(2009) 05 BOM CK 0065

In the Bombay High Court

Case No : Writ Petition No. 68 of 2009

Hari Shanker Singhania and Others — APPELLANT

Vs

State of Maharashtra, Government Pleader Office, High Court and Others — RESPONDENT

Date of Decision : 07-05-2009

Acts Referred:

Arbitration Act, 1940 — Section 20
Bombay Stamp Act, 1958 — Article 12, 46, 2, 27, 30
Constitution of India, 1950 — Article 226

Citation : (2009) 93 BomCR 556

Hon'ble Judges : Swatanter Kumar, C.J;S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : Soli Sorabjee, D.D. Madon, s, Sanjeev Kapoor, Devesh Juvekar and Ameya Gokhale, instructed by Khaitan and Co, for the Appellant; N.P. Pandit, AGP, S.V. Mehta, instructed by M. Ranchoddas and Co. for Respondent Nos. 7 to 15 and Geetanjali Prabhu, instructed by Vigil Juris, for Respondent Nos. 16 to 22, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Dharmadhikari, J.—By this petition under Article 226 of the Constitution of India, the Petitioners are praying for writ of mandamus or any other appropriate writ, order or direction directing the Respondent Nos. 2 and/or 3 to adjudicate and certify an Award of the Arbitrator as, according to them, the stamp duty required by law has been paid thereon. The Petitioners are also applying for direction to Respondent Nos. 2 and/or 3 to issue a certificate u/s 32 of the Bombay Stamp Act, 1958, certifying that the full duty with which it is chargeable has been paid and that the Award be registered and certified accordingly.

2. The Petitioners and Respondent Nos. 7 to 22 were parties to the Deed of Dissolution dated 26th March, 1987 and a Supplementary Agreement dated 28th March, 1987. The Petitioners filed an application u/s 20 of the Arbitration Act, 1940 in this Court being Arbitration Suit No. 1904 of 1992. That application was

dismissed by this Court holding that it was barred by law of limitation and that order was confirmed by a Division Bench. However, the orders of the learned Single Judge and the Division Bench came to be set aside by the Hon''ble Supreme Court of India on 4th April, 2006 and it appointed the Hon''ble Shri Justice S.N. Variava, former Judge of the Supreme Court of India as a Sole Arbitrator. The learned Arbitrator made an award on 4th August, 2008/ 12th September, 2008 which came to be forwarded to Respondent No. 2 for adjudication and determination of proper stamp duty by the learned Arbitrator. The Arbitrator sought a certificate u/s 32 of the Bombay Stamp Act, 1958. It is stated that despite repeated follow up by the Petitioners, the adjudication and determination u/s 31 of the Act has not been taken up and, therefore, the certificate u/s 32 of the said Act has not been issued.

3. The Petitioners therefore addressed an Advocates'' letter requesting expeditious issuance of certificate but despite receipt of the same and further reminder dated 3rd December, 2008, the necessary steps in accordance with law have not been taken. It is alleged that for the first time the Petitioners received a letter dated 29th December, 2008, copy of which is annexed at Exhibit H to the Petition in which it was stated by Respondent No. 2 that the adjudication of stamp duty is taking time since the market value of an immovable property at Kanpur, which forms a subject matter of the award, has to be ascertained. The Petitioners replied to this letter and pointed out that the award is covered by Article 12 of Schedule I to the Bombay Stamp Act, 1958 and it is not an Instrument of partition falling under Article 46 of the said Schedule. It was their case that the award is effecting partition and not an award directing partition. In these circumstances, the award should be adjudicated accordingly and the certificate be issued to that effect. Since no action was taken, that this Writ Petition under Article 226 of the Constitution has been filed in which the above reliefs have been claimed.

4. Shri N.P. Pandit, learned AGP appearing for Respondent Nos. 1 to 6 has raised a preliminary objection to the maintainability of this Writ Petition. He submits that firstly the Petition is premature inasmuch as the adjudication is yet to take place. He invites our attention to Sections 31, 32 and 53 of the said Act and contends that the procedure provided by these provisions for adjudication and determination of stamp duty, is not completed. Therefore, at this stage, this Court should not decide as to which of the articles in Schedule I to the said Act would be attracted or are applicable. Assuming without admitting that the affidavit in reply to this Writ Petition discloses the stand of the Authority, yet, if the Petitioners are aggrieved by the action of the Respondents, they have a remedy to file an appeal u/s 53 of the Act to the Appellate Authority. Thus, assuming that the petition could be filed by the Petitioners, yet, the same need not be entertained as there is an alternate and equally efficacious remedy available to the Petitioners herein.

5. Shri Sorabjee, learned Senior Counsel controverted his submissions and urged

that the petition cannot be said to be premature inasmuch as, though it is filed, aggrieved by inaction of the Authority, yet, from the affidavit in reply filed by the Respondents, it is apparent that they have decided the quantum of stamp duty payable. They have already concluded the issue and according to them the award is "Instrument of partition" and therefore, stamp duty is liable to be paid on that basis. In these circumstances, the Writ Petition is maintainable.

6. The second submission of Shri Sorabjee is that the remedy of the Appeal is not available. He invites our attention to Section 32A of the Act and contends that the remedy of appeal is provided in limited cases and that power cannot be invoked in the facts of this case. This is not a case where adjudication of market value or any conclusion on the basis of determination of market value is being questioned. Therefore, considering the clear language of Section 32A of the Act, the remedy of appeal is not available.

7. As far as merits are concerned, Shri Sorabjee submits that definition of the term "instrument of partition", is defined in Section 2(m), and the phraseology of Articles 12 and 46 makes it clear that the controversy is covered by Article 12 of Schedule I of the said Act and it is not governed by Article 46 thereof. He submits that Article 12 uses the word "in the course of a suit". However, they are not of any significance inasmuch as an Application u/s 20 of the Arbitration Act, 1940 is not a suit as commonly understood. Therefore, Article 12 is the governing article for the purposes of determination of stamp duty.

8. Shri Sorabjee has relied upon the decisions of the Supreme Court in the case of P.A. Ahammed Ibrahim Vs. The Food Corporation of India, and Harishankar Singhania and Others Vs. Dr. Gaur Hari Singhania and Others, in support of his contentions.

9. With the assistance of Shri Sorabjee and Shri Pandit, we have perused the relevant provisions of the said Act. We are not impressed by the contentions raised by Shri Sorabjee with regard to remedy of appeal. We are of the opinion that reading Sections 31 and 53 of the said Act, after adjudication of stamp duty is done, the remedy of appeal u/s 53 is available. Therefore, assuming that the Petitioners are dissatisfied with the adjudication and they are aggrieved thereby, they cannot bypass the remedy of a statutory appeal, more particularly, when an adjudication order within the meaning of the relevant statutory provisions is yet to be passed and communicated to the Petitioners.

10. As is well settled, stamp duty is not a duty on the transaction but on the instrument. The scheme of the Stamp Act therefore is that an instrument is chargeable to the stamp duty. The Act has taken note of several instruments which are chargeable to stamp duty and they are listed in the First Schedule. It is not the case of Shri Sorabjee that the Award is not chargeable to stamp duty at all. It is his case that Article 12 covers an award specifically and more particularly an award not directing a partition. Therefore, the argument is that the award in this case is not directing a partition and therefore, cannot be

termed as "instrument of partition" covered by Article 46. Thus, it is clear that the controversy is under which Article of Schedule I the instant award is chargeable to stamp duty. Such a case has to be decided by the adjudicating authority whenever the instrument is brought before it. Section 31 is relevant for this purpose, and therefore, reproduced hereinbelow.

31. Adjudication as to proper stamps (1) When an instrument, whether executed or not and whether previously stamped or not, is brought to the Collector, by one of the parties to the instrument and such person applies to have the opinion of that officer as to the duty (if any) with which [or the article of Schedule I under which] it is chargeable and pay [a fee of one hundred rupees] the Collector shall determine the duty (if any) with which [or the Article of Schedule I under which] in his judgment, the instrument is chargeable.

(2) For this purpose the collector may require to be furnished with a true copy or an abstract of the instrument, and also with such affidavit or other evidence as he may deem necessary to prove that all the facts and circumstances affecting the chargeability of the instrument with duty, or the amount of the duty with which it is chargeable, are fully and truly set forth therein and may refuse to proceed upon any such application until such true copy or abstract and evidence have been furnished accordingly:

Provided that, (a) no evidence furnished in pursuance of this section shall be used against any person in any civil proceeding, except in any inquiry as to the duty with which the instrument to which it relates is chargeable; and

(b) every person by whom any such evidence is furnished shall, on payment of the full duty with which the instrument to which it relates is chargeable, be relieved from any penalty which he may have incurred under this Act by reason of the omission to state truly in such instrument any of the facts or circumstances aforesaid.

(3) Where the Collector acting under subsections (1) and (2) is not the Collector of the District and if he has reasons to believe that the market value of the property, which is the subject matter of the instrument, received by him for adjudication, has not been truly set forth therein, he shall for the purpose of assessing the stamp duty, determine the true market value of such property, as laid down in the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995.

(4) When an instrument is brought to the Collector for adjudication,

(i) within one month of the execution or first execution of such instrument in the State; or

(ii) if, such instrument is executed or first executed, out of the State, within three months from the date of first receipt of such instrument in this State.

The person liable to pay the stamp duty u/s 30 shall pay the same within sixty days from the date of service of the notice of demand in respect of the stamp duty adjudicated by the Collector. If such person fails to pay the stamp duty so demanded within the said period, he shall be liable to pay a penalty at the rate of two per cent of the deficient portion of the stamp duty, for every month or part thereof, from the date of execution of such instrument, or as the case may be, date of the first receipt of such instrument in the Sate.

Provided that, in no case, the amount of the penalty shall exceed double the deficient portion of the Stamp Duty.

11. A bare perusal of the same would make it abundantly clear that what is contemplated therein is adjudication and determination of stamp duty by the statutory authority. During the course of such adjudication and determination, there are distinct provisions i.e. Section 31(3) under which market value of the property which is subject matter of the Instrument can be determined. The market value determined by the Authority is distinct determination and that is covered by the power of appeal conferred u/s 32B of the said Act. However, when adjudication of stamp duty has been done, then, the remedy of appeal provided in Section 53 is available. Section 32B and Section 53 of the said Act read thus:

32B. Appeal

(1) Any person aggrieved by any order determining the market value under subsection

(3) of Section 31 or u/s 32A or any order imposing any penalty u/s 32A may, within sixty days from the date of receipt of such order, by an application in writing (accompanied by such fee not exceeding three hundred rupees as the State Government may, from time to time, by notification in the Official Gazette, specify; and different rates of fees may be specified for different areas), file an appeal against such order to the Deputy Inspector General of Registration and Deputy Controller of Stamps, who shall after considering the same, pass such order thereon as he thinks just and proper; and the order so passed shall, subject to the provisions of Section 32C, be final and shall not be questioned in any Court or before any authority:

Provided that, all applications made and pending with the Collector immediately before the commencement of the Bombay Stamp (Amendment) Act, 1989 (hereinafter, in this section, referred to as "the Amendment Act"), for being referred to Courts for decision u/s 32B as it existed immediately before the coming into force of the Amendment Act, shall, on the coming into force of the Amendment Act be transferred by the Collector to the Deputy Inspector General of Registration and Deputy Controller of Stamps and the applications so transferred shall be deemed to be the appeals filed and pending before the Deputy Inspector General of Registration and Deputy Controller of Stamps who shall dispose off the same in accordance with this section:

Provided further that, nothing contained in subsection (1) and the first proviso shall affect the references already made by the Collector to the Courts and pending before the Courts immediately before the commencement of the Amendment Act; and such references shall be disposed off by the concerned Courts as if the Amendment Act has not been passed.

(2) No appeal and no application for revision shall lie against the order of the Deputy Inspector General of Registration and Deputy Controller of Stamps, passed under subsection (1).

53. Control of and statement of case to Chief Controlling Revenue Authority

(1) The powers exercisable by a Collector under Chapter III, Chapter IV and Chapter V and under Clause (a) of the second proviso to Section 27 shall in all cases be subject to the control of the Chief Controlling Revenue Authority; (1A) Any person aggrieved by an order of the Collector under Chapter III, Chapter IV, Chapter V and under Clause (a) of the second proviso to Section 27 may, within sixty days from the date of receipt of such order, by an application in writing, accompanied by a fee of three hundred rupees, file an appeal against such order to the Chief Controlling Revenue Authority; who shall, after giving the parties a reasonable opportunity of being heard, consider the case and pass such order thereon as he thinks just and proper and the order so passed shall be final.

(2) If any Collector, acting u/s 31, Section 39 or Section 40, feels doubt as to the amount of duty with which any instrument is chargeable, he may draw up a statement of the case, and refer it, with his own opinion thereon, for the decision of the Chief Controlling Revenue Authority.

Provided that, nothing contained in this subsection shall apply in relation to any order of the Collector of the District determining the true market value of the immovable property which is the subject mater of instrument referred to in Sub-section (1) of Section 32A.

(3) Such authority later giving the parties a reasonable opportunity of being heard, shall consider the case and send a copy of its decision to the Collector, who shall proceed to assess and charge the duty (if any) in conformity with such decision.

12. It is not disputed that Section 31 falls in Chapter III which is Entitled "Adjudication as to Stamps". The present matter concerns Adjudication as to stamps payable on an Award, which is an Instrument for the purposes of the Act. The Adjudication contemplated in this case is u/s 31(2) of the Act. Therefore, it is covered by Section 51(1A) as reproduced above. This is a power of Appeal distinct from Section 32A as is clear from a reading of Section 53(2) of the Act. Thus, it is apparent that the instant case is of adjudication of stamp duty and, therefore, adjudication order contemplated by Section 31 of the Act is capable of being challenged u/s 53 thereof. Shri Sorabjee, therefore, is not right in his submission that there is no remedy of appeal provided by the Act against an

adjudication order. The remedy is available in both cases and that is how the Stamp Act, as amended, reads. We cannot ignore these provisions while deciding the issue of maintainability of this Writ Petition and considering the preliminary objections raised by Shri Pandit.

13. We are of the view that there is much substance in the contention of Shri Pandit that the instant petition is not maintainable. Presently, there is no adjudication done and no order is passed. Merely because the Superintendent of Stamps has filed an affidavit before us outlining the stand of the Authority that does not mean that the adjudication will not be done fairly and in accordance with law. Adjudication is to be done by a high powered authority like the Collector and he is not bound by the view expressed by the Superintendent of Stamps. We have no doubt in our mind that the Adjudicating Authority will apply its independent mind and arrive at a decision on the quantum of stamp duty payable on the subject award. We have no doubt in our mind that while adjudicating the matter, he will not be influenced by the views expressed in the affidavit of the Superintendent of Stamps. The Authority will carry out the Exercise fairly and in accordance with law and we need not assume its power, in our limited jurisdiction, merely because of a vague Apprehension of the Petitioners. Except placing reliance on some parts of the affidavit in reply nothing has been placed before us which would enable us to hold that the Adjudication will not be Impartial and Independent. Even if Adjudication order is adverse to the Petitioners, yet, after it is duly communicated to the Petitioners, they have an alternate and efficacious remedy of an appeal u/s 53 of the Act in which they can challenge the adjudication order on merits and raise all pleas as are raised in the Writ Petition. Since the Petitioners have an alternate and equally efficacious remedy of an appeal u/s 53 of the Act, we are not inclined to entertain this Writ Petition, at this stage. The Writ Petition is dismissed on the ground of availability of alternate and equally efficacious remedy.

14. Since we have dismissed the Writ Petition on the ground of availability of alternate and equally efficacious remedy, we decline to make any observations on merits of the matter. It would not be proper on our part to express any opinion on the rival contentions. They are kept open for being raised in appropriate proceedings at an appropriate stage. With these clarifications, we dismiss the Writ Petition. In the circumstances aforesaid, there shall be no order as to costs.

