(1997) 06 BOM CK 0008

In the Bombay High Court

Case No : Writ Petition No''s. 1947 and 1948 of 1995

ITC Limited and Another APPELLANT

Vs

The State of Maharashtra and Others RESPONDENT

Date of Decision : 10-06-1997

Acts Referred:
Bombay Stamp Act, 1958 — Section 2

Citation : (1997) 3 ALLMR 242 : (1997) 4 BomCR 536

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : K.A. Setalwad and L.V. Mankar, instructed by Baby Girnashu and Co, for the Appellant;

Final Decision : Allowed

Judgement

R.M. Lodha, J.—Both these writ petitions between the same parties raise the identical questions and, therefore, were heard together and are disposed of by this common order.

2. The first petitioner viz. TTC Limited agreed to purchase two flats viz. flat No. 302 and flat No. 202 in the building known as ''Samudra Mahal situated at Dr. Annie Besant Road, Worli from the builders of the building by way of two separate agreements dated 27th August 1973. On each of the said agreements stamp duty of Rs. 5/- was paid. The agreements were duly registered with the Sub-Registrar of Assurances in the year 1973 itself. The possession of the flats were taken by the first petitioner also in the year 1977. It appears that the respondent No. 2 i.e. Dy. Inspector General of Registration and Dy. Controller of Stamps (Enforcement), Bombay by notice dated 30th October, 1994/20th May, 1994 asked the first petitioner to furnish the said agreements since according to him the proper stamp duty payable on the said agreements was not paid. According to respondent No. 2 herein the said agreements were conveyance of the property and stamp duty payable on the said agreements was the stamp duty payable on the market value of the property.

3. On 21-7-1994 reply was sent by the first petitioner to the respondent No. 2. It was replied that notice was misconceived and proper stamp duty was paid on the said agreements. The respondent No. 2, however, repelled the contentions raised by the first petitioner and directed it to pay stamp duty of Rs. 29,750/- treating the market value of the flat No. 302 at Rs. 2,25,000/-. The respondent No. 2 also imposed penalty at Rs. 250/-. With regard to other flat No. 202, the respondent No. 2 similarly directed the first petitioner to pay stamp duty of Rs. 29,750/- treating the market value of flat No. 202 at Rs. 2,25,000/-. A penalty of Rs. 250/- was imposed also regarding flat No. 202. The order dated 4th August, 1994 passed by respondent No. 2 Dy. Inspector General of Registration and Dy. Controller of Stamps (Enforcement), Bombay is impugned in these two writ petitions.

4. Mr. K.A. Setalvad, the learned Counsel appearing for petitioners strenuously contended that the stamp duty has been paid on the agreements dated 27-8-1973 in accordance with law existing at the time of execution of the agreements. He would submit that the amended Item 25 including explanation in Schedule I of the Bombay Stamps Act, 1958 which came into effect from 09-12-1985 has no application to the agreements which were executed on 27-8-1973. He thus submitted that the order passed by respondent No. 2 directing the first petitioner to pay additional stamp duty and penalty was absolutely illegal and deserves to be set-aside. In support of his contentions, Mr. Setalvad relied upon the decision of this Court in Padma Nair Vs. The Deputy Collector, Valuation and Stamp Duty and another, .

5. Though the respondents have filed affidavit in reply for contesting the writ petitions, at the time of the hearing of the writ petitions, nobody appeared on behalf of respondents. The crux of reply in the counter-affidavit is that the amendment in Item 25, Schedule I of the Bombay Stamps Act, 1958 by way of insertion of explanation in the year 1985 was retrospective in nature and the first petitioner was liable to pay the stamp duty on the agreement as conveyance deed.

6. I have considered the contentions raised by the learned Counsel for the petitioner and also perused the averments made in the writ petition, counter-affidavit filed by respondents, the affidavit in rejoinder filed by the petitioner, the relevant provisions of the Bombay Stamps Act, 1958 and the judgement of this Court in Padma Nair (supra).

7. Both the agreements in dispute were executed on 27th August, 1973. By one agreement the first petitioner agreed to purchase flat No. 302 and by the other agreement the first petitioner agreed to purchase flat No. 202 from the builder. There is no dispute that the stamp duty paid on each of the said agreement was Rs. 5/-.

8. The only question that falls for determination in this writ petition is : Whether first petitioner was liable to pay stamp duty on these agreements in accordance

with law which was in force in the year 1973 or the stamp duty could be charged on the said agreements as per the amended Item 25 including explanation in Schedule I of the Bombay Stamps Act which came into effect in the year 1985?

9. The Bombay Stamps Act, 1958 was enacted to consolidate and amend the law relating to stamp and stamp duties in the State of Bombay and now adapted for the State of Maharashtra. Section 2 of the Bombay Stamp Act deals with the definitions. Clause (d) and (h) of section 2 which define expression ''chargeable'' and ''duly stamped'' read thus:

"Section 2(d) "chargeable" means, as applied to an instrument, executed or first executed after the commencement of this Act, chargeable under this Act, and as applied to any other instruments, chargeable under the law in force in the State when such instrument was executed or, where several persons executed the instrument at different times, first executed ;

Section 2(h) "duly stamped" as applied to an instrument means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in the State; "

10. From the aforesaid two definitions of the expression, ''chargeable'' and ''duly stamped'', it is clear that the stamp duty chargeable on an instrument is the duty chargeable in accordance with law in force in the State at the time of execution of such instrument. The chargeability of instrument starts at the time of its execution in the State. In case of an instrument executed outside the State the chargeability of instrument starts from the date of its receipt in the State and when several persons execute an instrument then when first of these persons sign the same in the State. In the year 1973 when the agreements for sale in question were executed, these were covered under Clause (h) of Item 5 of Schedule I and the stamp duty payable on the such agreement was Rs. 5/-. In the year 1985 the amendment was made in the Bombay Stamp Act by Maharashtra Act 27 of 1985. The said amendment became effective from 09-12-1985. Schedule I to the Act was substituted by new schedule and in Item 25 which prescribes rates of stamp duty chargeable on conveyance, an explanation was added. The said explanation provides that in case of an agreement for sale of an immovable property, where the possession of any immovable property is transferred before the execution, or at the time of execution, or after the execution of, such agreement without executing the conveyance in respect thereof, such agreement for sale shall be deemed to be a conveyance and stamp duty shall be leviable accordingly thereon. The said explanation became effective from 09-12-1985 and its effect is that an ordinary agreement for sale of immovable property will attract the duty as is leviable on conveyance. Section 2(d) and (h) afore-quoted clearly shows that stamp duty payable on instrument would be the duty prescribed under the law in force on the date of execution of such instrument. Therefore, the explanation added to Item 25 in the year 1985 in Schedule I cannot be made applicable to the

agreements for sale of immovable property which were already executed earlier. The amendment by way of explanation in Item 25 of Schedule I which came into force w.e.f. 09-12-1985 cannot have retrospective effect and cannot be made applicable to the agreements executed earlier thereto. If on the date of the execution of the instrument, the stamp duty was properly paid, by subsequent amendment in law which is not retrospective in nature, the stamp duty properly paid at the time of its execution would not be rendered improper. An agreement for sale of an immovable property by itself does not create any right, title or interest in the property. This position is well clarified in section 54 of the Transfer of Property Act. The title in an immovable property is not conveyed by mere execution of agreement for sale and such agreement is not conveyance within the meaning of term ''conveyance'' as is legally understood. The legislature was well aware of this legal position and therefore intervened in the year 1985 by inserting explanation to item 25 in Schedule I and thus created legal fiction treating agreement for sale of immovable property as conveyance for the purposes of chargeability of stamp duty. This provision would be applicable to the agreements for sale of immovable property executed on or after 09-12-1985 when the said provision came into effect. The agreements for sale of immovable property executed in the year 1973 much before the amended Item 25 including explanation Schedule I could not be charged with stamp duty treating such agreements as conveyance. Upon perusal of the two agreements in question, I find that the said agreements for sale are only agreements simplicitor and do not create any right, title or interest by themselves in the purchaser. Clause 6 of the agreements makes this position abundantly clear.

11. In Padma Nair''s case (supra), the learned Single Judge took into consideration the amendment in Item 25 which came into effect from 9-12-85 and it has been held that the amended provision has no retrospective effect and is not applicable to the transactions which were executed and registered before coming into force of the same. The learned Single Judge in Padma Nair''s case held thus :

"6. I have carefully considered the newly inserted Explanation. It reads as follows :

"Explanation- For the purposes of this article, wherein the case of agreement to sell an immovable property, the possession of any immovable property is transferred to the purchaser before the execution, or at the time of execution, or after the execution of, such agreement without executing the conveyance in respect thereon, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly:

Provided that, the provisions of section 32-A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section :

Provided further that, where subsequently a conveyance is executed in pursuance of such agreement of sale, the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance, shall be adjusted towards the total duty leviable on the conveyance. It is an agreed position that this Explanation came into force with effect from 9-12-1985 and that it has no retrospective effect and, as such, it is not applicable to the present transaction which was executed and registered before coming into force of the same. This Explanation, in my opinion, clearly supports the view I have taken for reasons more than one. First, it creates a legal fiction which is only for the purposes of Item 25 of the Schedule I to the Bombay Stamp Act i.e. for the purposes of determining the stamp duty applicable to conveyance. For that limited purpose, it provides that even agreement to sell in certain circumstances shall be deemed to be a conveyance and stamp duty shall be levied thereon accordingly. Second, the second proviso to this Explanation clearly goes to show that the legislature it self is fully conscious of the legal position that an agreement of sale is merely agreement to sell in pursuance of which a conveyance is to be executed in future and it is in that light that it is provided that where subsequent conveyance is executed in pursuance of such agreement to sell, the stamp duty, if any, already paid and recovered on the agreement to sell which has been deemed to be a conveyance, shall be adjusted towards the total duty leviable on the conveyance. The proviso itself recognises in no less clear terms the distinction between a conveyance and an agreement to sell. The only object of the Explanation is to make the rates of stamp duty prescribed for conveyances applicable, in certain cases, also to agreements to sell. To avoid the levy of duty again on the very same transaction when subsequently in pursuance of such agreement a conveyance is executed, provision has been made for adjustment of the amount of duty levied on the agreement to sell towards the duty payable on the conveyance. In any event, it is only after the amendment made with effect from 9-12-1985 that even on agreement to sell falling within the Explanation to Item 25, stamp duty is leviable at the same rate as applicable to conveyance. The above Explanation, in no way, even purports to obliterate the distinction between a conveyance and an agreement to sell."

12. Taking into consideration the aspects considered aforesaid, I am of the view that the explanation to Item 25 in Schedule I of the Bombay Stamp Act which came into effect from 9-12-85 has no retrospective operation and is not applicable to the agreements in question which were executed in the year 1973 and, therefore, the respondent No. 2 was not justified in treating the said agreements as conveyance and directing the first petitioner to pay additional duty and penalty as directed in his order dated 4th August, 1994.

13. Consequently, both the writ petitions are, allowed. The impugned order dated 04-8-1994 is quashed and set-aside. Since the respondents have not appeared, the parties are directed to bear their own costs. Rule is made absolute in aforesaid terms in both the writ petitions.

