(2013) 06 KL CK 0036

In the High Court Of Kerala

Case No : Writ Petition (C) No. 22670 of 2012

Federal House Construction Co-operative Society Ltd. and Another	APPELLANT
Vs	
State of Kerala and Others	RESPONDENT

Date of Decision : 05-06-2013

Acts Referred:

Kerala Co-operative Societies Act, 1969 — Section 110, 110(2)(i), 40(1)(a)
Kerala Stamp Act, 1959 — Section 30, 9

Citation : (2013) 3 ILR (Ker) 359 : (2013) 3 KHC 461 : (2013) 3 KLT 643

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : O.V. Radhakrishnan, Sri Mohan Abraham Idicula, Smt. Rachel Joseph, Sri Martin D. Alumkara and Smt. R. Rajasree Chuttimattathil, for the Appellant; Ramprasad Unni, Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

A.M. Shaffique, J.—The petitioner is a Society registered under the Kerala Co-operative Societies Act, 1969 (hereinafter referred as the ''Act''). The Writ Petition is filed challenging Ext. P-6, an order issued by the District Registrar imposing stamp duty of Rs. 2,69,478 on a document submitted by them for registration, relying upon a judgment of this Court in W.P. (C) No. 2377/2009 produced as Ext. P-7. In Ext. P-7 judgment this Court proceeded on the basis that S. 40(1)(a) of the Act does not enable the Government to issue any notification in respect of documents executed by a Society or by an officer or member thereof relating to the business of such society or any class of such instruments, or in respect of any award or order made under the Act, in cases where, but for such remission the society, officer or member, as the case may be, would be liable to pay such stamp duty. But the contention of the petitioner is that no notification pursuant to S. 40(1)(a) of the Co-operative Societies Act has been issued by the Government and in the absence of any such notification, the notification issued under Ss. (1) and (2) of S. 35 of the Travancore Cochin Co-operative Societies Act, 1951 and by sub-section (2)(a) and (2)(b), S. 30 of the Madras Co-operative Societies Act as per SRO No. 75/60 shall apply, in view of S. 110 of the Co-operative Societies Act. In Ext. P-4 Clause 1(a) of the notification SRO 75/60 reads as under:

The stamp duty, registration fees and fees for encumbrance certificate payable under the Stamp Act and the Registration Act, in force in the State shall be remitted to the Co-operative Societies, in the following cases to the extent indicated in each case.

(a) The whole stamp duty with which under the Kerala Stamp Act, 1959 (Act 17 of 1959) instruments executed by or on behalf of any registered Co-operative Society or instruments executed by ''any officer of a Guardian of minor'' and relating to the business thereof and decisions, awards or orders of the Registrar or the Arbitrator under the said Co-operative Societies Act.

2. It is therefore the contention of the petitioner that in the absence of any notification under S. 40(1)(a) of the Act, the notification in terms of Ext. P-4 remains in force and therefore when a document is executed by a Co-operative Society in favour of its member with reference to the business of the Society exemption from stamp duty is available.

3. Reference is also made to the bye-laws of the Society in order to show that construction of the building and sale of property is also the business activity of the Society.

4. Counter-affidavit is filed by the 3rd respondent supporting the stand taken in Ext. P-6. Main contention urged is that the liability to pay stamp duty is on the purchaser of the property under S. 30 of the Kerala Stamp Act. In the absence of any notification under S. 40(1)(a) of the Act, the intention of the legislature is very clear in so far as the liability to pay tax on the stamp duty is on the purchaser of the instrument the legislature never intended to exempt such persons from the liability to pay stamp duty. In respect of instruments where the liability to pay stamp duty is on the society, such remission of tax is possible.

5. Heard the learned Senior Counsel Sri O.V. Radhakrishnan, and the learned Government Pleader.

6. Reference is also made to the Division Bench judgments of this Court especially in Writ Appeal 1689/2008 and Writ Appeal No. 1280/2008 and the reference order in Writ Appeal No. 1216/2007. A Division Bench of this Court in Writ Appeal No. 1280/2004 held that when a document is executed by the Joint Registrar of Co-operative Societies, who is a non-member, the Society is not entitled to get the benefit of notification in SRO No. 75/60. Another Division Bench of this Court, while considering the question whether sale by liquidator of a Co-operative Society attracts the liability to pay stamp duty formed an opinion that the Division Bench in Writ Appeal No. 1280/2004 was rendered without noticing the distinction in the notification immediately after the expression

"instrument executed by or on behalf of any Registrar of Co-operative Societies" and therefore the matter was referred to the Full Bench.

7. It is not in dispute that as far as the present document is concerned, it is a sale deed executed by the Society in favour of a member of Co-operative Society conveying certain extent of undivided share of land in his favour. The first question to be considered is whether the notification S.R.O. No. 75/60 is still in force. It is not in dispute that no notification had been issued by the Government in terms of S. 40(1)(a) of the Act which reads as under

40. Exemption from certain taxes, fees and duties.--(1) The Government may, by notification in the Gazette, remit in respect of any class of societies,--

(a) the stamp duty chargeable under the Kerala Stamp Act, 1959 (17 of 1959), in respect of any instrument executed by or on behalf of a society or by an officer or member thereof and relating to the business of such Society, or any class of such instruments, or in respect of any award or order made under the Act, in cases where, but for such remission the society, officer or member, as the case may be, would be liable to pay such stamp duty;

8. The learned Government Pleader further submits that certain notifications had been issued with reference to remission of Stamp duty with reference to Scheduled Caste and Scheduled Tribes in terms of Section 9 of the Kerala Stamp Act, Section 110 of the Act deals with repeal and savings. Sub-section 2 Clause (i) reads as under:

(2) Notwithstanding the repeal of the Madras Co-operative Societies Act, 1932 and the Travancore-Cochin Co-operative Societies Act, 1951 and without prejudice to the provisions of Ss. 4 and 23 of the Interpretation and General Clauses Act, 1125 (VII of 1125):

(i) all appointments, rules and orders made, notifications and notices issued, and suits and other proceedings instituted, under any of the Acts hereby repealed shall, so far as may be, be deemed to have been respectively made, issued and instituted under this Act;

9. Therefore after repealing the previous enactments, the rules, orders or notifications issued under repealed Act has been saved and it is deemed to have been instituted under the Act. Going by S. 110(2)(i) there cannot be any dispute that the notification issued at Ext. P-4 is deemed to have been issued under the Act. In the absence of any other notification superseding the same Ext. P-4 is still in force. No doubt, if the Government had issued a notification under S. 40(1)(a) probably it is a different situation. In the absence of any such notification, Ext. P-4 i.e. S.R.O. No. 75/60 is still in force and one has to approach the matter on the basis of the claim made by the petitioner as per S.R.O. No. 75/60. Such a position is evident from the view expressed by the Division Bench in the judgments referred above.

10. Such being the situation going by Ext. P-3 document, it is clear that this

document is executed by or on behalf of a Co-operative Society and hence the exemption notification squarely applies.

11. The contention of the learned Government Pleader is based on S. 30 of the Kerala Stamp Act, which refers to the liability to pay stamp duty. The provisions reads as under:

30. Duties by whom payable.--In the absence of an agreement to the contrary, the expense of providing the proper stamp shall be borne,--

(a) in the case of any instrument described in any of the following Articles of the Schedule, namely:

* * * * * * *

(b) In the case of a conveyance (including a reconveyance of mortgaged property) by the grantee; in the case of a lease or agreement to lease by the lessee or intended lessee;

* * * * * * *

The stipulations in the Kerala Stamp Act do not have any relevance to the exemption granted by the Government under the Co-operative Societies Act. When the exemption notification is clear, irrespective of the fact as to who is liable to pay stamp duty, the remission had been given in respect of instruments executed by Co-operative Societies. Since the sale deed is also considered to be an instrument and it is executed by the Co-operative Society, exemption notification squarely applies. Even going by S. 30 of the Kerala Stamp Act, it is not the rule that the liability to pay stamp duty is only on the purchaser as the opening words of S. 30 starts with the Clause that "in the absence of an agreement to the contrary".... In the above circumstances, I am of the opinion that this writ petition is only to be allowed.

12. While issuing Ext. P-6 order, the District Registrar relied upon Ext. P-7 judgment, Apparently in Ext. P-7 judgment, effect of S. 110(2)(i) of the Act and its impact on S. 40(1)(a) of the Act and the views expressed by the Division Bench Judgments relying upon Notification S.R.O. No. 75/60 was not brought to the notice of the learned Single Judge. In the result this writ petition is allowed as follows:

Ext. P-6 is set aside. The 4th respondent is directed to register the original of Ext. P-3 relying upon the notification as Ext. P-4 and on the basis of the observations made above. The time spent for prosecuting the above writ petition i.e. from 27-9-2012 till the date of receipt of a copy of this judgment shall be excluded by the Registrar while computing the period for representation of the original document for registration.

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