

(2023) 01 MP CK 0098

In the Madhya Pradesh High Court

Case No : Writ Petition No. 15281 Of 2021

Krishna Builders And Developers

APPELLANT

Vs

Collector Of Stamps, Collector Office And Others

RESPONDENT

Date of Decision : 23-01-2023

Acts Referred:

Constitution Of India, 1950 — Article 226

Indian Stamp Act, 1899 — Section 5(d), 13, 14, 33, 38(2), 40, 41, 48, 48B

Citation : (2023) 01 MP CK 0098

Hon'ble Judges : Sanjay Dwivedi, J

Bench : Single Bench

Advocate : Sanjay Agrawal, Girish Kekre, Siddharth Sharm

Final Decision : Allowed

Judgement

Sanjay Dwivedi, J

1. Since pleadings are complete and learned counsel for the parties are ready to argue the matter finally, therefore, it is finally heard.

2. By the instant petition filed under Article 226 of the Constitution of India, the petitioner is questioning the legality, validity and propriety of the order dated 18.05.2021 (Annexure P/1) passed by the respondent no.1 whereby the petitioner has been directed to deposit an amount of Rs.46,61,667/- as deficit stamp duty and equal amount of Rs.46,61,667/- being the penalty and as such, total amount of Rs.93,23,334/- was directed to be deposited by the petitioner within a period of 30 days from the date of passing of the impugned order.

3. The factual matrix of the case relevant for considering the questions raised are as follows:-

(3.1). On the basis of a complaint made by one Mukesh Kumar Jain that the agreement executed between the petitioner and the respondent no.2 on 18.03.2011 (Annexure P/2) was not duly stamped and suffers from deficit stamp

duty, the respondent no.1 passed the impugned ex parte order dated 18.05.2021 (Annexure P/1) giving reference of Section 40 of the Indian Stamp Act, 1899 (hereinafter referred to as the 'Act, 1899') and also giving reference of clause 5(d) of Schedule I-A saying that the agreement in question falls under the said clause which needs to be stamped with 2% stamp duty of the market value of the land which comes to Rs.46,61,667/- as deficit stamp duty and therefore, penalty with an equal amount i.e. Rs.46,61,667/- was also inflicted and as such, total amount of Rs.93,23,334/- has been directed to be deposited by the petitioner in the treasury within a period of 30 days, failing which, the amount shall be recovered from the petitioner as a land revenue.

4. Shri Sanjay Agrawal, learned senior counsel appearing for the petitioner has contended that the impugned order has been assailed on two counts- firstly, that the same has been issued in violation of principles of natural justice as no opportunity of hearing was provided to the petitioner before passing the order. Although according to him, in the order it is shown that notice was issued and served upon the petitioner despite that, he did not appear before the authority and as such, ex parte order was passed. According to Shri Agrawal, copy of notice has been obtained through RTI over which no acknowledgment of receipt of notice is available and as such, it is clear that no notice has ever been served upon the petitioner and secondly that the agreement which is the subject matter of the impugned order was executed between petitioner and respondent no.2 on 18.03.2011 does not fall within the ambit of 'instrument' referred in clause 5(d) of Schedule I-A appended with the Act, 1899. Counsel for the petitioner submits that the order has also been assailed on the ground of competency saying that the authority, after a period of five years from the date of execution of the agreement, has no jurisdiction to pass any order in view of provisions of Section 48-B of the Act, 1899.

5. In rebuttal, the respondent no.1 has filed its reply justifying the order passed by the authority stating that notice has duly issued and served upon the petitioner. In support whereof, respondent no.1 has also filed the documents showing dispatch of notice upon the petitioner. It is also stated in the reply that petitioner has an alternative remedy of appeal and the impugned order is appealable and without availing the statutory remedy of appeal, the petition is not maintainable. It is also stated in the reply that Section 5(d) of Schedule I-A deals with an agreement which is the impugned agreement dated 18.03.2011 and recital of the same makes it clear that it falls within the respective provision and, therefore, 2% stamp duty was required to be paid over the market value of the land but that was not done and, as such, the authority has rightly inflicted the penalty and also directed the petitioner to deposit the same along with deficit stamp duty. However, there is no submission with regard to the fact as to how the authority can exercise the power and inflict the penalty over the 'instrument' after a period of five years from the date of its execution because there is a clear embargo as per Section 48-B of the Act, 1899 upon the authority restricting them not to pass any order over the instrument with regard to deficit stamp duty

after five years of its execution.

6. Shri Girish Kekre, learned counsel for the respondent/State on the other hand submits that the rider for exercising the power within a period of five years as given in Section 48-B comes into operation only when the authority has exercised the power under Section 48 but he submits that here in this case, the impugned order has not been passed exercising the power under Section 48 and, therefore, the said rider is not applicable.

7. The respondent no.2 (JDA) has also supported the stand taken by respondent no.1 in its reply and tried to justify the impugned order passed by the authority.

8. Considering the submissions made by learned counsel for the parties, this Court is of the opinion that as far as objection with regard to maintainability of the petition without availing the alternative remedy of appeal is concerned, the said objection in the light of the facts involved in the present case is ignored for the reason that petitioner has challenged the impugned order mainly on the ground that it was issued by the authority in violation of principles of natural justice that too without having competence to exercise the power of recovering the deficit stamp duty over the instrument dated 18.03.2011 whereas that power cannot be exercised after expiry of period of five years from the date of execution and since the question of competency is involved, therefore, alternative remedy of appeal is not coming in the way and the petition cannot be dismissed on this count. The Supreme Court recently in the case of Radhe Krishan Industries Vs. State of Himachal Pradesh and Others reported in (2021)6 SCC 771 after considering the case of Whirlpool Corpn. Vs. Registrar of Trade Marks (1998) 8 SCC 1 and also other cases on this issue, laid down the principle emerging for entertaining the writ petition under Article 226 of the Constitution of India even in presence of statutory alternative remedy of appeal. The principal laid down by the Supreme Court reads as under:-

"27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternate remedy arise where: (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a

writ petition should not be entertained when an efficacious alternate remedy is provided by law.

27. 5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with."

Ergo, the objection with regard to maintainability of the petition raised by the respondents is hereby rejected.

9. The ground with regard to the submission made by learned counsel for the petitioner that the agreement which is the subject matter of the impugned order does not fall within the ambit of clause 5(d) of Schedule I-A is concerned, it is clear that petitioner and even the respondents under misconception has referred clause 5(d) of Schedule 1A but in fact it is the instrument which relates to clause 5(d) of Schedule I-A which has been referred in the impugned order itself. Before dealing with the same, it is apt to reproduce the respective provision which reads as under:-

"5(d):- If relating to the construction of a building on a land by a person other than the owner or lessee of such land and having a stipulation that after construction, such building shall be held jointly or severally by that other person and the owner or the lessee, as the case may be, of such land, or that it shall be held jointly or severally by them and the remaining part thereof shall be sold jointly or severally by them."

From the Schedule itself, it is clear that it relates to an agreement executed between the parties with regard to construction of a building over the land by a person other than the owner or lessee of such land. Here, in this case, agreement executed between the JDA claiming themselves to be a lessee with the petitioner who has not owned the land and is other than owner and lessee. However, the said clause further provides that the agreement must contain a condition with regard to the building proposed to be constructed and such building shall be held jointly or severally by the other person and the owner or lessee, meaning thereby, parties to the agreement or further it shall be sold jointly or severally by them and further the remaining part thereof, i.e. part of the building or the land shall be sold jointly or severally by them.

10. The agreement in question, nowhere contains such a condition but recital of the same reveals that it is for development of land and therefore, leased out to different persons and the persons leased out the land will have to start

construction within a period of four years from the execution of lease. It is clear from the recital of agreement that neither petitioner nor the respondent no.2 had any building jointly or severally and as such, that agreement does not come within the purview of instrument which is said to be an agreement as described under clause 5(d) of Schedule I-A. The submission made by learned counsel for the petitioner appears to be proper and as such, exercising power by the respondent no.1, treating the agreement dated 18.03.2011 (Annexure P/2) as an agreement under clause 5(d) is not proper.

11. The further contention raised by learned counsel for the petitioner that in the impugned order although it is shown that notice was issued to the petitioner and even after service he did not appear before the authority, but no acknowledgment of receipt of notice is available. The documents obtained by the petitioner through RTI, was the notice which was said to have been issued but none of the documents was filed by the respondents to indicate that the notice was served upon the petitioner. Even though, according to learned counsel for the petitioner during the course of arguments, it is submitted that from the documents filed by the respondents it does not reveal that notice has ever been issued on the correct address or on the office of the petitioner. As per learned senior counsel, when a specific stand is taken by the petitioner for non serving the notice upon him, then the respondents should have come with a strong proof or cogent evidence to substantiate that not only the notice was issued upon the petitioner but it got served upon him and as such, in absence of proper evidence produced by the respondents, the submission made by counsel for the petitioner has to be accepted that notice was never served upon the petitioner and the impugned order can also be considered to be passed ex parte in violation of principles of natural justice.

12. As regards the objection of competency of the authority as has been raised by learned counsel for the petitioner is concerned, Section 48-B, has given power to the authority to recover the deficit stamp duty within a period of five years from the date of execution of the instrument but the agreement in question which is said to be of deficit stamp duty was executed on 18.03.2011 whereas the power has been exercised after much delay and beyond the prescribed period of limitation of five years and as such, the Collector was not having competence to pass such an order.

13. As regards the contention raised by learned Govt. Advocate for respondent no.1 that the rider for exercising the power within a period of five years as given in Section 48-B comes into operation only when the authority has exercised the power under Section 48 is concerned, it is apt to go through Section 48 which reads as under:-

"48. Recovery of duties and penalties.- All duties, penalties and other sums required to be paid under this Chapter may be recovered by the Collector by distress and the sale of the movable property of the person from whom the same are due, or by any other process for the time being in force for the recovery of

arrears of land revenue.”

It is clear from the provision of Section 48 that for recovery of any penalty or deficit stamp duty, Collector has to proceed under Section 48 and the manner prescribed therein and, therefore, prescribed period of limitation appended with proviso 48-B is also applicable in the case in hand.

14. Further, Section 48-B which is relevant in the facts and circumstances of the present case reads as under:-

“48-B. Original instrument to be produced before the Collector in case of deficiency .-Where the deficiency of stamp duty is noticed from a copy of any instrument, the Collector may, by order require the production of original instrument from a person in possession or in custody of the original instrument for the purpose of satisfying himself as to the adequacy of amount of duty paid thereon. If the original instrument is not produced before him within the period specified in the order it shall be presumed that the original document is not duly stamped and the Collector may proceed in the manner provided in this Chapter:

Provided that no action under this section shall be taken after a period of five years from the date of execution of such instrument.”

Although in the impugned order, it is shown that action has been taken under Section 40 of the Act, 1899 which has been amended in the year 2017, replacing the earlier provision of Section 40 and the amended provision of Section 40 reads as under:-

“5. For Section 40 of the principal Act, the following Section shall be substituted, namely:-

"40.(1) When the Collector impounds any instrument under section 33, or receives any instrument sent to him under sub-section (2) of Section 38, not being a receipt or a bill of exchange or promissory note, he shall adopt the following procedure--

(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement thereon that it is duly stamped, or that it is not so chargeable, as the case may be;

(b) if, after holding an enquiry, he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of two percent of the deficient portion of stamp duty for every month or part thereof from the date of execution of the instrument and shall certify by endorsement thereon that it is duly stamped. The amount shall be payable by the person liable to pay the duty:

Provided that in no case the amount of penalty so calculated shall exceed the principal amount of deficit stamp duty to be recovered:

Provided further that, when such instrument has been impounded only because it has been written in contravention of Section 13 or Section 14, the Collector may, if he thinks fit, remit the whole penalty prescribed by this Section;

(c) for the purpose of enquiry under this chapter, the Collector shall have the power to summon and enforce the attendance of witnesses, including the parties to the instrument or any of them and to compel the production of documents by the same means and so far as may be in the same manner as is provided in the case of Civil Court under the Code of Civil Procedure, 1908 (5 of 1908);

(d) any person aggrieved by an order of the Collector under sub-section (1) may, in the prescribed manner, appeal against such order to the officer notified by the State Government in this regard:

Provided that no appeal shall be admitted unless such person has deposited at least 25 percent of the amount of deficit stamp duty as ordered by the Collector. Such amount shall be adjustable against the amount payable as per final order of the appellate authority, or refundable together with an interest of one percent for every month or part thereof from the date of deposit;

(e) any person aggrieved by an order passed in appeal under clause (d) may appeal against such order to the Chief Controlling Revenue Authority in the prescribed manner;

(f) every first and second appeal shall be filed within thirty days from the date of communication of the order against which the appeal is filed, along with a certified copy of the order to which the objection is made and shall be presented and verified in such manner as may be prescribed:

Provided that in computing the period aforesaid, the time requisite for obtaining a copy of the order appealed against shall be excluded;

(g) the appellate authority, in deciding the appeal, shall follow such procedure as may be prescribed:

Provided that no order shall be passed without affording opportunity of being heard to the appellant.

(h) subject to orders passed in first or second appeal, as the case may be, the order passed by the Collector under sub-section (1) shall be final and shall not be called into question in any Civil Court or before any other authority whatsoever.

(2) Every certificate under clause (a) and (b) of sub-section (I) shall, for the purposes of this Act, be conclusive evidence of the matters stated therein.

(3) Where an instrument has been sent to the Collector under sub-section (2) of Section 38, the Collector shall, when he has dealt with it as provided by this Section, return it to the impounding officer."

15. Instead of entering into the field whether the agreement dated 18.03.2011 and the procedure for inflicting penalty and recovery of stamp duty can be

exercised by the authority under Section 40 or not, I am considering the fact that whether such power can be exercised by the authority after five years of the date of execution of the agreement or not.

16. As per the aforesaid provision, the instrument, i.e. agreement dated 18.03.2011 has not been impounded by the Collector as per Section 33 nor received the said instrument as per Section 38 and as such, it is clear that Collector has not exercised the power under Section 40 of the Act, 1899 but from perusal of Section 41, it is clear that recovery can be made of deficit stamp duty with respect to any instrument chargeable with duty and not duly stamped. Section 41, therefore, is relevant which reads as under:-

"41. Instrument unduly stamped by accident.- If any instrument chargeable with duty and not duly stamped, [not being a receipt] a bill of exchange or promissory note, is produced by any person of his own motion before the Collector within one year from the date of its execution or first execution, and such person brings to the notice of the Collector the fact that such instrument is not duly stamped and offers to pay to the Collector the amount of the proper duty, or the amount required to make up the same, and the Collector is satisfied that the omissions to duly stamped such instrument has been occasioned by accident, mistake or urgent necessity, he may, instead of proceeding under sections 33 and 40 receive such amount and proceed as next hereinafter prescribed."

It is clear from the aforesaid provision and on reading the provision of Section 48-B that when the authority noticed that there is deficiency of stamp duty in any instrument then he may first ask the authority concerned to produce the original instrument so as to satisfy himself and thereafter proceed further to recover the deficit amount and inflict fine, if so required. Section 48-B very categorically provides if Collector proceeds in the manner as provided in this Chapter, meaning thereby Chapter IV which covers the action of the Collector if so taken from Sections 33 to Section 48-B because Chapter IV of Act, 1899 covers the exercise from Sections 33 to Section 48-B and as such, it is clear that the proviso appended with Section 48-B comes into operation if any action of recovery is taken by the Collector under Chapter IV of the Act, 1899. and that power can be exercised only within a period of five years from the date of execution of instrument. The Supreme Court in case of Hariom Agrawal Vs. Prakash Chand Malviya reported in (2007)8 SCC 514 dealing with the provisions of Section 48-B of Stamp Act, 1899 has observed as under:-

"18. Section 48-B is a provision applicable in the State of Madhya Pradesh which was inserted by the Stamp (M.P. Amendment) Act, 1990 (24 of 1990) in Chapter IV under heading "Instrument not duly stamped" of the Act. This section reads as under:

"48-B. Original instrument to be produced before the Collector in case of deficiency.—Where the deficiency of stamp duty is noticed from a copy of any instrument, the Collector may, by order, require the production of original

instrument from a person in possession or in custody of the original instrument for the purpose of satisfying himself as to the adequacy of amount of duty paid thereon. If the original instrument is not produced before him within the period specified in the order, it shall be presumed that the original document is not duly stamped and the Collector may proceed in the manner provided in this Chapter:

Provided that no action under this section shall be taken after a period of five years from the date of execution of such instrument.

19. On a plain reading of Section 48-B, we do not find that the submission of the learned counsel for the appellant that by virtue of this provision the Collector has been authorised to impound even copy of the instrument, is correct. Under this section where the deficiency of stamp duty is noticed from the copy of any instrument, the Collector may call for the original document for inspection, and on failure to produce the original instrument could presume that proper stamp duty was not paid on the original instrument and, thus, recover the same from the person concerned. Section 48-B does not relate to the instrument i.e. the original document to be presented before any person who is authorised to receive the document in evidence to be impounded on inadequacy of stamp duty found. The section uses the phraseology "where the deficiency of stamp duty is noticed from a copy of any instrument". Therefore, when the deficiency of stamp duty from a copy of the instrument is noticed by the Collector, the Collector is authorised to act under this section. On deficiency of stamp duty being noticed from the copy of the instrument, the Collector would order production of original instrument from a person in possession or in custody of the original instrument. Production is required by the Collector for the purpose of satisfying himself whether adequate stamp duty had been paid on the original instrument or not. In the notice given to person in possession or in custody of original instrument, the Collector shall provide for time within which the original document is required to be produced before him. If, in spite of the notice, the original is not produced before the Collector, the Collector would draw a presumption that original document is not duly stamped and thereafter may proceed in the manner provided in Chapter IV. By virtue of the proviso, the step for recovery of adequate stamp duty on the original instrument on insufficiency of the stamp duty paid being noticed from the copy of the instrument, can only be taken within five years from the date of execution of such instrument. The words "the Collector may proceed in the manner provided in this Chapter" have reference to Section 48 of the Act. Under this section, all duties, penalties and other sums required to be paid under Chapter IV, which includes stamp duty, would be recovered by the Collector by distress and sale of the movable property of the person who has been called upon to pay the adequate stamp duty or he can implement the method of recovery of arrears of land revenue for the dues of stamp duty. By virtue of proviso to Section 48-B, the Collector's power to adjudicate upon the adequacy of stamp duty on the original instrument on the basis of copy of the instrument is restricted to the period of five years from the date of execution of the original instrument. This section only authorises the

Collector to recover the adequate stamp duty which has been avoided at the time of execution of the original instrument. This section does not authorise the Collector to impound the copy of the instrument.”

17. Admittedly, the Collector did not take any action within the period of five years from the date of execution of the instrument, i.e. agreement dated 18.03.2011 but initiated proceeding in the year 2021 that too beyond the prescribed period of limitation empowering Collector to exercise such power and as such, the order impugned is also without competence and illegal.

18. Considering the aforesaid and the observations made hereinabove, it is clear that the impugned order dated 18.05.2021 (Annexure P/1) is illegal on the count that the same has been passed without following the principles of natural justice. Further, the agreement dated 18.03.2011 (Annexure P/2) does not fall within the ambit of clause 5(d) of Schedule I-A and the power of recovering the deficit stamp duty cannot be exercised by the respondent no.1 beyond the period of five years from the date of execution of the instrument i.e. agreement dated 18.03.2011 (Annexure P/2).

19. Ex-consequencia, the petition is allowed and the impugned order dated 18.05.2021 (Annexure P/1) is hereby set aside.

No order as to costs.