

(2014) 07 BOM CK 0226

In the Bombay High Court

Case No : Writ Petition No. 1462 of 2008

Farida Abubakar Memon

APPELLANT

Vs

The Collector of Stamps

RESPONDENT

Date of Decision : 18-07-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 5 ABR 188 : (2015) 2 ALLMR 852 : (2014) 5 BomCR 836 :
(2015) 1 MhLj 588

Hon'ble Judges : M.S. Sonak, J

Bench : Single Bench

Advocate : Pradeep J. Ramchandani, Advocate for the Appellant; Niranjana Pandit, AGP, Advocate for the Respondent

Final Decision : Dismissed

Judgement

M.S. Sonak, J.—By this petition under Article 226 of the Constitution of India, the petitioners question the following:

(i) Order dated 26 October 2007, issued by the Collector Stamps Duty (Enforcement-II), Mumbai requiring the predecessor in title of the petitioners to pay stamp duty of Rs. 5,59,500/- and fine of Rs. 11,19,000/-;

(ii) The judgment and order dated 31 March 2008 passed by the Additional Controller of Stamps, Mumbai, in appeal against the aforesaid order dated 26 October 2007, which requires the predecessor in title of the petitioners to pay an amount of Rs. 5,90,500/- which includes deficit stamp duty and penalty;

2. As noted above, the Additional Controller of Stamps, Mumbai, in appeal u/s 32-B of the Maharashtra Stamp Act, 1958 (said Act), has in fact set aside the order dated 26 October 2007 passed by the Collector Stamp Duty (Enforcement-II), Mumbai and reduced the deficit stamp duty and penalty to Rs. 5,90,500/-, after taking into consideration the stamp duty already paid by the predecessor in title of the petitioners. There is a merger of the order dated 26 October 2007 with the

judgment and order dated 31 March 2008. In effect therefore, the challenge in this petition is against the judgment and order dated 31 March 2008 passed by the Additional Controller of Stamps, Mumbai. The same shall hereinafter be referred to as the impugned judgment and order.

3. The predecessor in title of the petitioners vide Memorandum of Understanding (MOU) dated 26 September 1996 agreed to purchase the immovable property, known as "Madina Mansion", bearing CTS No. 1/1125 at Mahim (said property) for consideration of Rs. 22,00,000/-. Clauses 3 and 4 of MOU, however record that the entire consideration has been paid and the vendor has handed over the possession of the said property to the purchaser. This MOU was executed on stamp paper of Rs. 20/-. At the relevant time, i.e., in year 1996, had the MOU been treated as conveyance in terms of Article 25 of the 1st Schedule to the said Act, the stamp duty payable thereon would be in the range of 10% ad valorem, which would correspond to approximately Rs. 2,20,000/-. The explanation "I" provides that for the purposes of Article 25, where in the case of agreement to sell an immovable property, the possession of any immovable property is transferred or agreed to be transferred to the purchaser before the execution, or at the time of execution, or after the execution of, such agreement then such agreement to sell shall be deemed to be conveyance and stamp duty thereon shall be leviable accordingly.

4. After a period of about ten years, i.e., on 17 July 2006, the predecessor in title of the petitioners entered into a conveyance for the transfer of the said property. This conveyance was executed on stamp paper of Rs. 1,10,000/- and duly registered with Sub-Registrar of Assurances, Mumbai on 22 August 2006. It is pertinent to note that in the year 2006, the stamp duty payable on conveyance was 5% ad valorem. Accordingly, upon the market value of Rs. 22,00,000/-, the stamp duty payable was Rs. 1,10,000/-.

5. It is the case of the petitioners that their predecessor in title had on 28 June 2006 lodged the un-executed Deed of Conveyance dated 17 July 2006 for adjudication, in order to determine the stamp duty thereon. In the un-executed Deed of Conveyance, there was a clear reference made to the MOU dated 26 September 1996. The Adjudicating Officer, upon determination of the market value of the said property at Rs. 22,00,000/-, had determined the stamp duty payable as Rs. 1,10,000/-, in terms of ad valorem rate applicable in the year 2006. According to the petitioners, such determination is relatable to the provision of section 4 of the said Act, including in particular such sub-section (2) thereof, which gives a statutory option to the parties to determine for themselves which of the instruments used in a single transaction of sale, shall, for the purposes of sub-section (1), be deemed to be the principal instrument. The predecessor in title of the petitioners had determined the Deed of Conveyance dated 17 July 2006 to be the principal instrument.

6. The Sunshine Cooperative Housing Society, which is formed by the tenements of the said property lodged the complaint before the Inspector General of

Registration and Collector of Stamps, Enforcement-II and various authorities on or about 23 January 2007, complaining that the predecessor in title of the petitioners had evaded payment of stamp duty upon MOU dated 26 September 1996, which in fact was the principal instrument. Thereupon, the Collector of Stamps, Enforcement-II issued notice to the predecessor in title of the petitioners, requiring him to produce the MOU dated 26 September 1996. Upon production the said document was impounded and the duty payable thereon was determined at Rs. 5,59,500/-. The fine corresponding to 200% amounting to Rs. 11,19,000/- was also imposed by the order dated 26 October 2007, to which reference has been made earlier.

7. Aggrieved by the aforesaid order dated 26 October 2007, the predecessor in title of the petitioners preferred an appeal u/s 32-B of the said Act before the Appellate Authority, i.e., the Additional Controller of Stamps, Mumbai. The Appellate Authority proceeded to determine the market value of the said property at Rs. 23,35,000/-, instead of Rs. 22,00,000/- as determined by the parties. The stamp duty payable thereon was determined under Article 25(b) of the 1st Schedule to the said Act, as it then was, at the rate of 10% amounting to Rs. 2,33,500/-. Besides penalty at the rate of 200% was determined at Rs. 4,67,000/-. Upon giving due credit to the stamp duty of Rs. 1,10,000/- already paid, the Appellate Authority determined the deficit stamp duty including penalty payable at Rs. 5,90,500/-. The order dated 26 October 2007 was accordingly set aside and the appeal was partly allowed in the aforesaid terms.

8. Mr. P.J. Ramchandani, learned counsel for the petitioners has made the following submissions in support of this petition:

(a) In terms of section 4(2) of the said Act, the predecessor in title of the petitioners and his vendor were competent to determine for themselves which of the two instruments used in the single transaction of the sale, i.e., MOU dated 26 September 1996 and conveyance dated 17 July 2006, should be the principal instrument. Accordingly, the predecessor in title of the petitioners and his vendor determined that the Deed of Conveyance dated 17 July 2006 shall be the principal instrument. There was no suppression in as much as the MOU dated 26 September 1996 was specifically referred to in the Deed of Conveyance dated 17 July 2006. The principal instrument, i.e., Deed of Conveyance was duly submitted for adjudication before the stamp authorities and the stamp authorities themselves determined the stamp duty at Rs. 1,10,000/- which was duly paid. In such circumstances, there was absolutely no warrant for entertaining the complaint made by the society, which complaint ought to have been summarily dismissed;

(b) Admittedly, the Deed of Conveyance dated 17 July 2006, in its unexecuted form was submitted for adjudication to the stamp authorities. Such adjudication was carried out by the stamp authorities in terms of section 31 of the said act and the stamp duty was determined at Rs. 1,10,000/- by the Collector. In issuing the order dated 26 October 2007, the Collector has virtually reviewed its earlier

decision, when in law, powers of review are not at all vested in the Collector. In the event, there was any error in adjudication and the consequent determination, then only remedy available was the exercise of revisional powers by the Chief Controlling Revenue Authority in terms of section 53A of the said Act. Accordingly, the order dated 26 October 2007, is clearly a nullity, in as much as the Collector of Stamps had no power or jurisdiction to pass the same. In this regard, reliance was placed upon the decision of learned Single Judge of this Court in the case of *Guruashish Construction Pvt. Ltd. Vs. The Collector of Stamp and Another*,

(c) The impugned judgment and order determines the market value of said property at Rs. 23,35,000/- in place of Rs. 22,00,000/- as determined by the parties to the Deed of Conveyance or the MOU. The difference in determination, is less than 10%. In terms of proviso to section 32A(4), no party shall be required to pay any amount to make up the difference or to pay any penalty, if the difference between the amount of the market value as set forth in the instrument and the market value as determined by the Collector of the District does not exceed ten per cent, of the market value determined by the Collector of the District. It is the case of the petitioners, that this proviso has been completely ignored in passing the impugned judgment and order.

9. Mr. Niranjana Pandit, learned AGP for respondent Nos. 1 to 3 submitted that the determination of stamp duty in the present case, is upon the MOU, which clearly constituted the principal instrument, insofar as the transactions of sale is concerned. Mr. Pandit submitted that even if the parties have the liberty to determine which document, from out of the series of documents shall be deemed to be the principal document, nevertheless the duty chargeable on the instrument so determined shall be the higher duty which would be chargeable in respect of any of the said instruments employed. Accordingly, in the present case the duty chargeable upon principal instrument should have been Rs. 2,20,000/- which corresponds to 10% ad valorem duty. Further, Mr. Pandit submitted that this is not at all a case of exercise of any review jurisdiction by the Collector, particularly since the duty now determined is in the context of MOU and not the Deed of Conveyance. Further, Mr. Pandit submitted that the proviso to sub-section (4) of section 32A of the said Act is inapplicable, as the determination of duty in the present case is upon the MOU, for which the stamp duty payable was at the rate of 10% ad valorem duty. Mr. Pandit pointed out that the predecessor in title of the petitioners had paid the entire consideration for the said property and even obtained the possession of the said property on the basis of MOU dated 26 September 1996, but the stamp duty upon the said documents was evaded for a period over a decade by practicing a subterfuge. Mr. Pandit submitted that the extra ordinary equitable jurisdiction under Article 226 of the Constitution of India ought not to be exercised in favour of such petitioners. For all these reasons, Mr. Pandit submitted that this petition may not be entertained, more particularly since the appellate authority had already granted substantial relief to the petitioners or their predecessor in title.

10. The rival contentions now fall for my determination.

11. Section 4 of the said Act reads thus:

4. Several instruments used in single transaction of sale [development agreement], mortgage or settlement.

(1) Where, in the case of any [development agreement] sale, mortgage or settlement, several instruments are employed for completing the transaction, the principle instrument only shall be chargeable with the duty prescribed in Schedule-I for the conveyance, [development agreement], mortgage or settlement, and each of the other instruments shall be chargeable with a duty of [one hundred rupees] instead of the duty (if any) prescribed for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of sub-section (1), be deemed to be the principal instrument.

[(3) If the parties fail to determine the principal instrument between themselves, then the officer before whom the instrument is produced may, for the purposes of this section, determine the principal instrument:]

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

12. Aforesaid section 4 of the said Act is applicable when several instruments are used in order to complete a single transaction. The section attempts to provide a solution to the difficulty that may be encountered at the time of payment of stamp duty, when a single transaction is recorded in series of documents. For the sake of convenience, the parties in terms of sub-section 2 of section 4 of the said Act have been conferred the liberty to determine for themselves, which of the instrument so employed, for the purpose of sub-section (1), be deemed to be the principal instrument. Sub-section (3) provides that if the parties fails to determine the principal instrument between themselves, then the Officer before whom the instrument is produced may determine the principal instrument. There is a proviso, which governs the entire section, which provides that the duty chargeable on the instruments so determined shall be highest duty which would be chargeable in respect of any of the said instruments so employed.

13. From the scheme of section 4 to the said Act, it appears that the liberty granted to the parties for determining which from out of the series of instruments employed in a single transaction, shall be principal instrument, is basically for sake of convenience of the parties. However, the scheme is not to enable the parties to either evade the stamp duty or for that matter pay stamp duty upon any one of the instruments, which would bear the lowest stamp duty in the series of instruments. On the contrary the proviso, which applies to the entire section makes it clear that the duty chargeable on the instrument, so

determined shall be highest duty which would be chargeable in respect of "any of the said instruments employed". The expression "any of the said instruments employed" as appearing in the proviso to section 4 makes it clear that the stamp duty, even upon the principal instrument which may have been determined by the parties themselves, shall be the highest duty which would be chargeable in respect of any of several instruments used in a single transaction of either sale, mortgage, settlement or development agreement.

14. Applying the provisions of section 4 of the said Act to the facts and circumstances of the present case, it is clear therefore, that the stamp duty payable, even upon the principal instrument as determined by the parties in the present case shall be the highest duty which would be chargeable in respect of the two instruments so employed in the single transaction of sale of the said property. Therefore, although there could be no objection to the parties determining the Deed of Conveyance as being the principal instrument, upon such instrument, the parties would have to pay stamp duty which would be chargeable in respect of the MOU, because admittedly stamp duty payable in respect of MOU would be higher than the stamp duty payable in respect of the conveyance. Thus construed, there does not appear to be any error in requiring predecessor in title of the petitioners to pay stamp duty upon the MOU at the rate of 10% ad valorem, which admittedly was the rate applicable in respect of the such instrument in the year 1996, which is the year in which the said instrument was admittedly executed. Further the explanation I to Article 25 of Schedule-1 to the said Act makes it clear that in case of agreement for sale of any immovable property where possession of the immovable property has been transferred at the time of execution of the agreement, such agreement shall be deemed to be conveyance and the stamp duty payable thereon shall be leviable accordingly.

15. The petitioners' second contention is indeed well taken in law. However, the same is not really attracted to the facts and circumstances of the present case. The legal position is indeed made clear in the decision of the *Guruashish Construction Pvt. Ltd. (supra)*, which in terms holds that the Collector is not vested with inherent powers of review. In the event, the Collector has erred, then such error can be corrected by the Chief Controlling Revenue Authority by exercise its revisional jurisdiction u/s 53A of the said Act.

16. In the present case, however, the Collector was mainly concerned with the determination of the stamp duty upon MOU dated 26 September 1996. Such MOU dated 26 September 1996 was in fact impounded by the Collector in pursuance of the complaint of the Society, upon prima-facie satisfaction that the same was under valued and insufficiently stamped. Ultimately, the Collector concluded that the proper stamp duty payable upon such document would be Rs. 5,59,500/-. Further, since such stamp duty was evaded for a period of almost 10 years, the Collector determined the penalty at 2% per month, which came to Rs. 11,19,000/-. In the appeal preferred by the predecessor in title before the

Appellate Authority no contention with regard to the Collector exercising any nonexistent review jurisdiction, was raised. The pleas raised, mainly were that there was failure of natural justice, denial of credit to the extent of Rs. 1,10,000/- and the interpretation of section 4(2) of the said Act.

17. Even if this Court were to proceed on the basis that the Collector of Stamp Duty, in issuing the order dated 26 October 2007 has exercised a review jurisdiction, which he did not possess, then the question would arise whether, in the facts and circumstances of the present case, the impugned order deserves to be interfered with in exercise of equitable jurisdiction under Article 226 of the Constitution of India. In the present case, as noted earlier, the MOU dated 26 September 1996, very clearly constitutes "Conveyance" for the purposes of Article 25 in the 1st Schedule to the said Act. At the time of execution of the MOU, not only the entire consideration for the purchase of the said property came to be paid, but further the predecessor-in-title of the petitioners, was placed in possession of the said property. In the year 1996, the stamp duty admittedly payable upon such instrument was 10% ad valorem which was not paid. In the year 2006, when the Deed of Conveyance dated 17 July 2006 came to be executed, the stamp duty payable upon such Conveyance was only 5% ad valorem. In terms of section 4 of the said Act, no doubt the parties had an option to treat any one of the two instruments as the principal instrument, accordingly, the predecessor-in-title of the petitioners opted to treat the Deed of Conveyance dated 17 July 2006 as the principal instrument and paid stamp duty of only 5% ad valorem thereof. In doing so, the proviso to section 4 of the said Act, which provides that the duty chargeable on the instrument so determined shall be the highest duty which shall be chargeable in respect of any of the said instruments so employed, was ignored. On basis of the same, the predecessor-in-title of the Petitioners was required to pay stamp duty at the rate of 10% ad valorem. Clearly therefore, this is not a case where the Collector has merely changed his opinion as to the valuation of the said property and reviewed its earlier decision. Further, the Appellate Authority has already scaled down the stamp duty and penalty from Rs. 16,78,500/- to Rs. 5,59,500/- In any case, if justice is the by-product of even an erroneous exercise of jurisdiction, ordinarily, such just and equitable result shall not be whittled down in exercise of the extra ordinary and equitable jurisdiction under Article 226 of the Constitution of India. This is yet another reason as to why the impugned order, does not call for interference.

18. The petitioners final contention that the Appellate Authority has ignored the proviso to section 32A(4) of the said Act, is again, not well founded. In the present case, although the difference between the market value as determined by the Appellate Authority and the market value as determined by the parties themselves is less than 10%, what is important is that in respect of the MOU dated 26 September 1996, the stamp duty payable in the year 1996 was 10% ad valorem and not 5% ad valorem, as in the year 2006. The predecessor-in-title of the petitioners, by opting to treat the Deed of Conveyance dated 17 July 2006 as the principal instrument, paid stamp duty at the rate of 5% ad valorem. As

noticed earlier upon correct interpretation of the provisions of section 4 of the said Act, the duty payable, ought to have been 10% ad valorem. In such a situation therefore, there is no question of the proviso to section 32A(4) of the said Act being attracted.

19. Even if the proviso to section 32A(4) of the said Act is applied to the facts and circumstances of the case, then at the highest the market value of the said property shall have to be pegged down to Rs. 22,00,000/- and the enhanced value of Rs. 23,35,000/- shall have to be ignored. However, upon the market value of Rs. 22,00,000/-, stamp duty at the ad valorem rate of 10% becomes payable. The difference in the final figures of stamp duty payable, would therefore be negligible, to call for any interference under Article 226 of the Constitution of India. Thus, there is no merit in the final contention of the petitioners, as well.

20. In the result, there is no merit in any of the contentions raised by and on behalf of the petitioners. The petition is liable to be dismissed and is so dismissed.

21. The interim relief is vacated. The Registry is directed to pay to the respondents the amounts that may have been deposited by the petitioners in this Court together with interest, as may have accrued thereon within a period of four weeks from today.

22. Rule is accordingly discharged. In the facts and circumstances of the present case, there shall be no order as to costs.

23. At this stage, Ms. Vinaya Shete, learned counsel for the petitioners seeks a direction that in pursuance of this judgment and order, the Registry may be directed to hold on the amounts deposited in this Court, for a period of eight (8) weeks from today. In the interest of justice, the Registry is directed to hold on the said amounts for a period of eight (8) weeks from today. In the event, there is no interim relief obtained by the petitioners from the Supreme Court of India, then Registry is directed to pay the amounts to the respondents alongwith interest as may have accrued thereon.