 and 16.05.2006 and earnest money of Rs.1,40,000/☐ was paid.

The appellants filed Suit No.863 of 2008 and Suit No.864 of 2008 praying for specific performance of contract. Another suit filed by the sister of the defendant being O.S.No.327 of 2008 was also clubbed. The Principal Civil Judge impounded agreements to sell filed by the plaintiffs in Suit Nos.863 and 864 of 2008 with direction to the plaintiff to pay deficit duty and penalty vide order dated 27.09.2010. Plaintiffs challenged the order by means of Writ Petition Nos.69264 ☐ 65/2010 and 69263/2010 which were disposed of by the High Court vide its judgment dated 14.03.2013 directing the Principal Civil Judge to permit the plaintiffs to place written submissions. After the order of the High Court, the Principal Civil Judge passed an order dated 22.04.2013 by which agreements to sell in question were admitted in evidence and marked for the plaintiffs in O.S.Nos.863 and 864 of 2008 on payment of deficit duty and penalty. Deficit duty in both the suits was determined as Rs.12013/☐ and Rs.20320/☐ respectively and the penalty imposed was double of the deficit duty in both the suits.

3. Aggrieved by the judgment of the Principal Civil Judge, respondent-defendant filed a writ petition in the High Court. The High Court disposed of the writ petition relying on a Division Bench judgment of Karnataka High Court in Digambar Warty and others vs. District Registrar, Bangalore Urban District and another, ILR 2013 KAR 2099. The High Court directed the courts below to levy the penalty at 10 times of the deficit duty as per judgment of Karnataka High Court in ILR 2013 KAR 2099. Aggrieved by the judgment of the High Court this appeal has been filed by the appellants.

4. Learned counsel for the appellant submits that the High Court committed an error in directing payment of penalty at 10 times. The trial court has rightly directed for payment of deficit duty and penalty at the rate of 2 times which was a just and proper order. It is submitted by the learned counsel for the appellant that when the Deputy Commissioner can reduce levy of penalty not exceeding 10 times of the amount of duty, the trial court while determining the deficiency and penalty shall also have such discretion. The trial court has rightly exercised the discretion by imposing the penalty of two times.

5. Learned counsel appearing for the respondent submits that the instruments were not duly stamped. While admitting the insufficiently stamped documents the trial court has no discretion while levying the penalty. The statute i.e. Section 34 of the Karnataka Stamp Act, 1957 mandates penalty at the rate of 10 times. The Division Bench of the High Court in Digambar Warty and others (supra) has correctly interpreted Section 34 while holding that Court has no discretion to reduce the penalty from 10 times. The High Court has rightly followed the above Division Bench Judgment.

6. We have considered submissions of the learned counsel for the parties and perused the records.

7. The issue which needs to be answered in the present case is as to whether the trial court which had admitted the agreements to sell in evidence could have exercised its discretion in imposing penalty at the rate of 2 times of deficient amount of stamp duty or it was obligatory for the trial court to impose the penalty at the rate of 10 times.

8. Before we proceed to consider the respective submissions of the parties, it is relevant to notice statutory provisions of the Karnataka Stamp Act, 1957. Section 33 requires every person having by law or consent of parties authority to receive evidence, is obliged to impound any instrument which according to him is not duly stamped. Section 33 sub-section (1) is as follows:

“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.”

9. Section 34 provides that instruments not duly stamped are inadmissible in evidence. Section 34 sub-section (1) which is relevant for the present case is 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,

(a) nothing herein contained shall be deemed to require any magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceeding other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;”

10. Section 38 empowers the Deputy Commissioner to refund penalty paid under sub-section (1) of Section

37. Section 39 relates to the Deputy Commissioner's power to stamp instruments impounded. Section 38 and Section 39(1) are as follows:

“38. Deputy Commissioner's power to refund penalty paid under sub-section (1) of section 37. (1) 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.

(2) When such instrument has been impounded only because it has been written in contravention of section 13 or section 14, the Deputy Commissioner may refund the whole penalty so paid.

39. Deputy Commissioner's power to stamp instruments impounded. (1) 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 a duty not exceeding fifteen naye paise only or a mortgage of crop Article 35 (a) of the Schedule chargeable under clause (a) or (b) of section 3 with a duty of twenty-five naye paise, he shall adopt the following procedure:

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

(b) if he is of 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:

Provided that, when such instrument has been impounded only because it has been written in contravention of section 13 or section 14, the Deputy Commissioner may, if he thinks fit, remit the whole penalty prescribed by this section.”

11. Section 34 proviso provides for admitting in evidence an instrument not duly stamped are on payment of duty and penalty. With regard to penalty statute provides:

“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;”

12. The statute envisages that when the 10 times of the amount of the proper duty or deficient portion thereof exceeds five rupees, a sum equal to 10 times of such duty or portion is the penalty.

13. The language of Section 34 provides a flat rate of penalty when the amount of proper duty exceeds five rupees i.e. 10 times of such duty or portion. There is a clear Contrast in the language of Section 34 and Section 39. Section 39 sub[Section (1) sub[Clause (b) is extracted for ready reference:

“39(1)(b) if he is of 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:”

14. The above provision indicated that if the Deputy Commissioner is of opinion that such instrument is chargeable with duty and is not duly

stamped shall require the payment of the proper duty with a penalty of five rupees. The latter part of the provision states "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". Thus, discretion has been conferred on the Deputy Commissioner which is apparent from the words "if he thinks fit". Deputy Commissioner has discretion of imposing penalty of 10 times or lesser of the amount of duty or portion thereof. There is clear contradistinction between the power under Section 33 and 39. The object and purpose for such contradistinction in the provision and power is not far to seek. Section 33 applies to every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office. Thus, Section 33 covers a host of authorities, persons before whom instruments are filed. The legislative scheme does not indicate any distinction between a court receiving an insufficiently stamped instrument in evidence and other authorities. All have to impose penalty of 10 times of the duty or deficit portion, if it exceeds rupees five. This provision is for purpose of maintaining a uniformity in imposing a fixed penalty of 10 times without adverting to any adjudicatory process regarding quantifying the quantum of penalty. The statute gives discretion to Deputy Commissioner who is the authority envisaged by the Act in charge of the revenue administration of a District.

The definition of Deputy Commissioner is given in Section 2(dd) which is to the following effect:

"2(dd) 'Deputy Commissioner' means the Chief Officer in charge of the revenue administration of a district and includes in respect of such provisions of this Act or rules made thereunder such officer in such area as the State Government may by notification in the Official Gazette specify;"

15. The amount of duty and penalty is required to be sent to Deputy Commissioner under Section 37. Section 37 is quoted below:

"37. Instruments impounded how dealt with. (1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 34 or of duty as provided by section 36, he shall send to the Deputy Commissioner an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Deputy Commissioner or to such person as he may appoint in this behalf.

(2) In every other case, the person so impounding an instrument shall send it in original to the Deputy Commissioner.

16. Deputy Commissioner under Section 38 is empowered to refund any portion of the penalty in excess of five rupees which has been paid in respect of such instrument. Section 38 sub-Section (1) again uses the expression "if he thinks fit". Thus, in cases where penalty of 10 times has been imposed, Deputy Commissioner has discretion to direct the refund of the penalty in facts of a particular case. The power to refund the penalty under Section 38 clearly indicates that legislature have never contemplated that in all cases penalty to the extent of 10 times should be ultimately realised. Although the procedural part which provides for impounding and realisation of duty and penalty does not give any discretion under Section 33 for imposing any lesser penalty than 10 times, however, when provision of Section 38 is read, the discretion given to Deputy Commissioner to refund the penalty is akin to exercise of the jurisdiction under Section 39 where while determining the penalty he can impose the penalty lesser than 10 times.

17. In the Division Bench judgment of the Karnataka High Court relied by the High Court in Digambar Warty and others (supra), after noticing the provisions of Section 33 and 34 the Division Bench laid down following in paragraph 36:

"36. This provision refers to the power of the Civil Court which admits the documents in evidence. The main Section is couched in the negative. Unless the instrument is duly stamped, it is inadmissible in evidence. As an exception, the proviso provides for payment of duty and penalty. In the matter of collection of duty and penalty no discretion is vested with the authority admitting such an instrument in evidence. The duty payable on the instrument is prescribed by statute. Therefore, there is no question of any discretion being vested with the authority impounding the document in the matter of collecting the duty. Once the duty payable is ascertained from the statute, no discretion is vested with the authority admitting the document in evidence, in the matter of imposition of duty and penalty. The word used in the said proviso is 'shall'. It is mandatory. However, Section 35 makes it clear, that where an instrument has been admitted in evidence without there being objection at the time of admitting the said instrument in evidence, then 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. Section 58 deals with the power of the Appellate Court to review the finding recorded by the original Court under Section 34 of the Act, either suo motu or on the application of the Deputy Commissioner. Section 36 of the Act deals with admission of improperly

stamped instrument. The State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.”

18. The above view of the Karnataka High Court that there is no discretion vested with the authority impounding the document in the matter of collecting duty under Section 33, is correct. The word used in the said proviso is 'shall'. Sections 33 and 34 clearly indicate that penalty imposed has to be 10 times. The Division Bench of the Karnataka High Court in Digambar Warty and others (supra) has rightly interpreted the provisions of Sections 33 and 34 of the Act. We, thus, are of the view that the High Court in the impugned judgment did not commit any error in relying on the judgment of the Division Bench in Digambar Warty and others (supra). We thus has to uphold the above view expressed in the impugned judgment.

19. There is one more aspect which needs to be noted in the present case. We have seen that even though 10 times penalty has to be collected and imposed by the person impounding the document under Section 37, Section 38 empowers the Deputy Collector to refund the duty. Learned trial court while imposing penalty at the rate of two times has given following reason:

"The plaintiffs of O.S. No.863/08 and 864/08 are stated to be agriculture and are residing at Sherewad village. The said fact is not denied by the defendants therein. It appears that the agreements were prepared by local villagers who are not experienced in the documentation. Looking to the status of the plaintiffs, their standard of having qualification of the document writers. I am of the opinion that the ratio laid down by our Hon'ble High Court in ILR 2011 KAR 4719 can be applied to the present facts and circumstances levying 10 times penalty in respect of said agreement will be harsh on the plaintiffs. Therefore I am of the opinion that levying double the amount of deficit duty as penalty will meet the ends of justice.”

20. The order of the trial court was passed as early as on 22.04.2013 that is more than five years ago. In view of impounding the documents and imposition of penalty, we are sure that the suit must not have been proceeded further, and it must be at the threshold stage; asking the appellant to deposit 10 times of penalty and thereafter to invoke the jurisdiction of Deputy Collector under Section 38 to refund penalty shall be a proceeding again taking considerable time. In the facts of the present case, we are of the view that ends of justice be served in closing the matter by confirming the payment of deficit duty with the double penalty as imposed by the trial court which shall

obviate the proceeding of approaching the Deputy Commissioner for reduction of penalty under Section 38, which in the facts of the present case and for the reasons noted by the trial court was a relevant consideration for refund/reduction of the penalty.

21. In view of the foregoing discussion, we are, therefore, of the view that the High Court has correctly interpreted the provisions of Section 33 in the impugned judgment but instead of prolonging the matter permitting the appellant to deposit 10 times of penalty and thereafter to take recourse under Section 38, we in the facts of the present case close the proceedings regarding penalty on the agreements to sell by approving the direction of the trial court for payment of entire deficit duty and double the penalty.

22. The appeal is disposed of accordingly.

.....J.
(ASHOK BHUSHAN)

NEW DELHI,
December 14, 2018.

.....J.
(AJAY RASTOGI)