

Civil Appeal  
Present :- The Hon'ble Justice Jayanta Kumar Biswas.  
Judgment on: June 10, 2010  
C.A.N.No.2513 of 2010  
in  
S.A.No.338 of 2002  
Sri Sandip Ghosh  
v.  
Sri Subimal Chowdhury & Ors.

**POINTS**

Power of Attorney – Not stamped, if admissible in evidence – If can be attested by the notary – Presumption if can be drawn – Whether on the strength of a document which is not a power of attorney an application can be filed – Stamp Act 1899, S 2(21), 3(42) , 35 – Notaries Act 1952, S 2(d),8, 11, 15 – Evidence Act 1872, S 85 – Power Of Attorney Act 1882, S 2.

**FACTS**

In an application for amendment of the written statement in connection with a second appeal the question arose whether the application was maintainable in view of the fact that the same was filed not by appellant but by some body claiming to have been authorised for the purpose. The document of authorization was produced in court and the question arose that whether this was a power of attorney.

**HELD**

Section 2 of the Powers-of-Attorney Act,1882 provides that the done a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and that every

instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.

Para 7

Section 4 of the Powers-of-Attorney Act, 1882 provides that an instrument creating a power-of-attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the High Court or District Court within the local limits of whose jurisdiction the instrument may be.

Para 8

Section 85 of the Indian Evidence Act, 1872 provides that the court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated.

Para 9

Section 8 of the Notaries Act, 1952 provides that a notary may by virtue of his office verify, authenticate, certify or attest the execution of any instrument. Section 2(b) of the Notaries Act, 1952 defines the expression "Instrument" saying that it includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

Para 10

Section 2(21) of the Indian Stamp Act, 1899 defines the expression "Power-of-Attorney" saying that it includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it.

Para 11

Section 3 of the Indian Stamp Act, 1899 provides that subject to the provisions of the Indian Stamp Act, 1899 and the exemptions contained in Schedule I thereto, every instrument mentioned in that Schedule I shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor.

Para 12

Article 42 of Schedule I of the Indian Stamp Act, 1899 indicates the amount chargeable as duty for a notarial act, that is to say, any instrument, endorsement, note, attestation, certificate, or entry not being a protest made or signed by a notary public in the execution of the duties of his office or by any other person lawfully acting as a notary public.

Para 13

Section 11 of the Notaries Act, 1952 provides that any reference to a notary public in any other law shall be construed as a reference to a notary entitled to practise under the Notaries Act, 1952; and the word “notary” defined by s.2(d) of the Notaries Act, 1952 means a person appointed as such under the Notaries Act, 1952.

Para 14

Article 48 of Schedule I of the Indian Stamp Act, 1899 indicates the amounts chargeable as duty for the several categories of powers-of-attorney mentioned therein.

Para 15

Section 35 of the Indian Stamp Act, 1899 provides 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 by any public officer, unless such instrument is duly stamped.

Para 16

Question of a presumption under s.85 of the Indian Evidence Act, 1872 could arise only if the document was attested by the notary after it was duly stamped. Section 2(11) of the Indian Stamp Act, 1899 says that “duly stamped”, as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for time being in force in India.

Para 18

Mr Sourav Sen, advocate, for the appellant.

Mr. Hiranmoy Bhattacharyya &

Mr. Mrinal Kanti Ghosh, advocates, for the respondents

**THE COURT:** 1) The appellant in this second appeal was the second defendant in Title Suit No. 189 of 1988 (renumbered as Title Suit No.17 of 1993) filed before the Munsif 5th Court at Alipore in the district South 24 Parganas by the first respondent and his wife, since deceased.

2)The suit was filed for eviction mainly on the ground of reasonable requirement. The trial court decreed the suit and the appellant's appeal therefrom was dismissed by the first appellate court. During pendency of the second appeal the appellant has filed the present application dated March 16, 2010 for amendment of his written statement.

3)The respondents are contesting the application. In their opposition dated March 29, 2010 they have taken a point that the application, not signed by anyone but verified by one Baby Basu claiming to be the appellant's cousin sister and authorised by the appellant for the purpose, is not maintainable.

4)With the reply dated April 19, 2010, also verified by Baby Basu, a document dated March 2, 2010 has been produced claiming that thereby the appellant authorised Baby to file the application. The document seems to have been executed by the appellant and attested by a notary in New Delhi on March 2, 2010 impressing his seal on a Rs.5 adhesive stamp affixed to it. The contents of the document dated March 2, 2010 are quoted below:

“Be it known to all to whom it may concern that I, Mr. Sandip Kumar Ghosh aged 41 years, son of Late Shri Mukul Ranjan Ghosh residing at Ground Floor, 47/6, N.C.Das Road, Behala, Kolkata-700 034, do hereby nominate, appoint, empower and constitute Mrs. Baby Basu, wife of Shri Dilip Basu residing at 69/1A, Chetla Road, Kolkata-700 027, as my lawful legal attorney and authorize him/her to do the following acts, deeds and things:-

To carry out all the legal proceedings that are pending/on going at the Hon'ble Calcutta High Court and Hon'ble Alipore Judge's Court pertaining to my residence at 47/6, N.C.Das Road Kolkata- 700 034 on my behalf. I do hereby solemnly declare that I am executing this Power-of-Attorney and have signed this power of Attorney on this 02-03-2010."

5)The questions are whether the document dated March 2, 2010 is a power-of-attorney, and whether on the basis thereof Baby could file the application on behalf of the appellant.

6)The expression "Power-of-Attorney" has been defined by s.1A of the Powers-of- Attorney Act, 1882. Section 1A reads as follows:

"1A. Definition.—In this Act, "Power-of-Attorney" includes any instruments empowering a specified person to act for and in the name of the person executing it."

7)Section 2 of the Powers-of-Attorney Act,1882 provides that the donee a power-of-attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and that every instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof.

8)Section 4 of the Powers-of-Attorney Act, 1882 provides that an instrument creating a power-of-attorney, its execution being verified by affidavit, statutory declaration or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the High Court or District Court within the local limits of whose jurisdiction the instrument may be.

9)Section 85 of the Indian Evidence Act, 1872 provides that the court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a Notary Public, or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government, was so executed and authenticated.

10)Section 8 of the Notaries Act, 1952 provides that a notary may by virtue of his office verify, authenticate, certify or attest the execution of any

instrument. Section 2(b) of the Notaries Act, 1952 defines the expression “Instrument” saying that it includes every document by which any right or liability is, or purports to be, created, transferred, modified, limited, extended, suspended, extinguished or recorded.

11)Section 2(21) of the Indian Stamp Act, 1899 defines the expression” Power-of-Attorney” saying that it includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it.

12)Section 3 of the Indian Stamp Act, 1899 provides that subject to the provisions of the Indian Stamp Act, 1899 and the exemptions contained in Schedule I thereto, every instrument mentioned in that Schedule I shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor.

13) Article 42 of Schedule I of the Indian Stamp Act, 1899 indicates the amount chargeable as duty for a notarial act, that is to say, any instrument, endorsement, note, attestation, certificate, or entry not being a protest made or signed by a notary public in the execution of the duties of his office or by any other person lawfully acting as a notary public.

14)Section 11 of the Notaries Act, 1952 provides that any reference to a notary public in any other law shall be construed as a reference to a notary entitled to practise under the Notaries Act, 1952; and the word “notary” defined by s.2(d) of the Notaries Act, 1952 means a person appointed as such under the Notaries Act, 1952.

15)Article 48 of Schedule I of the Indian Stamp Act, 1899 indicates the amounts chargeable as duty for the several categories of powers-of-attorney mentioned therein.

16)Section 35 of the Indian Stamp Act, 1899 provides 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 by any public officer, unless such instrument is duly stamped.

17) Here the admitted position is that the document dated March 2, 2010 was not stamped at all in terms of the provisions of art.48 of the Indian Stamp Act, 1899, though it appears to have been stamped in terms of the provisions of art.42 thereof. Under the circumstances, in view of the provisions of s.35 of the Indian Stamp Act, 1899, neither it can be admitted in evidence for any purpose, nor can it be acted upon by this court.

18) Question of a presumption under s.85 of the Indian Evidence Act, 1872 could arise only if the document was attested by the notary after it was duly stamped. Section 2(11) of the Indian Stamp Act, 1899 says that “duly stamped”, as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for time being in force in India.

19) Since the document was not stamped at all as a power-of-attorney, it could not be attested as such by the notary and hence the question of drawing any presumption under s.85 of the Indian Evidence Act, 1872 does not arise at all. It cannot be considered a power-of-attorney within the meaning of the expression defined by s.1A of the Powers-of-Attorney Act, 1882 and the provisions of s.2(21) of the Indian Stamp Act, 1899.

20) Since the document, though described by the executant thereof as a power-of-attorney, is not actually a power-of-attorney, on the strength thereof Baby could not file this application on behalf of the appellant. In view of the provisions of s.2 of the Powers-of Attorney Act, 1882 things done by Baby would have been as effectual in law as if they had been done by the appellant only if the instrument created a power-of-attorney. This leads to the conclusion that in law the appellant did not file this application.

21) Since this application has not been decided on merits, I do not think the appellant needs any leave of the court, for which prayer has been made, to file an appropriate amendment application. In my opinion, it is not necessary to say that the appellant is at liberty to file a fresh amendment application. What I hold is that this application, not taken out by the appellant or by his constituted attorney, but by an unauthorised person, is not maintainable.

22) For these reasons, the application is dismissed. No costs. Certified

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sh ( Jayanta Kumar Biswas, J.)