(1994) 01 BOM CK 0026

In the Bombay High Court

Case No : Writ Petition No. 799 of 1990

Crest Hotel Ltd. and another — APPELLANT

Vs

The Assistant Superintendent of Stamps and another — RESPONDENT

Date of Decision : 04-01-1994

Acts Referred:

Bombay Stamp Act, 1958 — Article 15, 25, 258
Transfer of Property Act, 1882 — Section 54

Citation : AIR 1994 Bom 228 : (1994) 4 BomCR 35 : (1994) MhLj 1261

Hon'ble Judges : B.R. Saraf, J

Bench : Single Bench

Advocate : M.K. Ghelani with Ms. Veena Advani instructed by M/s. Law Charter, for the Appellant; S.M. Shah, for the Respondent

Judgement

Dr. B.R. Saraf, J.—On 7 September 1986, petitioners, Crest Hotels Ltd. entered into an agreement of sale of a flat being flat No. 121 on 1st floor of the building named ''Madhali'' which was still to be constructed and open car parking space therein. It was lodged for registration with the sub-Registrar of Assurance at Bombay on 29 September, 1986. The said agreement was later on cancelled by the parties by a deed of cancellation dated 6 October, 1988. The deed of cancellation was also lodged for registration with the Sub-Registrar of Assurance at Bombay. The document of cancellation was executed on a stamp paper of Rs. 10/-. The Sub-Registrar of Assurances, being of the opinion that the stamp duty prescribed under article 25 of Schedule I to the Bombay Stamp Act, 1958 ("the Act") was applicable, forwarded the same to the Assistant Stamp Superintendent, Bombay. The Assistant Stamp Superintendent, Bombay held that stamp duty under Art. 258 of Schedule I to the Act was charge-able on the deed of cancellation in question. As it was executed on a stamp paper of Rs. 10/-, the Assistant Stamp Superintendent determined the deficient stamp duty at Rs. 2,17,890/-. Penalty of Rs. 21,000/- was also levied. By a letter dated 4 January, 1990 the petitioners were directed to pay the said amount of deficient stamp duty and penalty within one month. The petitioners have challenged the above order of the Assistant Stamp Superintendent.

2. The contention of the petitioners is that the deed of cancellation is chargeable to duty at the rates specified in Art. 15 of the Schedule I to the Act which, at the material time, read as under:

"15. Cancellation -- Instrument of, if attested and not otherwise provided for : Twenty Rupees."

According to the petitioners, the proper stamp duty on the deed of cancellation in question was Rs. 20 under Art. 15 and not the amount determined by the Assistant Stamp Superintendent treating it as a document chargeable to stamp duty under Art. 25 of Schedule I to the Act. Article 25 of Schedule I contains the rates of stamp duty chargeable on conveyance. This article has been amended by the Maharashtra Act 27 of 1985 and the Explanation was inserted. By Maharashtra Act 27 of 1988, the Explanation thereto was renumbered as Explanation I and between the words "the possession of any Immovable property is transferred" and the words ''''to the purchaser before the execution", the words "or agreed to be transferred" were inserted. Thus, the scope of Art. 25 was extended first in 1985 by inclusion of the Explanation and later by inclusion of the words "or agreed to be transferred'' in the said Explanation. By the first amendment of 1985 even agreement of sale was brought within the purview of Art. 25 if the possession was transferred to the purchaser before the execution or at the time of execution or after execution of such agreement without executing the conveyance in respect thereof. By the 1988 amendment even agreement to sell where the possession of any property was agreed to be transferred to the purchaser without amounting the conveyance in respect thereof was also included within the expression "conveyance" for the purpose of chargeability of stamp duty.

3-4. The contention of the respondents is that the cancellation of agreement of sale in this case amounts to re-conveyance of the property by the purchaser to the owner with when the agreement to sell had been originally entered into. Reliance is placed in this connection on Explanation to Art. 25 of Schedule I to the Act.

5. In reply to the above submission, counsel for the petitioners submits that the original agreement of sale itself in this case does not fall within Art. 25 of Schedule I to the Act even after insertion of the Explanation. The original agreement of sale was dated 7 September, 1986 and was lodged for registration on 29 September, 1986. In 1986, the Explanation to Art. 25 had already been inserted which provided that for the purpose of that article even agreement to sell of immovable property where possession of such property is transferred to the purchaser before the execution etc. shall be deemed to be a conveyance and stamp duly shall be leviable thereon accordingly. The petitioners submit that the agreement of sale in the instant case, which has been cancelled by the deed of cancellation in question, did not stipulate transfer of possession to the purchaser

at any time before or after the execution of the agreement of sale without executing a conveyance in respect thereof. Such a document cannot be deemed to be a conveyance even by virtue of deeming provision contained in the Explanation to Art. 25 as it does not have the effect of transferring any right in the Immovable property to the purchaser. The learned counsel for the petitioner drew my attention to the agreement of sale which clearly does to show that at the time of execution of the agreement the property in question had not been constructed. Only the plans had been finalised and approved and it was on the basis of those plans that the agreement for sale had been executed. My attention was also drawn to clause 20 of the agreement for sale, more particularly sub-clauses (c)(d)(e) and (f) thereof which read as under:

"(c) It is specifically declared that the possession of the said premises is not transferred to the flat-holder before the execution, or at the time of execution or after the execution of this Agreement without executing the Conveyance in respect thereof.

(d) Conveyance if any to be executed in pursuance hereof shall be completed at or before the time of handing over of possession of the said premises.

(c) In the event however the Purchaser insists on receiving possession prior thereto and if the Developers are in a position to agree to give the same, and any stamp duty and or other charges, duties or and levies become payable on those presents and/or on such possession latter and/or on any record thereof or otherwise, the same shall be borne and paid by the purchaser alone.

(f) This agreement is not an agreement to sell an Immovable property or conveyance within the meaning of the terms under the Bombay Stamp Act, 1958 and no interest in the Immovable property is or is intended to be transferred to or vested inter-vivo in the plot-holder/s."

It is contended that before any possession could be given, this agreement was cancelled which is clear from the recitals in the deed of cancellation itself.

6. I have carefully perused the deed of cancellation. It is stated in the preamble of the deed that the Developers had not put the flat-holders in possession of the said flats and the open car parking space and that the cancellation had been made at the instance of the purchasers who were not desirous of taking possession of the same. The recitals in the agreement for sale and the deed of cancellation clearly go to show that the possession of the flats was never handed over by the petitioners to the purchasers and that the cancellation of the agreement took place before any such possession could be given, In such a situation, I find it difficult to hold that the deed of cancellation amounted to reconveyance of the property. It is well-settled that a contract for sale of Immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property. It is thus clear that an agreement for sale is merely a document creating a right to obtain a not her document of sale on fulfilment of

terns and conditions specified therein. It does not, of itself, create any interest in or charge on such property. On the strength of such an agreement a buyer does not become the owner of the property. The ownership remains with the seller. It will get transferred to the buyer only on execution of the sale deed by the seller. What the buyer gets from an agreement for sale is only a right to obtain a sale deed executed in his favour. If the seller refused to comply, the buyer is entitled to enforce that obligation by filing a suit for specific performance (see Padma Nair v. The Deputy Collector, Valuation and Stamp Duty W. P. No. 2586 of 1988 dated 28 July, 1993).

7. The Explanation to Art. 25 of Schedule I merely creates a legal fiction for the purposes of that article and for that limited purpose it provides that even agreement for sale in the circumstances specified therein shall be deemed to be a conveyance and stamp duty shall be levied thereon accordingly. In the instant case, evidently the Explanation is not attracted. The conditions precedent for applicability of the deeming provision are totally absent. On the other hand, in clause 20 of the agreement for sale, it is specifically provided to the contrary. That being so, in the instant case by the agreement of sale which has been cancelled by the deed of cancellation in question, there was no conveyance even for the limited purposes of Art. 25 of Schedule I to the Bombay Stamp Act. That being so, no immovable property or interest therein was conveyed to the purchaser by the said agreement and hence there was nothing to be reconveyed by the flat purchasers to the owners of the building by the deed of cancellation. Article 25 will be attracted only to such deeds of cancellation which have the effect of reconveyance of the property already conveyed by a valid document. Where there is no conveyance, question of reconveyance cannot arise and, in such a case the deed of cancellation cannot fall under Art. 2. It falls under Art. 15 and is chargeable to stamp duty prescribed therein.

8. The learned counsel for the respondents submits that the stamp duty of Rs. 10 paid by the petitioners falls share of even the stamp duly chargeable under Art. 15 and at least to that extent the concerned authorities are empowered to demand Rs. 10 being difference of duty and the penalty thereon. I do not propose to go into this matter. If the petitioners have not complied with the requirements under Art. 15, the concerned authorities shall be at liberty to demand from the petitioners deficient stamp duty in accordance with law.

9. In view of the foregoing discussion, I am of the clear opinion that the impugned order of the Assistant Stamp Superintendent levying duty on the deed of cancellation at the rates specified in Art. 25 of Schedule I to the Act is not tenable in law and the same is, therefore, set aside and quashed.

10. In the result, this writ petition is allowed Rule is made absolute.

11. No order as to costs.

12. Certified copy expedited.

13. Petition allowed.

