

(2005) 12 BOM CK 0006

In the Bombay High Court

Case No : Writ Petition No. 4846 of 2005

Jaika Automobiles Private Limited

APPELLANT

Vs

Joint District Registrar (Class-1) and Another

RESPONDENT

Date of Decision : 23-12-2005

Acts Referred:

Bombay Stamp Act, 1958 — Article 13, 14, 25, 40, 41
Constitution of India, 1950 — Article 226, 227

Citation : (2006) 4 BomCR 452

Hon'ble Judges : Dharmadhikari B.P., J

Bench : Single Bench

Advocate : S.V. Manohar, for the Appellant; A.R. Taiwada, AGP, for the Respondent

Judgement

Dharmadhikari B.P., J.—By this writ petition under Articles 226 and 227 of Constitution of India, the petitioner, a private limited company has challenged the order dated 5/8/2005 passed by Chief Controller, Revenue Authority i.e. respondent No. 2 herein as also the demand notice issued by first respondent No. 1 dated 1/1/2005 under the provisions of Bombay Stamp Act, 1958 (hereinafter referred to as Stamp Act). Considering the nature of controversy, I have heard parties finally by consent at the stage of admission itself. I have heard Advocate S.V. Manohar for petitioner and learned AGP Advocate Mrs. Taiwade for respondents.

2. The facts are not in dispute. The sister concern of petitioner by name M/s Jaika Motors (independent company) raised loan from United Commercial Bank worth Rs. 7 Crores. Rs. 5 Crores was against hypothecation of stocks while Rs. 2 Crores was against book debts of the other company. Said concern executed two deeds of hypothecation, one in relation to stocks and movable while the other in relation to book debts. A Security cum Mortgage Bond was then executed by petitioner in relation to immovable property as collateral security for that loan. Petitioner paid stamp duty under provisions of Article 40(c) of Schedule-I of

Stamp Act treating it as collateral security. All these three documents are executed on 23.08.2002. The audit party of Accountant General (II) found short levy of stamp duty worth Rs. 5,26,300/-. The Collector of Stamps accepted this audit objection and issued order dated 1/1/2005 demanding said amount with 2 % interest from the date on document. This order was challenged by petitioner by filing appeal u/s 53(1-A) of Stamp Act. The respondent No. 2/Appellate Authority on 5/8/2005 has dismissed this appeal observing that Article 40(c) was not attracted as on earlier documents Stamp duty under Article 40(a) or (b) of Schedule-I has not been paid. After considering provisions of Section 4 of Stamp Act, it has been observed that the document chargeable with highest duty is to be considered for payment of stamp duty. The order of Collector dated 1/1/2005 has therefore been maintained.

3. Learned Counsel for petitioner contended that parties have treated hypothecation agreements as principal document and as per Government Notification dated 6/5/2002 stamp duty of Rs. 1,73,500/- has been duly paid on it. The petitioner has given Security Bond cum Mortgage deed for financial assistance to another company M/s. Jaika Motors. It being collateral security, Article 40(c) applied and stamp duty has been paid upon it as per law. It is contended that when parties determined for themselves that hypothecation deed shall be the principal document, respondent No. 2 could not have treated the collateral security as principal document. Reliance has been placed upon Article 54 which prescribes that where the collateral or auxiliary or additional security by way of further assurance is given and where the principal or primary security is duly stamped, maximum duty payable upon such collateral/auxiliary/additional security will Rs. 200/- only.

4. Learned AGP supported the order by inviting attention to Section 4, Article 40 and Article 54 of Schedule I of Stamp Act and contended that out of total 3 documents i.e. 2 Hypothecation Deeds and 1 Security Bond cum Mortgage Deed, the document attracting levy of highest stamp duty can alone be treated as principal document and the petitioner is therefore rightly directed to pay shortfall in stamp duty. According to her, in view of express language of Section 4(3) the arguments of petitioner are misconceived and deserve to be ignored.

5. Section 4 of Stamp Act upon which the respondents are placing reliance is as under:

Section 4.- Several Instruments used in single transaction of sale, mortgage or settlement.

(1) Where, in the case of any 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, mortgage or settlement, and each of the other instruments shall be chargeable with the duty of 20 Rs 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 purpose of the section, determine the principal instrument.

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

Respondent No. 2 has held that the party may treat any document as principal instrument but the one chargeable with highest duty is to be considered for payment and levy of Stamp duty. It has been thereafter held that third document i.e. document of Security Bond cum Mortgage deed employed to complete the transaction attracts stamp duty under Article 54 at the rate prescribed under Article 40(b) of Schedule I of Stamp Act. However, while considering the arguments of petitioner, said Authority overlooked the fact that the parties treated Hypothecation Deeds as primary/principal security and that petitioner did not derive any benefit under the Mortgage deed executed by him in favour of Bank. No doubt there are total three documents but question is whether they fall u/s 4 above. As is apparent, Section 4(1) deals with three types of transaction only and hence documents i.e. sale, mortgage and settlement. There can be no debate that none of these three documents constitute sale. The phrase "settlement" has been defined in Section 2(i) and it reads:

Section 2(i). "settlement" means any non-testamentary disposition in writing of movable or immovable property made,-

(i) in consideration of marriage,

(ii) for the purpose of distributing property of the settler among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or

(iii) for any religious or charitable purpose and includes an agreement in writing to make such a disposition and where any such disposition has not been made in writing any instrument whether by way of declaration of trust or otherwise, the terms of any such disposition:

It is thus obvious that the documents under consideration do not constitute "settlement" also. The third and only category left is that of mortgage. It is not in dispute that the other two documents viz. Hypothecation Deeds dated 23rd August, 2002 are executed not by petitioner but by M/s. Jaika Motors in favour of UCO Bank and it is not the case of respondents that these are the documents of mortgage. By first documents demand cash credit of Rs. 5 Crore has been secured while by the second demand cash credit of Rs. 2 Crores has been secured. Stamp duty of Rs. 1,24,250/- only is paid on first hypothecation while stamp duty of Rs. 49,250/- only had been paid on 2nd hypothecation. Total

stamp duty of Rs. 1,73,500/- only has been paid by M/s Jaika Motors. Respondents have not taken any objection on stamp duty paid on these two hypothecation deeds. It is not the case of respondents that petitioner has derived any advantage out of this loan transaction with UCO Bank. The document in dispute i.e. Security Bond cum Mortgage Deed is valued at Rs. 7 Crore and stamp duty of Rs. 200/- only is paid upon it as per Article 40(c) upon it by the petitioner. Section 4 above speaks of the situation in which several documents/instruments are employed for completing the transaction either of sale, mortgage or settlement. It is obvious that such several documents/instruments are not employed in this case for completing the transaction of mortgage. There is only one document of mortgage that too executed by present petitioner who has not derived any advantage thereunder from the mortgagee UCO Bank. The transaction of loan has taken place between M/s Jaika Motors and Bank and said transaction is not covered by Section 4. The transaction of mortgage between petitioner and Bank is not employing several instruments and hence, it is also not covered by said section. The finding of respondent No. 2 that it is third document employed to complete a single transaction does not bring the transaction of loan between M/s. Jaika Motors & Bank into the fold of Section 4 as there is no loan transaction between petitioner and Bank. It is thus obvious that Section 4 of Stamp Act has no application to the case of petitioner and impugned order passed by respondent No. 2 by placing reliance upon it is therefore misconceived and unsustainable.

6. Respondent No. 2 has negated the contention of present petitioner that mortgage in question is covered by Article 40(c) and has upheld the objection of Audit Party of the office of Accountant General that it is chargeable to stamp duty under Article 54. It has been observed that only if on earlier documents complete stamp duty as contemplated by Article 40(a) or (b) is paid, then only Article 40(c) is applicable. It is therefore necessary to consider Articles 40 and 54.

Mortgage deed, not being an agreement relating to Deposit of Title Deeds, Pawan, Pledge or Hypothecation (Article 6), Bottomry Bond (Article 14), Mortgage of crop (Article 41), Respondents Bond (Article 53), or Security Bond or Mortgage Deed (Article 54)-

At the end of this article, exemption are provided for instruments executed by certain person and also for letter of hypothecation accompanying a bill of exchange. As the same are not relevant, are not reproduced. In the scheme of this article, except for case is covered by Explanation-II above, disbursement in favour of mortgagor by Bank is not the criterion. In Clause (c) above speaks of additional security for the purposes mentioned in Clause (a) or (b) when the principal or primary security is duly stamped. Thus when the mortgage deed is executed as additional security by way of further assurance Article 40(c) applies and it does not state that the principal or primary security has to be mortgage only. In fact, very opening words in said Article 40 exclude Hypothecation from it. In this background when Clause (c) specifically uses the word "security" and

contemplates execution of mortgage deed as collateral or auxiliary or additional or substituted security or as a further assurance, it is apparent that such "principal or primary security" need not be only mortgage. Article 40(c) does not contemplate only mortgage deed covered under substantive part of Article 40 or Article 40(a) or (b) as principal or primary security. It only requires the cases where document of mortgage is executed as auxiliary or additional or substituted security or by way of further assurance when no additional advantage is derived there under by the mortgagor. Hence, reasoning given by respondent No. 2 to deny advantage of Article 40(c) to the petitioner is clearly erroneous.

7. Respondent No. 2 has after holding that Article 40(c) is not applicable to the case of petitioner has further held that said Mortgage Deed is covered by Article 54 of Stamp Act. It is to be noted that substantive part of Article 40 excludes from its purview Security Bond and Mortgage Deed covered under Article 54. Thus there is no overlapping between these two Article and types of Mortgages. According to Audit Objection the mortgage deed is for guaranteeing the due performance of contract by borrow (M/s. Jaika Motors) and hence it is chargeable under Article 54 and not under Article 40(b). However this issue is not considered by respondent No. 2 and he has proceeded to hold that as mortgage deed in question is principal document in terms of Section 4, it attracts Stamp duty under Article 54 at the rate prescribed under Article 40(b) of Schedule I of Stamp Act. He has also permitted adjustment for stamp duty already paid in excess on hypothecation deeds. Article 54 deals with Security Bond or Mortgage deed, where such Security Bond or Mortgage deed is executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof i.e. by virtue of such office, or by a surety the due performance of a contract, or in pursuance of an order of the Court or a public officer, not being otherwise provided for by the Bombay Court Fees Act, 1959. Thus, the purpose of Security or Mortgage contemplated by Article 54 is not as that of a security contemplated under Article 40 of Schedule I of the Stamp Act. The very opening clause of Article 40 excludes documents covered by Article 54. Article 54 does not contemplate document which is by way of security for repayment of money advanced or to be advanced to its executor or on its strength as loan. The basic purposes of document covered under Article 54 is to secure discharge of some already existing obligation from the executor of the document. Thus the executor of document executes it to inspire confidence in other party there to that he is concerned and serious about the obligation already accepted by him or cast upon him by virtue of office or contract or Court order accepted by him. In it, thrust is primarily on the discharge of obligation already cast upon and accepted by executor under some other contract or transaction and on the document being executed to guarantee its due performance. The obligation is already incurred by executor thereof & does not spring for the time from such document. In Article 40 thrust is on document itself because there is no other obligation on executor of that document (covered under Article 40) independent of or in absence of such document. It is not the

case of respondents that present petitioner had already agreed to repay the loan amount being advanced by Bank to M/s. Jaika Motors or their existed any such earlier arrangement/agreement between petitioner and Bank. The obligation incurred by petitioner springs from the mortgage deed in question and there is no obligation upon him in absence thereof, petitioner has not executed it as a guarantee to UCO Bank that he would faithfully execute the obligation already accepted by him in this respect. Respondents have not shown that Bank procured mortgage deed from present petitioner on account of any preexisting obligation. Obviously, Article 54 has no application to the case of present petitioner.

8. Under the circumstances, the impugned judgment dated 5/8/2005 delivered by respondent No. 2 as also the demand notice dated 1/1/2005 issued by respondent No. 1 is hereby quashed and set aside.

9. Writ petitioner is disposed of accordingly. Rule is made absolute in above terms. There shall be no order as to costs.