(2012) 04 BOM CK 0113

In the Bombay High Court

Case No : Writ Petition No. 842 of 2012

Guruashish Construction Pvt. Ltd. APPELLANT

Vs

The Collector of Stamp and Another RESPONDENT

Date of Decision : 17-04-2012

Acts Referred:
Bombay Stamp Act, 1958 — Article 25, 31, 32, 32(1), 32(3)

Citation : (2012) 5 ALLMR 956 : (2012) 4 MhLj 707

Hon'ble Judges : A.A. Sayed, J

Bench : Single Bench

Advocate : Raju Subramanium with Mr. A. Joshi and Mr. Atul Kshatriya instructed by M/s. Markant Gandhi and Co, for the Appellant; G.W. Mattos, AGP., for the Respondent

Judgement

A.A. Sayed, J.—Rule. Rule made returnable forthwith. Learned AGP waives service on behalf of the Respondents. By consent, the Petition is taken for hearing and final disposal at the admission stage. The above Petition impugns an order dated 5 March 2012 passed by the Collector of Stamps, Borivali. By the impugned order, the Respondent No. 1 - Collector of Stamps, Borivali, has reviewed his order dated 16 October 2010 and held that the ''Shifting Agreements'' between the Petitioner and tenement holders be treated as ''Agreements for alternate accommodation'' and has fixed the market value and the stamp duty payable under Article 25(d) of the Bombay Stamp Act, 1958 (hereinafter referred to as ''the said Act'') and directed the Petitioner to deposit the stamp duty within 30 days.

2. The Petitioner is a Builder and Developer. Respondent No. 1 is the Collector of Stamps, Borivali. Respondent No. 2 is the State of Maharashtra.

3. The facts which led to the filing of the present Petition are as under :

The Petitioner had entered into tripartite Joint Development Agreement dated 10 April 2008 (hereinafter referred to as "the said Agreement") between themselves, the Maharashtra Housing and Area Development Authority (hereinafter referred to as "MHADA") and Goregaon Siddharth Nagar Sahakari Grahanirman Sanstha Limited (hereinafter referred to as "the said Sanstha") whereby the Petitioner agreed to develop a piece of land more particularly described in the Schedule to the said Agreement. The said property was occupied by the members of the said Sanstha who were erstwhile tenants of MHADA. Under the said Agreement, the Petitioner was required to provide housing to individual members of the said Sanstha. The Petitioner executed individual Agreements with each of the members describing them as ''Shifting Agreements'' for shifting them from the area in their occupation to a temporary alternate accommodation. The ''Shifting Agreement'' provide for a separate Agreement to be executed in future for alternate permanent accommodation. This Agreement for alternate permanent accommodation was agreed in the ''Shifting Agreement'' to be treated as the ''principal document'' for payment of appropriate stamp duty. The Petitioner has executed 648 such ''Shifting Agreements''.

4. Prior to the execution of the aforesaid ''Shifting Agreements'', the Petitioner applied to the Respondent No. 1 u/s 31 of the said Act for adjudication for the purpose of paying the stamp duty. Pursuant thereto, the Respondent No. 1 adjudicated the said ''Shifting Agreements'' and called upon the Petitioner to pay a sum of Rs. 100/-as the stamp duty. The amount was paid by the Petitioner and the Respondent No. 1 issued adjudication certificate by making an endorsement on the ''Shifting Agreements'' as required u/s 32(1) of the said Act. The said documents were then registered with the Sub-Registrar of Assurances.

5. It appears that during the internal audit of the office of the Registrar General and Controller of Stamps, Pune, the Auditors raised an objection as regards the ''Shifting Agreements'' not being appropriately stamped, as the said documents, according to them, were for alternate accommodation. Pursuant thereto, a notice dated 30 December 2011 was issued by the Collector of Stamps to the Petitioner proposing to levy and recover stamp duty treating the ''Shifting Agreements'' as Agreements for alternative accommodation and calling upon the Petitioner to furnish their say. By a letter dated 31 January 2012 the Petitioner replied and objected to the same. The Respondent No. 1 proceeded to conclude the hearing in absence of the Petitioner and by the impugned order dated 5 March 2012 called upon the Petitioner to pay stamp duty of a sum of Rs. 38,975/-on certain documents and Rs. 59,500/-on other documents.

6. Heard learned Senior Counsel for the Petitioner and learned AGP.

7. Learned Senior Counsel on behalf of the Petitioner has urged the following submissions :

(i) that in view of Section 53A of the said Act, only the Chief Controlling Revenue Authority had the power to revise, examine and order the recovery of deficient duty, if any, and the Respondent No. 1 had no power to review his own decision and the Respondent No. 1 had become functus officio;

(ii) that under Clause 13 of the ''Shifting Agreement'', the parties had agreed that a final alternate permanent accommodation Agreement shall be executed between the parties for allotment of the new premises to the occupants and that such alternate permanent accommodation Agreement shall be considered as the ''principal document'' for payment of stamp duty. u/s 4 of the said Act, it is only the ''principal instrument'' which is chargeable to prescribed duty, which ''principal instrument'' is yet to be executed;

(iii) that the ''Shifting Agreements'' do not identify the premises nor do they identify the location, number of the building, the floor, the flat number, etc and that at the time of execution of the ''Shifting Agreements'' even the plans were not finally sanctioned and that everything was to be determined after the plans were finally sanctioned and buildings were constructed and allotment made by the Society by draw of lots, and therefore the question of paying prescribed stamp duty on the ''Shifting Agreements'' did not arise;

(iv) that the impugned order was passed without jurisdiction and that the Appeal u/s 32B and/or u/s 53(1A) of the said Act is illusory and will not be a sufficient and efficacious remedy.

8. Learned Senior Counsel for the Petitioner has relied upon a three-Judge Bench decision of the Hon''ble Supreme Court in the case of Government of Uttar Pradesh and Others Vs. Raja Mohammad Amir Ahmad Khan, which considered the provisions of Sections 31, 32 and 33 of the said Act. He has also placed reliance upon a decision of a learned Single Judge of this Court in the case of Kumbhargaon Vividh Karyakari Sahakari Seva Society Ltd. vs. Assistant Registrar, Co-op. Societies & Ors. (1993) Mh.L.J. 178, in support of his submission of the alternative remedy not being an efficacious remedy and necessity for entertaining this Petition by this Court.

9. The learned AGP, on the other hand, supported the impugned order.

10. Section 53A of the said Act is relevant for our purposes. The same is extracted hereunder :

53A. Revision of Collector''s decision uner sections 32, 39 and 41.

(1) Notwithstanding anything contained in sub-section (3) of section 32, sub-section (2) of section 39 and sub-section (2) of section 41, when through mistake or otherwise any instrument is charged with less duty than leviable thereon, or is held not chargeable with duty, as the case may be, by the Collector, the Chief Controlling Revenue Authority may, within a period of six years from the date of certificate of the Collector u/s 32, 39 or 41, as the case may be, require the concerned party to produce before him the instrument and, after giving a reasonable opportunity of being heard to the party, examine such instrument whether any duty is chargeable, or any duty is less levied, thereon and order the recovery of the deficit duty, if any, from the concerned party. An endorsement shall thereafter be made on the instrument after payment of such

deficit duty.

(2) ....

From a bare reading of the aforesaid section, it would be apparent that it is only the Chief Controlling Revenue Authority which has been given the power of revision, when through mistake or otherwise any instrument is charged with less duty than leviable thereon or is held not leviable with duty, as the case may be, by the Collector. Once the Collector has, in the present case, u/s 32 (1) of the said Act issued adjudication certificate by making an endorsement on the ''Shifting Agreements'', the ''Shifting Agreements'' are deemed to be duly stamped. Such endorsement having been made by the Collector, it was only the Chief Controlling Revenue Authority who had power to revise and examine the instrument for ascertaining whether the stamp duty was properly charged and the Collector had no power to review its own decision either suo moto or because of any objection raised by Auditors or otherwise. In reviewing his own order and passing the impugned order, the Collector, in my view, has clearly acted without jurisdiction.

11. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , the Hon''ble Supreme Court has held that alternate remedy would not be a bar in three contingencies (i) where the writ petition seeks enforcement of any fundamental rights, (ii) where there is violation of principles of natural justice; or (iii) where the order or the proceedings are wholly without jurisdiction or the vires of an Act is challenged. In the present case, as stated earlier, the Collector in reviewing his own order has clearly acted without jurisdiction and hence, in the facts of the present case, I am inclined to exercise writ jurisdiction of this Court and set aside the impugned order on this count alone.

12. Apart from the above, it is required to be noted that under the ''Shifting Agreements'', one of which Agreement has been annexed as Exhibit "A" to the Petition, it has been agreed between the parties in clause 13 as follows :

13. The Developers alone shall be liable to pay Stamp Duty, Registration Charges, etc. arising out of this Agreement. The parties however agree that a final Permanent Alternate Accommodation Agreement shall be executed between the parties for allotment of the new premises to the Occupant. Such Permanent Alternate Accommodation Agreement shall be considered as the principal document for payment of appropriate applicable stamp duty.

13. It is averred by the Petitioner in the Petition that at the relevant time when the ''Shifting Agreements'' were executed, the building plans were not finally sanctioned and the allotment of draw of lots was not carried out by the Society. This position is not disputed before the Court. The final Permanent Alternate Accommodation unit/flat was, therefore, not determined and, therefore, the final ''principal document'' was not executed at the relevant time. Clause 2 of the ''Shifting Agreement'' is also relevant and provides as follows :

2. The Occupant acknowledges and agrees that the allotment of the New premises shall be made by the Society by a draw of lots and as such the New Premises shall be of a lay out and pattern contained either in Type A or Type B as provided in Annexure A hereto.

Thus, the ''Shifting Agreements'' do not identify the premises and/or the location, building, floor or flat number. That would have to be determined after the plans are finally sanctioned, the buildings are constructed and the allotment is made by the Society by draw of lots.

14. It would be apposite here to refer to Section 4 of the said Act which reads as under :

4. Several Instruments used in single transaction of development agreement sale, 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 principal 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.

(Emphasis supplied)

15. Perusal of the aforesaid section would make it clear that when there are several instruments employed for completing the transaction of development agreement, sale, mortgage or settlement, it is only the ''principal instrument'' which will be chargeable to the prescribed duty under the said Act. Sub-section (2) of Section 4 gives a discretion to the parties to select and determine which of the several documents will be the principal document. Prima facie, in the facts of this case, the ''Shifting Agreements'' are only preliminary Agreements which incorporate the principal intention of the parties and facilitates the Developer to shift the tenants temporarily to a temporary accommodation and incorporate the broad terms on which the permanent alternate accommodation on the permanent basis would be identified and allotted to them.

16. The impugned order, however, erroneously proceeds on the basis that since

the new area which is to be allotted to the party is mentioned in the ''Shifting Agreement'', the said document is to be treated as an Agreement for alternate accommodation. This finding clearly overlooks the fact that at the time of entering into the ''Shifting Agreements'', the alternative accommodation had not been identified and the plan itself was not finally sanctioned. Moreover, under clause 13 of the ''Shifting Agreement'' the parties had agreed to enter into an final permanent alternate accommodation Agreement which was to be considered as a ''principal document'' for the purposes of stamp duty. Even Section 4 of the said Act clearly postulates that the parties have discretion to decide, in matters such as the present one, as to which would be the ''principal instrument'' executed between them. Pertinently, the impugned order does not deal with any of the contentions raised by the Petitioner in its reply dated 21 January 2012 to the Show Cause Notice dated 30th December 2012 issued by the Collector.

17. For the aforesaid reasons, the impugned order cannot be sustained and would have to be set aside. Rule is made absolute in terms of prayer clause (a) of the Petition. In the facts and circumstances of the case, there shall be no order as to costs. Before closing, I record the Statement of the Petitioner through the learned Senior Counsel, that the Petitioner shall execute the final permanent alternate accommodation Agreements which would be the principal instruments and that the stamp duty on the said instruments shall be paid in accordance with law. It is, however, directed that unless the principal instrument is executed in accordance with law and the prescribed stamp duty is paid thereon, the Petitioner shall not put the tenant/occupant in possession/occupation of the permanent alternate accommodation.

