(2016) 08 GUJ CK 0076

In the Gujarat High Court

Case No : Stamp Reference No. 2 of 2012

Asset Reconstruction Co. (India) Ltd. APPELLANT

Vs

Chief Controlling Revenue Authority RESPONDENT

Date of Decision : 22-08-2016

Acts Referred:

Bombay Stamp Act, 1958 — Article 45(f), Section 20

Citation : (2017) AIR(Gujarat) 66 : (2017) 1 GLR 1 : (2016) 3 GujLH 797 : (2017) 1 RCRCivil 1058

Hon'ble Judges : M.R. Shah, J.B. Pardiwala and N.V. Anjaria, JJ.

Bench : Full Bench

Advocate : V.D. Nanavati, Advocate, for the Applicant No. 1; Manisha Lavkumar, Government Pleader, for the Respondent No. 2

Final Decision : Disposed Off

Judgement

M.R. Shah, J. - Present Stamp Reference under Section 54(1)(a) of the Bombay Stamp Act, 1958 (hereinafter referred to as "Stamp Act") is made by the Chief Controlling Revenue Authority, Gujarat State, Gandhinagar for the opinion of this Court with respect to the following questions.

"(A) Whether the objection raised by the Account General, Ahmedabad in audit para, in the year-2008 is proper or not, as per Article-45(F) of the Bombay Stamp Act, 1958 or not?

(B) Whether the Asset Reconstruction Company (India) Limited is liable to pay stamp duty of Rs. 24,94,100/- i.e. 4.9% stamp duty as per Article-20(A) of the Bombay Stamp Act or not?"

2. Facts leading to the present reference in nut-shell are as under:

2.1 That one Jai Bharat Steel Company (hereinafter referred to as "said company") obtained a loan from the Oriental Bank of Commerce, New Delhi (hereinafter referred to as "Bank") for an amount of Rs. 5.09 Crores. That after execution of the necessary documents, the said loan was disbursed in favour of the said company. It appears that thereafter the said company did not repay the loan amount due and payable to the Bank. That therefore the Bank executed an Assignment Agreement dated 18.11.2008 in favour of Asset Reconstruction Co. (India) Ltd., (hereinafter referred to as "ARCIL") Bombay - a company incorporated under the Companies Act, 1956 and registered under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Act, 2002 (hereinafter referred to as "SARFAESI Act"). That the said Assignment Agreement was executed by the Bank in favour of the ARCIL, which was registered before the Sub-Registrar, Bharuch on 18.11.2008 by Registration No. 8175. That with respect to the aforesaid document/Deed of Assignment, proceedings under Section 31 of the Stamp Act for the purpose of adjudication of the aforesaid deed had taken place. The Additional Superintendent of Stamps, Gujarat State, Gandhinagar passed an order dated 23.10.2008 and thereafter the aforesaid Deed of Assignment was executed.

2.2 It appears that during the audit of the office of Sub-Registrar, Bharuch by the office of the Accountant General (A.G.), Ahmedabad, the audit party raised objection in respect of the said Deed of Assignment dated 18.11.2008. That the audit party raised following objections.

"During the test check of documents registered during the year 2008 by Sub-Registrar, Bharuch, it was noticed in 4 documents styled and registered as ''Assignment Agreement'' that ''debt'' of various banks was sold to Asset Reconstruction Company (India) Ltd. As per recitals of the documents, the seller as the true, legal and beneficial owner of the loans, in the ordinary course of its business, unconditionally and irrevocably sold, assigned, transferred, released to and upto the purchaser all the loans forever pursuant to Section 5(1)(b) of the SARFAESI Act and all purchaser shall be deemed to be full and absolute legal owner, and the only person legally entitled to the loans or any thereof and to recover and receive all amounts due. Further, the sellers had simultaneously executed an irrevocable power of attorney in favour of the purchaser to sell, transfer, pledge, dispose off, create lien over the specified shares or any part thereof and to take all the actions, deeds, writings as may be necessary in this regard including but not limited to sign necessary forms, to hand over the necessary certificates to the buyers pay commission or brokerage, if any, etc. Besides, it was declared by the seller that power of attorney was given by it in consideration of the purchaser paying to the seller purchase consideration as per the terms of the assignment agreement. From the above, it could be seen that the documents fall under two description specified in Schedule-I of the Stamp Act that (i) deed of assign wherein the duty is chargeable at 75 paise per Rs. 1000 and (ii) power of attorney consideration wherein duty chargeable is as per conveyance. As per provisions of Section 6 of the Act, abid a document so framed as to come within two or more of the description in Schedule I shall, where the duties chargeable thereunder are different, be chargeable with the highest of such duties."

That as per the audit party objection, Deed of Assignment Agreement has also referred one Power of Attorney in Schedule 3 and the same is leviable for stamp duty as per Article 45(f) of the Stamp Act. Therefore, on the basis of the objection raised by the A.G., they raised objection of Rs. 23,53,800/- as deficit stamp duty.

2.3 That thereafter the Deputy Collector (Stamp Duty), Bharuch referred the matter on 18.10.2009 to the Chief Controlling Revenue Authority, Gandhinagar for review/revision under Section 53A of the Stamp Act. That the Chief Controlling Revenue Authority reopened the said case and vide communication dated 30.05.2010 sought explanation from the Assistant Manager, ARCIL and the said assignee was called upon to make submissions on the objections raised by the audit party. Number of notices were issued to the assignee, however nobody remained present on behalf of the assignee, however at last the Chief Controlling Revenue Authority received a letter dated 07.07.2011 of the assignee. That thereafter after considering the reply submitted by the assignee, the Chief Controlling Revenue Authority passed an order dated 04.01.2012 and quashed and set aside the order dated 23.10.2008 passed by the Additional Superintendent (Stamp Duty) and has directed to recover the deficit stamp duty of Rs. 23,53,800/- from the assignee on the ground that the Power of Attorney annexed with Schedule-3 to the Deed of Assignment is subjected to the stamp duty under Article 45(f) of Schedule-I to the Stamp Act and duty is leviable/ recoverable as per Article 20 of the Stamp Act.

2.4 That thereafter the ARCIL submitted an application on 29.02.2012 under Section 54(1)(a) of the Stamp Act to refer the aforesaid questions to this Court for its opinion. That is how on the application submitted by the Chief Controlling Revenue Authority, the aforesaid two questions are referred to this Court for its opinion.

3. Ms. V.D. Nanavaty, learned advocate has appeared on behalf of the ARCIL and Ms. Manisha Lavkumar, learned Government Pleader has appeared on behalf of the Stamp Duty Authority.

4. Ms. Nanavaty, learned advocate appearing on behalf of the ARCIL has vehemently submitted that in the present case the Assignment Deed dated 27.10.2008 registered with No. 8175 has been executed between the Bank and ARCIL for assignment of the right, title and interest in the financing documents and security interest. It is submitted that in order to enable the recovery of debt assigned in favour of ARCIL, power of attorney is also executed by the Bank in favour of ARCIL which is at Schedule-3 as part of assignment.

4.1 It is submitted that while passing the impugned order the learned Chief Controlling Revenue Authority has materially erred in inferring that since there is irrevocable power of attorney with the assignment deed, the same should be charged under Article 45(f).

4.2 It is further submitted that as such the power of attorney is complementary and is integral part of the Assignment Deed in order to avoid difficulty in future in recovery of debt under the financial documents assigned in favour of the assignee. It is submitted that the power of attorney so executed is a mandate as per the provisions of Securitization Act, 2002, which facilitates the pending and future legal proceedings which are to be conducted by the assignor - reconstruction company.

4.3 It is submitted that Deed of Assignment is transfer of actionable claim i.e. recovery of debt from financial documents etc., under the Section 130 of the Transfer of Property Act and therefore, it is not a transfer of immovable property. It is further submitted that as such by the power of attorney in question there is no authorization for sale of immovable property under Article 45(f) and therefore, the submission by the State Government that instrument of power of attorney should be charged under Article 45(f) is wholly unjustified having regard to the contents of the Assignment Deed and the power of attorney.

4.4 It is further submitted by Ms. Nanavaty, learned advocate appearing on behalf of the ARCIL that the right to sell the property by way of Assignment Deed is ancillary to the statutory rights flowing in the reconstruction company as part of the assignment. It is submitted that these rights do not flow from the power of attorney, but from the very statutory rights for enforcement of the security. It is further submitted that the Revenue Authority has not properly appreciated the fact that the originator is also not having any direct right to sell the property as stipulated by the authority in its order, but the right to sell flows from the provisions of the Securitization Act on the condition of the financial assistance being declared as the NPA and then the same is to be realized by way of enforcement of security. It is submitted that instrument of irrevocable power of attorney coupled with the Assignment Deed empowers ARCIL to act for and in the name of assignor. It is submitted that the assignor is described as seller but he is not the assignor to immovable property. It is submitted that Assignment Deed gives right to use the name of principal and the relationship is governed by the law of agency.

4.5 It is further submitted that power of attorney in question does not confer any right of ownership or conveying property to anyone. It is submitted that the ownership is being conveyed under the provisions of the Act and under the provisions of the SARFAESI Act read with Rule 9(6) of the Security Interest and Enforcement Rules, 2002.

4.6 It is further submitted by Ms. Nanavaty, learned advocate appearing on behalf of the ARCIL that the applicant ARCIL is a company incorporated under the provisions of the Companies Act, 1956 and is registered as reconstruction company under the provisions of section 2(v) and having the certificate of registration under section 3(4) of Securitization Act. It is submitted that acquisition of the financial assets of the Bank is recognised under section 5(1) and 5(2) of the Securitization Act. It is submitted that section 5(3) provides for complete control of the financial assistance by the reconstruction company as similar to the Bank. It is submitted that the power of attorney is executed by the Bank in violation of ARCIL as a part of the assignment agreement and already stipulated under section 5(3) of the Securitization Act. It is submitted that section 9(d) of the Securitization Act provides for enforcement of security interest by the reconstruction company which is the sole purpose of the assignment deed. It is submitted that the provisions of the Securitization Act even otherwise provides for taking the possession of the secured assets including the right to transfer, lease or sale for realising the secured assets and hence the said assignment deed do not confer any further right to sell or transfer. It is submitted that the rights already existed with the secured creditor - bank and the same has been transferred by way of assignment deed and the appended power of attorney do not offer any other rights in the same.

Making above submissions and relying upon the following decisions of the Hon''ble Supreme Court, this Court, Calcutta High Court, Andhra Pradesh High Court, it is requested to answer the question in favour of the applicant company and against the Revenue.

"1. Khettra Mohan Das v. Biswanath Bera, AIR 1924 Calcutta 1045 (Paras 2, 5, 9)

2. Seth Loon Karan Sethiya v. Ivan E. John & Ors., AIR 1969 SC 73 (Para 9)

3. ICICI Bank Ltd. v. Official Liquidator of APS Star Industries Ltd., AIR 2011 SC 1521 (Paras 3, 5, 9, 18 and 21)"

5. Mrs. Manisha Lavkumar, learned Government Pleader has supported the orders passed by the learned Chief Controlling Revenue Authority. It is submitted that merely because the power of attorney in question is appended to the Deed of Assignment, the power of attorney cannot escape from the payment of stamp duty. It is vehemently submitted that as such the documents/conveyance appended to the Deed of Assignment are executed for different purposes and therefore, for the purpose of the stamp duty, they are required to be treated and considered separately and liable to pay separate stamp duty. It is submitted that therefore, the power of attorney in question which is appended to Deed of Assignment as Schedule 3 is chargeable to stamp duty under Article 45(f) of the Stamp Act.

Making above submissions it is requested to answer the question in favour of the Revenue and against the applicant.

6. Heard learned advocates appearing for respective parties at length. A short question which is posed for consideration of this Court and the question which is referred to this Court is whether the power of attorney produced at Schedule-3 to the Deed of Assignment be subjected to the stamp duty as per Article 45(f) of the Bombay Stamp Act or not?

6.1 At the outset it is required to be noted that while executing the Deed of Assignment dated 23.10.2008 and executed between the Bank and the applicant company and one another in para 11.12 the seller (Bank) agreed to execute, simultaneously with the execution of the Agreement, an irrevocable Power of Attorney in favour of the Assignee or any other person nominated by the Assignee, substantially in the form set out in Schedule 3 annexed to the same, to act for and on its behalf as its constituted attorney, and on its behalf to do all such acts, deeds and things as may be required and to execute and deliver such deeds, documents and writings as may be required to further perfect the Assignee''s right title and interest to the Loans and for such other matters as stated therein. Consequent to the above the seller - Bank has executed the power of attorney in favour of the applicant company as per Schedule 3. On considering the power of attorney appointing the assignee to be lawfully constituted attorney with the following rights.

"1. To do all such acts, deeds and things as may be required and to make, execute, sign, seal and deliver and cause to be registered in favour of the Attorney, all such deeds, documents, and writings with all such covenants, conditions, declaration, agreements and stipulation as may, in the absolute discretion of the Attorney (which discretion shall be final and binding on the Seller) be deemed necessary as may be required to:

a) perfect the full legal right, title and interest of the Attorney in the Loans, the Financing Documents and the underlying Security Interests, pledges and/or guarantees; and

b) collect, enforce, realize and give receipts and discharges for receipt of the Loans.

2. To ask for, demand, recover, realize, enforce and obtain any payment of any of the Loans, including all dues, demands, actionable claims or charges in action arising in favour of the Seller from any of the Borrowers under the provisions of the Financing Documents or otherwise howsoever and to give full and effectual discharges and release to such Borrower.

3. To make, deliver, complete, execute and/or otherwise deal with, negotiate, endorse or deliver any negotiable instruments or any other deeds, documents or instruments relating to the Loans entitling the holders thereof to the Amounts Due or any other right or remedy therein stated.

4. To initiate and continue any legal proceeding and/or action whether by way of suit, petition, application, including for enforcement of any underlying Security Interests, pledges and/or guarantees in any court of law, tribunal and/or any other authority against any Borrower or any Person and/or to prefer and continue any appeal, revision, application, petition and/or any other proceedings at any higher court or tribunal against any order, award and/or decree or procurement by any court, authority or tribunal or any other authority and to withdraw any legal proceeding as aforesaid and to settle the same whether in or out of court as the Attorney may consider appropriate.

5. To engage any lawyer, counsel or any other professional experts in any court

of law or before any arbitrator or authority for and on behalf, of the Seller.

6. To pay to any Statutory Authority any taxes, dues, duties and demands with respect to any payment to be received from any Borrower and to do or take all such other acts, deeds and things as the Attorney may consider appropriate in order to protect the interest of the Seller and of the Attorney.

7. To appoint or remove any agent or agents with all or any of the powers aforesaid in order to enable such agent to exercise all or any of the powers given by the Seller to the Attorney herein and withdraw any such powers from any of them.

8. To present and lodge in the office of the Sub-Registrar of Assurances, anywhere in India and to admit execution of the Assignment Agreement and/or any Transaction Documents executed in favour of the Attorney and to do all acts and things necessary for effectively registering the said Assignment Agreement and/or Transaction Documents.

9. The exercise by the Attorney or their nominees of any power shall be conclusive evidence of its right to exercise such power, provided that the same is not inconsistent with the provisions hereof. The Seller hereby ratifies all actions that the Attorney or its nominee shall lawfully do or cause to be done by virtue hereof; and

10. The Attorney shall be entitled from time to time to appoint and remove at pleasure or substitute any agent or attorney in lieu and substitution or addition in respect of all or any of the matters aforesaid upon such terms not inconsistent herewith as the Attorney shall think fit.

Thus, considering the aforesaid clauses and the rights conferred upon the assignee the power of attorney is subjected to the stamp duty as per Article 45(f) of the Stamp Act. Article 45(f) reads as under:

45(f) When given for consideration and authorizing the attorney to sell any immovable property The same duty as is leviable on a conveyance under Article 20 for the amount of consideration or, as the case may be, market value of the immovable property whichever is greater.

Therefore, as such considering Article 45(f) of the Stamp Act and the power of attorney executed by the seller (Bank) in favour of the applicant, the said document is subjected to the payment of stamp duty as per Article 45(f) of the Stamp Act.

6.2 Merely because the same is part of the Deed of Assignment as Schedule 3 of the said Deed of Assignment, the applicant cannot be escaped from payment of the stamp duty on the said power of attorney as pert Article 45(f) of the Stamp Act. The power of attorney in question is required to be considered independently which might have been executed pursuant to one of the clause in the Deed of Assignment. Under the circumstances the contention on behalf of the applicant that the power of attorney in question is not subjected to the stamp duty as per Article 45(f) of the Stamp Act cannot be accepted.

6.3 Now, so far as the submissions on behalf of the applicant that even otherwise under the provisions of the Securitization Act the assignee had dropped all the rights in the debt which is assigned to them and the same shall be irrespective of the power of attorney and therefore, on the power of attorney in question, no stamp duty is leviable as per Article 45(f) of the Stamp Act is concerned, the aforesaid has no substance. What is required to be considered is the contents and substance of the power of attorney/instrument in question. If the applicant is of the opinion that irrespective of power of attorney they have got the rights under the Securitization Act, in that case, there may not be requirement of power of attorney. However, the power of attorney holder is conferred with the right as mentioned in the power of attorney, the same shall fall within Article 45(f) of the Stamp Act and the same is subjected to the payment of stamp duty as per Article 45(f) of the Stamp Act.

6.4 Now, so far as the reliance placed upon the decisions of the Hon''ble Supreme Court as well as this Court, Calcutta High Court and Andhra Pradesh High Court, which are relied upon by the applicant, referred to herein above, none of the decisions shall be applicable to the facts of the case on hand.

In the case of Canara Bank (Supra), the controversy was whether the order passed by the District Magistrate or the Chief Metropolitan Magistrate under Section 14 of the Securitization Act can be termed as "instrument" creating any right or liability in favour of the secured creditor so as to bring it within the definition of "conveyance" as defined in the Stamp Act. That is not the case here. Therefore, the said decision shall not be applicable to the case on hand.

6.5 Similarly, the decision of the Hon''ble Supreme Court in the case of Seth Loon Karan Sethiya (Supra) also shall not be applicable to the facts of the case on hand. Similarly, in the case of ICICI Bank Ltd. (Supra), the controversy before the Hon''ble Supreme Court was altogether a different controversy which shall not be applicable to the facts of the case on hand and with respect to the issue involved in the present case.

6.6 In view of the above and for the reasons stated above and considering the power of attorney in question and the rights conferred in favour of the power of attorney holder, conferred under the power of attorney in question, we are of the opinion that the power of attorney in question is liable to be and/or subjected to the stamp duty under Article 45(f) of the Stamp Act. No error and/or illegality has been committed by the learned Chief Controlling Revenue Authority in holding that the power of attorney in question is subjected to stamp duty as per Article 45(f) of the Stamp Act.

7. In view of the above and for the reasons stated above, question referred to this Court viz. whether the power of attorney in question is subjected to the stamp duty under Article 45(f) of the Bombay Stamp Act, 1958, is answered

against the applicant and in favour of the Revenue.

Present stamp reference stands disposed of accordingly.