

(2009) 12 AHC CK 0038
In the Allahabad High Court
Case No : C.M.W.P. No. 45972 of 2007

Arezzo Developers (P.) Ltd. and Others	APPELLANT
Vs	
State of U.P. and Another	RESPONDENT

Date of Decision : 11-12-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 226
Criminal Procedure Code, 1973 (CrPC) — Section 125, 126, 127, 128, 145
Stamp Act, 1899 — Section 2(14), 29, 31, 33, 33(4)
Transfer of Property Act, 1882 — Section 118, 54
Uttar Pradesh Consolidation of Holdings Act, 1953 — Section 28, 3(2), 30, 32, 48B
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 117,
117(1), 161, 162, 163
Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 — Rule 144, 145,
146, 147

Citation : (2010) 6 AWC 6133

Hon'ble Judges : Ashok Srivastava, J; Amitava Lala, J

Bench : Division Bench

Advocate : Ravi Kiran Jain, Y.K. Sinha, C.B. Yadav and D.K. Tiwari, for the Appellant; P.K. Sinha, S.C., for the Respondent

Judgement

Amitava Lala, J. 1. This writ petition has been filed by fifteen Petitioner companies challenging the respective notices issued to them to appear in person or through counsel before the Additional Collector (Finance and Revenue), Ghaziabad on a particular date and time to show cause as to why the stamp duty should not be imposed upon them initiating proceedings u/s 29 (e) read with Article 31 of Schedule IB and Section 33 (4) of the Indian Stamp Act, 1899 (hereinafter in short called as the "Stamp Act") in pursuance of order of the court of Sub-Divisional Magistrate, Ghaziabad. It was further mentioned in the notice that if explanation is not received within a particular period, it will be deemed that Petitioners have nothing to say in this regard and in absence thereof an order will be passed imposing stamp duty and penalty, which may be ten times of the deficient stamp duty recoverable as arrears of land revenue

along with interest.

2. Since the same cause of action arose to all the Petitioners, they have Jointly filed this writ petition, however, upon payment of respective court fees applicable to the individual Petitioners.

3. Normally the Court does not interfere with the notice to show cause, therefore, this Court wanted answer to such preliminary point from the Petitioners. In answer to that, Mr. C.B. Yadav, learned senior counsel appearing for the Petitioners, contended that it is true normally the Court does not interfere with the show cause notice but when the show cause notice is issued without jurisdiction, the Court is entitled to interfere with it.

4. According to us, scope of writ jurisdiction is very wide with its own restraint. However, violation of the principles of natural justice, infringement of fundamental right, jurisdictional error and question of ultra vires, being fundamentals, are always amenable to the writ jurisdiction as per ratio of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, supporting this principle. In any event, the Supreme Court in further numerous occasions reiterated wide scope and ambit of writ jurisdiction of the High Court under Article 226 of the Constitution of India.

5. Be that as it may, now we want to confine our Endeavour to know what compelled the Petitioners to invoke the writ jurisdiction of the Court challenging the notice instead of giving reply to the show-cause notice. With regard to a notice the Court has to see whether it is patently illegal, without jurisdiction, arbitrary or mala fide in nature or not, one of which is the basic material for the purpose of invocation of jurisdiction. Therefore, in this case when it has been alleged before us that the notice has been issued by the concerned authority without jurisdiction, we are inclined to hear the issue on merit.

6. Factually, the case is that when the landed properties were exchanged amongst the bhumidhars without any consideration, can it be treated to be an instrument of transfer to pay the stamp duty or not. Mr. Yadav has contended that the lands belong to same area and same type and have been exchanged amongst the parties without any financial consideration. The nature of such exchange is as good as consolidation. No consideration, no document, no instrument and no liability is involved in respect of this exchange. He has drawn our attention to Sections 161 and 162 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (hereinafter in short called as the "U.P.Z.A. and L.R. Act") to establish the cause. He said that exchange of land is permitted by the appropriate Collector and only on the basis of such permission the lands were exchanged. From Sections 161 and 162 of the U.P.Z.A. and L.R. Act. we find as follows:

161. Exchange.--(1) A bhumidhar may exchange with--

(a) any other bhumidhar land held by him: or

(b) any Gaon Sabha or local authority, lands for the time being vested in it u/s 117:

Provided that no exchange shall be made except with the permission of an Assistant Collector who shall refuse permission if the difference between the rental value of land given in exchange and of land received in exchange calculated at hereditary rates is more than 10 per cent of the lower rental value.

(1A) Where the Assistant Collector permits exchange he shall also order the relevant annual registers to be corrected accordingly.

(2) On exchange made in accordance with Sub-section (1) they shall have the same rights in the land so received in exchange as they had in the land given exchange.

162. Land revenue not affected by exchange.--Nothing in Section 161 shall affect the amount of the land revenue assessed on or payable for land so exchanged.

7. Rules 144, 145 and 146 of the Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter in short called as the "U.P.Z.A. and L.R. Rules") prescribe the modalities of such exchange. He has further submitted that this exchange is permissible under the law, otherwise similar type of provisions could not have been incorporated in the Uttar Pradesh Consolidation of Holdings Act, 1953 (hereinafter in short called as the "U.P.C.H. Act"). Sections 28, 30, 32 and 48B of the U.P.C.H. Act are providing similar type of exchange of land holdings amongst the parties under this Act. Under such Act the State itself encourages consolidation amongst the tenure holders by making exchange. As per Section 3(2) of the U.P.C.H. Act, "consolidation" means re-arrangement of holdings in a unit amongst several tenure holders in such a way as to make their respective holdings more compact. Though the present case is not under consolidation at the invitation of the State but principally it is in the nature of consolidation amongst the private parties, i.e., bhumidhars. Therefore, how the exchange amongst the private parties can be construed as a "sale" or "transfer" of property to attract the provisions of the Stamp Act, is unknown to him. Hence, the notice u/s 33 of the Stamp Act can not be applicable in this case. We find from Section 33 of the Stamp Act that it may apply for examination and impounding of instruments. Section 33 of the Stamp Act 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.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with stamp of the value and description required by the law in force

in India, when such instrument was executed, or first executed.

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 Sections 125 to 128 and Sections 145 to 148 of the Code of Criminal Procedure, 1973.

(b) in the case of a Judge of a High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section the State Government may, in cases of doubt, determine what offices shall be deemed to be public offices and who shall be deemed to be the persons in charge of public offices.

(4) Where deficiency in stamp duty paid is noticed from the copy of any instrument, the Collector may suo motu. or on a reference from any Court, or from the Commissioner of Stamps, or an Additional Commissioner of Stamps, or a Deputy Commissioner of Stamp or an Assistant Commissioner of Stamps, or any officer authorized by the Board of Revenue in that behalf, call for the original instrument for the purpose of satisfying himself as to the adequacy of the duty paid thereon, and the instrument so produced before the Collector shall be deemed to have been produced or come before him in the recommence of his functions.

(5) In case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty u/s 40 on the copy of the instrument:

Provided that no action under Sub-section (4) and Sub-section (5) shall be taken after a period of four years from the date of execution of the instrument:

Provided further that with the prior permission of the State Government an action under Sub-section (4) or Sub-section (5) may be taken after a period of four years but before a period of eight years from the date of execution of the instrument.

8. Mr. P.K. Sinha, learned standing counsel appearing for the State, has contended before us that extended meaning of the word "instrument" has been inserted u/s 2 (14) of the Stamp Act by way of amendment under the U.P. Act No. 38 of 2001. From such reference we find the meaning of the "instrument" as follows:

2 (14) "Instrument".-- "Instrument" includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded.

Mr. Sinha further said that such meaning of the instrument is to be read with Article 31 under Schedule I-B of the Stamp Act. Upon going through such Article, we find the same is as follows:

31. Exchange of property.-- Instrument of the same duty as a conveyance [No. 23 Clause (a)] for a consideration equal to the value of property of greatest value as set forth in such instrument. (See item 153 Appendix II).

9. He further said that Section 29 (e) of the Stamp Act speaks that in the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne in the case of an instrument of exchange--by the parties in equal shares. As per Section 56 (2) of the Stamp Act, if any Collector, acting u/s 31, Section 40 or Section 41, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority. Therefore, such power is a power of the authority in the reference or revision. Hence, though there is no dispute with regard to exchange yet whether the stamp duty will be payable in such exchange or not, is within the domain of the appropriate authority. The authority is empowered to examine every instrument so chargeable u/s 33 (2) of the Stamp Act itself. Since the application is made u/s 161 of the U.P.Z.A. and L.R. Act, Mr. Sinha further drew our attention to Section 118 of the Transfer of Property Act, 1882 (hereinafter in short called as the "Transfer of Property Act") to show the definition of "exchange", which is as follows:

118. "Exchange" defined.-- When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an "exchange".

10. In reply to such submissions, Mr. Yadav has drawn our attention to Section 54 of the Transfer of Property Act to establish that if any exchange is made on payment of price on the basis of the instrument executed amongst the parties, then only such exchange can be construed as transfer or sale of the property. He has drawn our attention to the definition of "sale" as u/s 54 therein, which is as follows:

54. "Sale" defined.--"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised....

11. Since no such sale occurred, notice u/s 33 of the Stamp Act can not be applicable because no instrument is available before the authority for the purpose of examination. Mr. Yadav further said that even there is no suo motu power on the part of the authority concerned, which he had invoked in the form of notice hereunder. A suo motu power, if any, is only to be exercised u/s 47 of the Stamp Act when power of payer to stamp bills and promissory notes is received by him unstamped. A further power is also there u/s 47A of the Stamp Act when any instrument is undervalued. However, when there is no instrument at all on exchange of lands between the bhumidhars for the purpose of payment

of any consideration or exchange thereof, the authority concerned can not call upon the Petitioners to show-cause as to why the stamp duty will not be given. He further drew our attention to the Seventh Schedule under Article 246 of the Constitution of India and said that transfer of property other than agricultural land ; registration of deeds and documents are part and parcel of item No. 6 of List III-Concurrent List therein. However, item No. 18 of List II- State List therein says that land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents ; transfer and alienation of agricultural land ; land improvement and agricultural loans ; colonization are part of the State List and are under the competence of the State. He has further drawn our attention to item No. 91 of List I-Union List therein to say that rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts are required to be determined by the Union since these are part and parcel of the Union List. It is further important to observe his submission that as per item No. 63 of List II-State List, rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty, meaning thereby except as specified above, the stamp duty would be determined by the State in respect of the document in question and whatever has been shown by Mr. Sinha being the meaning of the instrument, the same can not be applicable herein. Moreover, the State List in this respect will have prevailing effect in respect of exchange of the property. In any event, Mr. Sinha joined the issue therein and contended before us that Section 2 (14) of the Stamp Act as applicable in Uttar Pradesh is pari materia with the similar section under the Stamp Act. Therefore, meaning of "instrument" either in the Central Act or in the State Act can not be differentiated or distinguished to avoid the payment of stamp duty, as proposed by the State. Mr. Sinha further submitted that u/s 33 (4) of the Stamp Act, as applicable for both Central and State, deficiency of stamp duty can be examined by the Collector suo motu or on a reference from any Court or from the Commissioner etc. Once the property is exchanged coupled with the title, the Transfer of Property Act will be applicable and consequently the Stamp Act will be applicable in the instant case, to which Mr. Yadav has contended before us that U.P.Z.A. and L.R. Act is a special Act giving certain powers about exchange of properties amongst bhumidhars. No documents are required to be exchanged amongst the parties because without any loss both the bhumidhars want compactness of the land following the principle of consolidation as under the U.P.C.H. Act, by which the State itself calls upon such type of exchange for compactness. As the Petitioners are empowered to do so under the Act, they can not be compelled to pay any stamp duty for the same in absence of any instrument. u/s 161 (1A) of the U.P.Z.A. and L.R. Act, where the Assistant Collector permits exchange he shall also order the relevant annual registers to be corrected accordingly, thereby permission itself is giving title of the property amongst the properties intended to be exchanged. Sale is different from exchange as u/s 164 of the U.P.Z.A. and L.R. Act. Section 164 of the U.P.Z.A. and

L.R. Act is as follows:

164. Transfer with possession by a bhumidhar to be deemed a sale.--Any transfer of any holding or part thereof made by a bhumidhar by which possession is transferred to the transferee for the purpose of securing any payment of money advanced or to be advanced by way of loan and existing or future debt or the performance of an engagement which may give rise to a pecuniary liability, shall, notwithstanding anything contained in the document of transfer or any law for the time being in force, be deemed at all times and for all purposes to be a sale to the transferee and to every such sale the provisions of Sections 154 and 163 shall apply.

12. According to us, we can not be swayed away by any sentiment that there might be a loss of public exchequer. In case of fiscal loss, if any, we have to proceed with the dotted line. But admittedly there is no dispute with regard to the nature of exchange amongst the bhumidhars about their bhumidhari lands. It is totally governed by the U.P.Z.A. and L.R. Act. Therefore, it is to be examined under the Stamp Act as to what are the circumstances, in which a suo motu action can be taken on the part of the authorities. The authorities are empowered either by Section 31 or by Section 47 of the Stamp Act. Section 47 is permitting suo motu power under certain circumstances which is not comparable with Section 31 therein. Hence, under no such circumstances the exchange can be suo motu opened by issuing show cause, as has been done by the authority in the present case. It is right to say that meaning of "exchange" under the Transfer of Property Act is meant about the instrument with consideration, but when there is no instrument and no consideration, the meaning of exchange meant under the Transfer of Property Act or the Stamp Act cannot be held to be applicable in such case. It is a matter between two private parties. If both the private parties say that we have exchanged our bhumidhari lands only on account of compactness and there is no financial involvement in connection thereto, the State cannot jump upon the issue because State itself has promulgated such type of policy and/or idea under the U.P.C.H. Act. The only difference between such law and this law is that after issuance of notification appropriate State authority calls upon the parties to exchange their land under the previous law when similar action can be taken by the private parties subject to seal and signature of the State under the U.P.Z.A. and L.R. Act. The permission, which has been granted by the State authority, itself gives power to exchange the land amongst the private parties. Therefore, payment of stamp duty on such exchange is inapplicable herein. Only exception open for the State is to see whether such bhumidhari lands have been exchanged between the parties out of any fraudulent action or not, or, whether any unlawful deprivation of the parties is there or not ; and logically for the said reasons the permission of the State is required for exchange, but when the State itself found that exchange is valid and lawful, we cannot interfere with such exchange as alleged or at all. Even in this case the State has not come out with a case under Rule 147 of the U.P.Z.A. and L.R. Rules, which prescribes that if the Assistant Collector permits

exchange in respect of land constituting a portion of a holding, he shall apportion the land revenue payable for the holding between such portion and the remainder of the holding.

13. Therefore, the show-cause notices impugned In the present writ petition being bad in law are liable to be quashed and are hereby quashed.

14. Accordingly, the writ petition is disposed of without imposing any cost.

15. However, passing of this order will no way affect any right of the State to proceed in accordance with law. It is further desirable to express a view in this regard that if the law is required to be made much more stringent to prevent any fraudulent action or deprivation, it is open for the State to frame necessary law of course with a rider, so that the genuine exchanger of the properties should not be made to suffer.