

(2011) 07 GUJ CK 0096
In the Gujarat High Court

Case No : Special Civil Application No's. 7422 to 7433 of 2011

Keshubhai Mohanbhai Patel

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 15-07-2011

Acts Referred:

Bombay Stamp Act, 1958 — Section 32(A), 32(A)(4), 33, 39, 39(1)
Constitution of India, 1950 — Article 226

Citation : (2011) 3 GLR 2548

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Mehul Sharad Shah, for the Appellant; Jaswant K. Shah, Asstt. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Abhilasha Kumari, J.—Rule. Mr. Jaswant K. Shah, learned Assistant Government Pleader, waives service of notice of Rule on behalf of the Respondents in each petition. On the facts and in the circumstances of the case, and with the consent of the learned advocates for the respective parties, the petitions are being heard and decided finally.

2. The challenge in this group of petitions preferred under Article 226 of the Constitution of India is to the order dated 09.03.2011, passed by Respondent No. 2 - Deputy Collector, Stamp Duty Assessment Department (?the Deputy Collector? for short) under the provisions of Section 39(1)(b) of the Bombay Stamp Act, 1958 (?the Act? for short) whereby, the Petitioner has been called upon to pay Rs. 1,54,840/- as additional stamp duty and a penalty of Rs. 1,000/-. The Petitioner in this group of petitions is the same and similar orders of the Deputy Collector have been challenged in all the petitions, that have been filed in respect of 12 Sale Deeds for different parcels of land purchased by the Petitioner. As identical issues of facts and law arise in these petitions, they are being heard together and decided by a common judgment. For the sake of

brevity, the facts, as obtaining in Special Civil Application No. 7422 of 2011 shall be referred to, which are as follows:

3. Immovable property bearing part of Survey No. 423 situated at Katargam, District: Surat, was owned by Harivadanbhai Bachkaniwala, Manharlal Ratilal Bachkaniwala and others. Twelve Agreements to Sell were executed by the original owners of the land in favour of the Petitioner on 26.11.2002. On payment of the amount of consideration by the Petitioner to the original owners, twelve Sale Deeds were executed on 16.01.2003, through their Power of Attorney. The Petitioner filed the necessary Form envisaged under the provisions of Section 32A of the Act, on 16.01.2003. The Petitioner was served with a notice intimating him that he was required to pay deficit stamp duty of Rs. 1,12,840/-. The Petitioner paid the amount of deficit stamp duty on 22.01.2003. The Sale Deed was registered on 22.01.2003, mentioning the fact that the deficit stamp duty had been paid by the Petitioner, and the duly registered instrument was handed over to the Petitioner. However, after a period of seven years and ten months, the Deputy Collector issued notice dated 24.11.2010 to the Petitioner under the provisions of Section 39(1)(b) of the Act, calling upon him to remain present on 08.12.2010. The said notice referred to an earlier notice dated 17.09.2010, which, according to the Petitioner, was not received by him. Upon receipt of the notice dated 24.11.2010, the Petitioner inquired from the Deputy Collector why the notice was issued since, according to him, the said notice did not contain any details regarding the specific purpose justifying its issuance. The Petitioner filed a detailed reply to the said notice requesting the concerned Respondent to provide material, documents and the report on the basis of which action was proposed to be taken, and to afford the Petitioner a fair and reasonable opportunity of representing his case. The grievance of the Petitioner is that, without providing any material on which action was proposed to be taken, and without affording an opportunity of hearing, the Deputy Collector has passed order dated 09.03.2011, in exercise of powers u/s 39(1)(b) of the Act, directing the Petitioner to pay additional stamp duty as indicated hereinabove. Aggrieved thereby, the Petitioner has approached this Court for redressal of his grievances.

4. Mr. Mehul Sharad Shah, learned advocate for the Petitioner, has challenged the impugned order dated 09.03.2011 on various grounds. The first submission made by the learned advocate for the Petitioner is that though the Act provides for the alternative remedy of appeal before the Chief Controlling Revenue Authority u/s 53, however, as the impugned order dated 09.03.2011 has been passed in sheer violation of the principles of natural justice, this Court may entertain the petition by exercising jurisdiction under Article 226 of the Constitution. It is submitted that the Petitioner has not been afforded an opportunity of being heard, as envisaged under Sub-section (2) of Section 32A of the Act. The Petitioner has specifically requested the Deputy Collector to supply him the relevant material, documents and report on the basis of which deficit stamp duty is sought to be recovered, but without supplying the Petitioner with

the said material, the Deputy Collector has proceeded to pass the impugned order in violation of the principles of natural justice. The entire proceedings from the stage of notice to the passing of the impugned order have been conducted in violation of the principles of natural justice. No. material or documents have been supplied to the Petitioner and neither has an opportunity of hearing been afforded to him. As such, it is prayed that the impugned order dated 09.03.2011, being unsustainable in law, be quashed and set aside by exercising jurisdiction under Article 226 of the Constitution.

5. Various submissions on merits have been advanced by the learned advocate for the Petitioner on merits, which are briefly summarized as below:

(1) The provisions of Section 39 of the Act can only be exercised in the event that the Collector impounds any instrument u/s 33 or receives an instrument sent to him under Sub-section (2) of Section 37. In the present case, neither of the contingencies has arisen, therefore, the notice itself is bad in law as the same has been issued under a misconception of law and without application of mind.

(2) Under the provisions of Section 32A(4) of the Act, the Collector of the District may, suo-motu, or on receipt of information from any source referred to in Sub-section (1), call for and examine the instrument in order to satisfy himself as to the correctness of the consideration or the market value of the property which is the subject matter of such instrument, and the duty payable thereon within a period of six years from the date of registration of the instrument. If upon such examination, the Collector has reason to believe that the consideration does not proximate to the market value of such property, he shall proceed as provided in Sub-sections (2) and (3) of Section 32A. The notice has been issued after seven years and ten months, which is beyond the period of limitation prescribed in Sub-section (4) of Section 32A. The procedure adopted by the Deputy Collector, of mechanically issuing the notice and ignoring the detailed reply of the Petitioner and of reviving the proceedings after a period of seven years and ten months is high handed, irrational and arbitrary. As the notice has been issued beyond the period of limitation, the impugned order of the Deputy Collector is without jurisdiction.

(3) The impugned order contains No. reasons but is merely a reproduction of the contents of the reply of the Petitioner to the show cause notice. After reproduction of certain paragraphs of the reply, the Petitioner has straightaway been called upon to pay the deficit stamp duty of Rs. 1,54,840/- with penalty of Rs. 1,000/-, without any reason being assigned, or any ground being disclosed, as to why he is liable to pay the same. The impugned order is a non-speaking order, being devoid of reasons, and deserves to be struck down.

6. In support of the above submissions, the learned advocate for the Petitioner has placed reliance upon certain decisions which are discussed hereinbelow:

(a) Referring to the Division Bench judgment of this Court rendered in the case

of Diwan Kalusha Ahmedsha and Ors. v. Mr. Vanikar, Collector of Kaira ? 1970 GLR 1009, it is contended that the provisions of Section 39 of the Act have been interpreted by the Division bench and it has been held that the power conferred upon the Collector by the said Section is quasi-judicial in nature and before exercising such power, the Collector should consider the questions arising before him in a judicial spirit and must act in accordance with the principles of natural justice.

(b) The next judgment relied upon is Adani Exports Ltd. and Anr. v. Oriental Insurance Company Ltd. - 2001 (3) GLR 2736. It is held therein that High Court is not precluded from entertaining a petition even though an alternative statutory remedy is available, especially if the order under challenge has been passed without following the principles of natural justice.

(c) Reference has also been made to a judgment of the learned Single Judge of this Court in Bhavabhai Bhadabhai Maru v. N.M. Patel, President, Dhandhuka Nagar Panchayat - 1991 (2) GLH 137 wherein it has been held that when the action under challenge is manifestly unjust, patently illegal and ex-facie null and void, the High Court would entertain a petition despite the existence of an alternative remedy.

(d) Another judgment relied upon by the learned advocate for the Petitioner is that of Ram and Shyam Company Vs. State of Haryana and Others, wherein it has been held that the exhaustion of an alternative remedy is a rule of convenience and discretion rather than a rule of law, and does not oust the jurisdiction of the court.

(e) It is contended by the learned advocate for the Petitioner that notice for final disposal has been issued by this Court on 21.06.2011, and once the petition is entertained and heard on merits, it would not be proper to relegate the Petitioner to an alternative remedy. In support of this submission, the learned advocate has relied upon a judgment rendered by Division Bench judgment of this Court in K.S. Joy v. Indian Institute of Management and Ors. - 1994 (1) GLR 57.

7. On the strength of the above arguments, it is prayed that the impugned order dated 09.03.2011 be set aside, and the petition allowed.

8. The petition has been strongly resisted by Mr. J.K. Shah, learned Assistant Government Pleader appearing for the Respondents. It is pointed out by the learned Assistant Government Pleader that an alternative statutory remedy has been provided in Section 53 of the Act, which ought to have been availed of by the Petitioner, instead of filing the present petitions. The Act provides for the statutory procedure to be followed in the hierarchy of appeal, which should have been exhausted by the Petitioner before invoking the jurisdiction of this Court, therefore, this Court may not entertain the petitions and the Petitioner may be relegated to the alternative remedy. In support of the above submissions, reliance has been placed upon (I) Punjab National Bank Vs. O.C. Krishnan and Others, and (ii) 2001 (98) ECR 202 (SC)

9. On the question of the period of limitation for issuance of a show cause notice u/s 32A of the Act, it is submitted by the learned Assistant Government Pleader, that the issue has been decided by a Division Bench of this Court by judgment dated 01.04.2009, Letters Patent Appeal No. 1275 of 2006 in Special Civil Application No. 5356 titled Chief Controlling Revenue Authority and Ors. v. Nandadevi Dinesh Kumar Sharma, wherein it has been held that the period of six years prescribed in Sub-section (4) of Section 32A for exercise of suo-motu powers by the Collector would not ipso-facto apply in cases where the Collector exercises power on reference under Sub-section (1) of Section 32A. It is further contended that the issue regarding whether the show cause notice is without jurisdiction, or not, cannot be raised before this Court, as the show cause notice has not been challenged, and the same has culminated in the impugned order. At present, the show cause notice is No. more in existence. It is urged that if the Petitioner is aggrieved by the order of the Collector, the same can be challenged by him before the appropriate statutory authority and the submissions raised by him before this Court can be made before that authority.

10. On the strength of the above arguments, it is prayed that the petitions be dismissed.

11. Having heard the learned Counsel for the respective parties, and on perusal of the contents of the impugned order and other documents on record, it emerges that the first issue to be dealt with is, whether this Court should exercise jurisdiction under Article 226 of the Constitution of India, by entertaining the petitions despite the fact that an alternative statutory remedy is available. The restraint in exercising jurisdiction under Article 226 of the Constitution in a case where the Petitioner invoking such jurisdiction has an effective and adequate alternative remedy, is ordinarily a self-imposed one. The existence of an alternative remedy does not oust the jurisdiction of the Court. Ordinarily, judicial prudence would demand that the alternative remedy is exhausted before the Court exercises jurisdiction. The High Court has discretion whether, or not, to entertain a writ petition where the alternative remedy has not been exhausted. However, there are certain contingencies where this self-imposed restraint upon exercise of jurisdiction would not operate as a bar. The legal position has been aptly summed up by the Apex Court in the judgment of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, . The relevant paragraphs thereof are reproduced hereinbelow:

14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for any other purpose.

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition.

But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field.

12. As stated by the Apex Court in the above-quoted judgment, one of the contingencies which would not operate as a bar for exercise of jurisdiction is where there has been a violation of the principles of natural justice.

13. In the present case, the impugned order has been passed under the provisions of Section 39(1)(b) of the Bombay Stamp Act. The said Section has been judicially interpreted by a Division Bench of this Court in *Diwan Kalusha Ahmedsha and Ors. v. Mr. Vanikar, Collector of Kaira* (supra). The Division Bench, after scrutinizing the provisions of Section 39, has come to the conclusion that the power conferred upon the Collector in the said Section is quasi-judicial in nature. The Collector must, therefore, act justly and fairly in exercising the power, and not arbitrarily or capriciously. In short, while exercising power u/s 39 of the Bombay Stamp Act, the Collector must act in accordance with the principles of natural justice. The relevant paragraph of the judgment is extracted hereinbelow.

9. We are, therefore, of the opinion that the power conferred upon the Respondent u/s 39 of the Act is a quasi judicial power and before exercising the power conferred upon him under the said section, the Collector should consider the questions arising before him in a judicial spirit. In exercising the power, the Collector must act justly and fairly and not arbitrarily or capriciously; he must act in accordance with the principles of natural justice. Before taking any action under the said section, the Collector should give to the person likely to be affected by the order proposed to be made a notice of the action intended to be taken, make available to him the material on the basis of which the Collector proposed to take action under the said section and give a fair and reasonable opportunity to such person to represent his case and to correct or controvert the material sought to be relied against him.

14. In that case, the Division Bench concluded that the order of the Collector impugned before it, made u/s 39(1)(b) of the Act, was liable to be quashed and set aside as the essential principles of natural justice had not been complied with. Another infirmity found by the Division Bench in the said order was that it was not a speaking order, and did not disclose reasons in support of the conclusions arrived at.

15. In the present case as well, both the infirmities found by the Division Bench in the order impugned before it in *Diwan Kalusha Ahmedsha and Ors. v. Mr. Vanikar, Collector of Kaira (supra)* are conspicuously present. After receipt of the show cause notice dated 24.11.2010, the Petitioner vide reply dated 28.12.2010 has specifically requested that relevant material, documents and reports be supplied to him before proceeding any further. It has also been stated that the Petitioner is unable to effectively reply to the show cause notice, in the absence of the material and documents demanded by him. Additionally, a request has been made for affording him an opportunity of hearing. The Petitioner has further stated in the reply that the notice did not stipulate the reasons or purpose for which it has been issued, therefore, he is not in a position to give a proper reply. The issue of show cause notice, being beyond the period of limitation as provided in Section 32A(4), has also been raised. All these concerns raised by the Petitioner in the reply to the show cause notice have been totally ignored by the Deputy Collector, while passing the impugned order. This is evident from a bare perusal of the said order itself, which is virtually a reproduction of the contents of the reply of the Petitioner. The impugned order does not contain a single ground why the show cause notice has been issued, especially as the Petitioner had already paid the deficit stamp duty of Rs. 1,12,840/-, as demanded earlier, on 22.01.2003. It is clear from a reading of the impugned order that the request of the Petitioner for supply of relevant documents and material has not been considered at all. It is equally clear that the Petitioner has not been afforded any opportunity of hearing, despite his specific request for the same. After reproducing the extract from the reply of the Petitioner, straightaway the order is made for payment of Rs. 1,54,840/- as additional stamp duty u/s 39(1)(b), imposing a penalty of Rs. 1,000/-. No. reason, whatsoever, is reflected in the impugned order, in support of this demand. In short, the order is totally devoid of reasons.

16. The above state of affairs leaves No. manner of doubt in the mind of the Court that while exercising power u/s 39(1)(b) of the Act, which is a quasi-judicial power, the Deputy Collector has failed to act fairly and justly, which is a duty cast upon him and every authority exercising such power. A total non-compliance of the principles of natural justice is writ large on the face of the impugned order. No. material has been made available to the Petitioner on the basis of which the additional stamp duty of Rs. 1,54,840/- and penalty of Rs. 1,000/- has been imposed. No. opportunity of hearing, leave alone, a fair and reasonable opportunity of representing his case, has been afforded to the Petitioner. In a situation, where the material relied upon against the Petitioner has not been provided to him even on request, the question of the Petitioner being given a chance to controvert such material does not arise. The present is a case where the self-imposed restraint upon exercise of jurisdiction despite availability of an alternative remedy would not operate as a bar in entertaining the petitions, as stated by the Apex Court in *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. (supra)*.

17. In addition to being violative of the principles of natural justice, the impugned order is a non-speaking and unreasoned one. Time and again, the Supreme Court, and this Court, have emphasized upon the importance of giving reasons in support of an order made by a Court, judicial forum or a quasi-judicial authority. The person against whom an order is made should at least know and understand the grounds that weighed with the Court or authority, as the case may be, for making the order. An order that discloses No. reasons in support of the conclusions arrived at, cannot be sustained. In the above circumstances, in the considered view of this Court, the existence of an alternative remedy would not operate as a bar in exercising jurisdiction under Article 226 of the Constitution of India.

18. For the aforestated reasons, as the impugned order dated 09.03.2011 has been passed by the Deputy Collector without complying with the principles of natural justice, and is not a speaking order, the same is quashed and set aside.

19. Insofar as the question of limitation regarding issuance of show cause notice is concerned, as the Petitioner has raised this issue in the reply to the show cause notice, it is not considered appropriate to go into it at this stage as the show cause notice has now culminated in the impugned order, that has been set aside. It is clarified that the Respondents are not precluded from taking action, in accordance with law, if found necessary. In that event, the Petitioner shall be at liberty to raise all rights and contentions in this regard.

20. The petitions are allowed in the above terms. Rule is made absolute to the aforesaid extent, in each petition. The parties shall bear their own costs.