
(2003) 11 CAL CK 0043
In the Calcutta High Court
Case No : Writ Petition No. 1342 of 2003

Mendarian Enterprises Pvt. Ltd. and Others	APPELLANT
Vs	
Inspector General of Registration, Range-I and Others	RESPONDENT

Date of Decision : 13-11-2003

Acts Referred:

Stamp Act, 1899 — Article 23, 5, 4, 4(1), 4(2)

Citation : (2004) 1 CHN 363 : 108 CWN 933

Hon'ble Judges : Barin Ghosh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Section 4 of the Indian Stamp Act, 1899 as amended by the Bengal Stamp (Amendment) Act, 1922, is as follows:--

"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 1 or in Schedule 1A, as the case may be, for the conveyance, mortgage or settlement and each of the other instruments shall be chargeable with a duty of one rupee, if the principal instrument be chargeable with the duty prescribed in Schedule 1 or with a duty of (two rupees), if the principal instrument be chargeable with the duty (if any) prescribed for such other instrument in Schedule 1 or Schedule 1A, as the case may be.

(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:

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

2. Before 8th October, 1990 Articles 5 and 23 of Schedule 1A of the Act were as follows:--

"Description of Instrument

Proper Stamp-duty

5. Agreement or Memorandum of an Agreement --

(a) if relating to the sale of bill of exchange;

Fifty paise.

(b) (i) if relating to the sale of a Government security;

Subject to a maximum of rupees fifty, twenty-five paise for every Rs. 10,000 or part thereof, of the value of the security.

(ii) if relating to the sale of a share in an incorporated company or other body corporate;

Fifty paise for every Rs, 5,000 or part thereof, of the value of the share.

(c) if relating to storing of agricultural produce in cold storage;

Rupee one for every 1,000 kilograms of agricultural produce or part thereof.

(d) if relating to matters not otherwise provided for except matters relating to cheques, promissory-notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies or receipts.

Rupees five.

Exemptions

Agreement or Memorandum of agreement-

(a) for or relating to the sale of goods or merchandise exclusively, not being a Note or Memorandum chargeable under No. 43;

(b) made in the form of tenders to the Government of India for, or relating to any loan.

Agreement to lease--

See Lease (No. 35)

23. Conveyance, [as defined by section 2(10) not being a Transfer charged on exempted under No. 62--

Where the amount or value of the consideration for such conveyance as set forth therein does not

Rupee one and fifty paise.

exceed Rs. 50.

where it exceeds Rs. 50 but does not exceed Rs. 100;

Rupees three.

where it exceeds Rs. 100 but does not exceed Rs. 200;

Rupees six.

where it exceeds Rs. 200 but does not exceed Rs. 300;

Rupees nine.

where it exceeds Rs. 300 but does not exceed Rs. 400;

Rupees twelve.

where it exceeds Rs. 400 but does not exceed Rs. 500;

Rupees fifteen.

where it exceeds Rs. 500 but does not exceed Rs. 600;

Rupees eighteen.

where it exceeds Rs. 600 but does not exceed Rs. 700;

Rupees twenty-one.

where it exceeds Rs. 700 but does not exceed Rs. 800;

Rupees twenty-four.

where it exceeds Rs. 800 but does not exceed Rs. 900;

Rupees twenty-seven.

where it exceeds Rs. 900 but does not exceed Rs. 1,000;

Rupees thirty.

where it exceeds Rs. 1,000 but does not exceed Rs. 5,000;

Rupees thirty plus rupees eighteen and seventy-five paise for every Rs. 500 or part thereof in excess of Rs. 1,000.

where it exceeds Rs. 5,000 but does not exceed Rs. 10,000;

Rupees one hundred and eighty plus rupees twenty-five for every Rs. 500 or part thereof in excess of Rs. 5,000.

where it exceeds Rs. 10,000 but does not exceed Rs. 50,000;

Rupees four hundred and thirty plus rupees forty for every Rs. 500 or part thereof in excess of Rs. 10,000.

where it exceeds Rs. 50,000 but does not exceed Rs. 75,000;

Rupees three thousand six hundred and thirty plus rupees sixty for every Rs. 500

or part thereof in excess of Rs. 50,000.

where it exceeds Rs. 75,000 but does not exceed Rs. 1,00,000;

Rupees six thousand six hundred and thirty plus rupees eighty for every Rs. 500 or part thereof in excess of Rs. 75,000.

where it exceeds Rs. 1,00,000 but does not exceed Rs. 2,00,000;

Rupees ten thousand six hundred and thirty plus rupees one hundred twenty for every Rs. 500 or part thereof in excess of Rs. 1,00,000.

where it exceeds Rs. 2,00,000 but does not exceed Rs. 4,00,000;

Rupees thirty thousand six hundred and thirty plus rupees one hundred twenty for every Rs. 500 or part thereof in excess of Rs. 2,00,000.

where it exceeds Rs. 4,00,000 but does not exceed Rs. 7,00,000;

Rupees seventy-eight thousand and six hundred thirty plus rupees one hundred forty for every Rs. 500 or part thereof in excess of Rs. 4,00,000.

where it exceeds Rs. 7,00,000 but does not exceed Rs. 10,00,000;

Rupees one lakh sixty-two thousand and six hundred thirty plus rupees one hundred sixty for every Rs. 500 or part thereof in excess of Rs. 7,00,000.

above Rs. 10,00,000;

Rupees two lakhs fifty-eight thousand and six hundred thirty plus rupees one hundred eighty for every Rs. 500 or part thereof in excess of Rs. 10,00,000.

Exemption

Assignment of copyright under the Copyright Act, 1957 (14 of 1957), Section 18."

3. On 8th October, 1990 the Indian Stamp (West Bengal Amendment) Act, 1990 was published in the Calcutta Gazette, Extraordinary, Part III. The relevant provision of the said Amending Act with which we are concerned herewith are as follows:--

"1. Short title and commencement.--(1) This Act may be called the Indian Stamp (West Bengal Amendment) Act, 1990.

(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint.

10. Amendment of Schedule 1A.-- In Schedule 1A to principal Act, -- (1) in Article 5, for item (d) and the entries relating thereto under the headings "Description of Instruments" and "Proper Stamp-duty, the following items and entries shall be substituted:--

"(d) if relating to a sale or lease-cum -sale of immovable property;

The same duty as a Conveyance (No.23)for a market value.

(e) if relating to matters not otherwise otherwise provided for, except matters relating to cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies or receipts.

Rupees ten.

Exemption.-- The expression "Agreement or Memorandum of an Agreement", if relating to a sale, shall include an agreement to sell or any memorandum or acknowledgement in relation to transfer or delivery of possession of immovable property with an intent to transfer right, interest in, or title to, such property at any future date."

(2) in Article 23,--

(a) in the column under the heading "Description of Instruments", for the words "where the amount or value of the consideration", the words, "where the market value" shall be substituted;

(b) after the entry beginning with the words, "Rupees twenty-five thousand" and ending with the words, letters and figures, "in excess of Rs. 2,00,000", in the column under the heading, "Proper Stamp-duty", the following proviso shall be added:

"Provided that in any case where sale or lease-cum-sale agreement is executed and is stamped with the ad valorem stamp required for such agreement under item (d) of Article 5 and in furtherance of such agreement a conveyance is subsequently executed, the duty on such conveyance shall not exceed ten rupees or the difference of the duty payable on such conveyance and the duty payable under item (d) of Article 5, whichever is greater."

4. Before the notification pursuant to Sub-section (2) of Section 1 of the said amendment Act was published, on 17th August, 1992 the Indian Stamp (West Bengal Amendment) Act, 1992 was published in the Calcutta Gazette, Extraordinary Part III. Sections 1 and 3 of the amending Act, 1992 are as follows:--

"1. Short title and commencement.--(1) This Act may be called the Indian Stamp (West Bengal Amendment) Act, 1992.

(2) It shall come into force on such date as the State Government may, by notification in the Official Gazette, appoint 1st September, 1992.

3. Amendment of Schedule 1A.--In Schedule 1A to the principal Act, for Article 23, the following Article shall be substituted.

"23. Conveyance [as defined by Section 2(10)], not being a TRANSFER charged or exempted under No. 62--

where the amount or value of the consideration for such conveyance as set forth

therein does not exceed Rs. 1,000;

Rupees ten for every Rs. 100 or part thereof.

where it exceeds Rs. 1,000 but does not exceed Rs. 10,000;

Rupees fifty for every Rs, 500 or part thereof.

where it exceeds Rs. 10,000 but does not exceed Rs. 50,000;

Rupees one thousand plus rupees sixty for every Rs. 500 or part thereof in excess of Rs. 10,000.

where it exceeds Rs. 50,000 but does not exceed Rs. 1,00,000;

Rupees five thousand and eight hundred plus rupees seventy for every Rs. 500 or part thereof in excess of Rs. 50,000.

where it exceeds Rs. 1,00,000 but does not exceed Rs. 5,00,000;

Rupees twelve thousand and eight hundred plus rupees eighty for every Rs. 500 or part thereof in excess of Rs. 1,00,000.

where it exceeds Rs. 5,00,000 but does not exceed Rs. 10,00,000;

Rupees seventy-six thousand and eight hundred plus rupees ninety for every Rs. 500 or part thereof in excess of Rs. 5,00,000.

where it exceeds Rs. 10,00,000;

Rupees one lakh sixty-six thousand and eight hundred plus rupees one hundred for every Rs. 500 or part thereof in excess of Rs. 10,00,000.

Exemptions

(a) Assignment of copyright by entry made under the Copyright Act, 1957, section 18.

(b) Co-partnership Deed, see Partnership (No. 46)."

5. Subsequent thereto on 31st January, 1994 in exercise of the power conferred by Sub-section (2) of Section 1 of the Indian Stamp (West Bengal Amendment) Act, 1990, the Governor was pleased to appoint 31st January, 1994 as the date on which the said Act shall come into force and published a notification in relation thereto in the Calcutta Gazette, Extraordinary, on 31st January, 1994. By reason thereof the substituted Article 5(d) as well as the proviso to Article 23 became part of the Act.

6. On 28th March, 1994 the Indian Stamp (West Bengal Amendment) Act, 1994 was published in the Calcutta Gazette, Extraordinary, Part III. Sections 1 and 3 of the Amending Act are as follows:--

"1. Short title and commencement.--(1) This Act may be called the Indian Stamp (West Bengal Amendment) Act, 1994.

(2) It shall come into force at once.

3. Amendment of Schedule 1A.--In Schedule 1A to the principal Act, for Article 23, the following article shall be substituted:--

"23. Ten per centum of the market value.--Conveyance [as defined by Section 2(10)], not being a transfer charged or exempted under No. 62.

Exemptions.--(a) Assignment of copyright by entry made under the Copyright Act, 1957 (14 of 1957), Section 18.

(b) Co-partnership Deed, See Partnership (No. 46)."

7. By reason of the amendment Act of 1994 the proviso which was introduced to Article 23 of Schedule 1A by the 1990 amending Act with effect from 31st January, 1994 came to an end with effect from 28th March, 1994.

8. On 9th July, 1996 the West Bengal Finance Act, 1996 was published in the Calcutta Gazette, Extraordinary, Part III. Sections 1 and 2 of the 1996 Finance Act read as follows:--

"1. Short title and commencement.--(1) This Act may be called the West Bengal Finance Act, 1996.

(2) It shall come into force on such date, or shall be deemed to have come into force on such date not earlier than the first day of May, 1995, as the State Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act.

2. Application of Act 2 of 1899.--(1) The Indian Stamp Act, 1899 (hereinafter referred to as the principal Act) shall, in its application to West Bengal, be amended for the purpose and in the manner hereinafter provided.

(2) Amendment of Schedule 1A.--In Schedule 1A to the principal Act, for Article 23, the following article shall be substituted:--

"23. Conveyance [as defined by the Five per centum of the market value. Section 2(10)], not being a transfer charged or exempted under No. 62.

Exemptions :

(a) Assignment of copyright by entry made under the Copyright Act, 1957, (14 of 1957), Section 18.

(b) Co-partnership Deed, See Partnership (No. 46)."

9. By reason of the 1996 amendment, effected in the manner as aforesaid, the doubt of introducing the proviso to Article 23 of Schedule 1A to the principal Act and thereupon removing the same in the manner aforesaid stood crystallized. In 1996 the Legislature reaffirmed that the proviso has been removed from Article 23 of Schedule 1A to the principal Act.

10. The petitioner entered into an agreement for sale of an immovable property on 21st November, 2001. By reason of substitution of Item (d) of Article 5 of Schedule 1A to the principal Act by the 1990 amendment which came into effect on 31st January, 1994 and continued to remain till 30th November, 2000, the petitioner became obliged to pay stamp-duty on such agreement for sale as a Conveyance on the basis of market value. The petitioner paid such stamp-duty which was the same as was required to be paid for Conveyance except 2% surcharge payable on account of the Calcutta Improvement Trust Act. On 26th March, 2002 the West Bengal Finance Act, 2002 was published in the Kolkata Gazette, Extraordinary, Part III. Sections 1 and 2 of the Finance Act, 2002, referred to above, are as follows:--

"1. Short title and commencement.--(1) This Act may be called the West Bengal Finance Act, 2002.

(2) Save as otherwise provided, it shall come into force on such date, or shall be deemed to have come into force on such date as the State Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act.

2. Application and amendment of Act 2 of 1899.--(1) The Indian Stamp Act, 1899 (hereinafter referred to as the principal Act) shall, in its application to West Bengal, be amended for the purpose and in the manner hereinafter provided.

(2) In Schedule 1A to the principal Act, in Article 23, in the column under the heading, "Proper Stamp-duty", for the words, "Five per centum of the market values", the following letters, words and brackets shall be substituted:--

"(a) six per centum of the market value when the property is situated in the areas within the jurisdiction of any Municipal Corporation or Municipality of a notified area;

(b) five per centum of the market value when the property is situated in the areas other than those included in Clause (a)."

11. In order to complete the transaction, being the subject-matter of the said agreement for sale, executed on 21st November, 2001, a Conveyance was executed on 11th November, 2002 in favour of the petitioner. The petitioner presented the said Conveyance along with 2% surcharge on account of the Calcutta Improvement Trust Act as also the charges payable for registration. The registration was not made of that instrument which has resulted in the present writ petition. Although the registering authority did not communicate to the petitioner in writing the reasons for not registering the instrument, but during the course of hearing it crystallized that the registering authority as a condition for registering the said instrument was demanding Stamp-duty at the rate of 6% for the Conveyance, less the stamp-duty paid by the petitioner at the time of executing the agreement for sale. In other words, the registering authority was seeking implementation of the proviso which was introduced by the 1990

amendment and was kept alive from 31st January, 1994 to 27th March, 1994.

12. At the time when the matter was heard on 14th August, 2003, the learned counsel appearing on behalf of the State relied upon a hand book of stamp-duty printed and published by the Govt. of West Bengal, Finance (Taxation) Department. In that under the heading "Omissions and Errata" the following has been provided:--

"2. In Schedule IA under Article 23 at page 64 after the entry beginning with the words "Rupees one lakh" and ending with the words, letters and figures "in excess of "Rs. 10,00,000", in the column under the heading "Proper Stamp-duty", the following proviso shall be added:

"Provided that in any case where sale or lease-cum sale agreement is executed and is stamped with the ad valorem stamp required for such agreement under item (d) of Article 5 and in furtherance of such agreement a Conveyance is subsequently executed, the duty on such Conveyance shall not exceed ten rupees or the difference of the duty payable on such Conveyance and the duty payable under item (d) of Article 5 whichever is greater.""

13. It was, thus, submitted by the learned counsel on behalf of the State, that the proviso remained all through in the statute book and accordingly the same is required to be followed. The learned counsel for the petitioner submitted on that day that inasmuch as the proviso is not in the statute book, the registering authority on the basis of executive instruction could not require their officers to do things which the Legislature has not permitted them to do and if they have done so that is not permissible. In this background I directed the Finance Secretary, Govt. of West Bengal to clarify the matter by filing an affidavit. The Principal Secretary to the Govt. of West Bengal, Finance Department has filed an affidavit wherein he has stated, inter alia, as follows:--

"3. That inadvertently, in course of printing, the proviso to Article 23 of Schedule IA was omitted from the said Schedule and hence was printed in a separate page under the heading "Omissions and Errata"..... "Omissions and Errata" appearing immediately after the "Contents" at the page marked with number (v). Photocopies of the inside Cover Page, the Preface and the first five pages of the said Book, collective marked with letter "A" are annexed hereto.

I crave leave to refer to a copy of the said Hand Book at the time of hearing, if necessary.

4. I humbly submit further that the occasion for printing the said Book was due to coming into force of the Indian Stamp (West Bengal Amendment) Act, 1990, with effect from January 31, 1994, after receiving the assent of the President of India as per notification of the same.

A photocopy of the said notification is annexed hereto and marked with letter "B".

5. That the said Hand Book of stamp-duty including the said proviso to Article 23

is being followed by all registration authorities in West Bengal, particularly the office of the Registrar of Assurances as per instruction of the Government of West Bengal."

14. The short question is can the Executive collect duty which they have not been authorised by the Legislature to collect. I do not think that Executive has any power to collect a duty which the Legislature has not imposed. It may be possible that by reason of arrear on the part of the Legislature the 1994 amendment brought to an end the proviso inserted to Article 23 of Schedule IA to the principal Act by the 1990 amendment which was given effect to on 30th January, 1994. It may also be a conscious act of the Legislature. It is the Legislature who alone can say that it was either a mistake or it was a conscious act. Until such time the Legislature itself does not come out and say it was a mistake, by reason of the subsequent acts of the Legislature, the one and the only conclusion would be that it was a conscious act on the part of the Legislature. In any event, whether it was a mistake or not a mistake of the Legislature cannot be pointed out by or on behalf of the Executive. The legislative intent can be gathered only from words used by the Legislature and not from what was passing through their mind at the time the legislation was made, It is not known whether the Legislature at the time of making the 1994 amending Act followed by the 1996 amending Act, by mistake kept away the proviso inserted to Article 23 of Schedule IA to the principal Act, but the way the Legislature has spoken and as has been published in the Official Gazette the one and the only intention of the Legislature that can be gathered is of the deletion of the said proviso.

15. It is now settled law that in this country the Executive can make law but they can do so only when the Legislature has kept the legislative field in a vacuum. The subject proviso was inserted by the Legislature and then that was deleted. In such circumstances, the Executive however has no power to legislate, for it is settled law that once the Legislature withdraws a provision of law, that should always be construed to have been done by the Legislature consciously. In those circumstances, I am unable to accept the existence of the subject proviso to Article 23 of Schedule 1A to the principal Act.

16. If the proviso is not there in the Act, then the provisions contained in Section 4 of the Act are attracted. In terms of the provisions contained in the Transfer of Property Act, an agreement for sale of an immovable property is not a transfer or sale of such property. In order to complete a sale, one is required to execute an instrument and to have the same registered provided the value of the property is more than Rs. 100/-. In that view of the matter, the agreement for sale as well as the Conveyance in the instant case should be deemed to be several instruments employed for completing the sale. In such circumstances, duty is payable on the principal instrument only at the applicable rate specified in Schedule 1A to the principal Act.

17. In so far as the agreement for sale is concerned, duty thereon is highest

which appears to be the admitted position. The State does not want that for the Conveyance the petitioner is required to pay duty at the rate of 6%. The respondents are contending that 5% of the duty having been paid, the remaining 1% is to be paid. In such circumstances, duty chargeable on the agreement for sale being the highest duty, the same stands automatically determined in terms of the provisions of Section 4 of the Act being the principal instrument. In so far as the Conveyance is concerned, duty charge will be Rs. 2/- only.

18. The learned Counsel for the State submitted that having regard to the provisions contained in the proviso to Sub-section (2) of Section 4 of the Act, the highest duty chargeable on the instrument to be determined as the principal instrument should be such instrument which is chargeable to highest duty. He, therefore, submitted that despite absence of the subject proviso, the petitioner would be required to pay the difference of 1% which was effected by reason of the last Finance Act as mentioned above. If that was already provided in the proviso to Sub-section (2) of Section 4 of the Act, there was no necessity of adding the proviso as was done and thereupon deleted. I think the proviso to Sub-section (2) of Section 4 of the Act was provided for a totally different reason. In terms of Sub-section (1) of Section 4 of the Act, only the principal instrument is chargeable with duty prescribed in Schedule 1A and any other instrument is chargeable with the duty of Rs. 2/-. In terms of Sub-section (2) of Section 4 of the Act, it is the party, who is liable to pay duty, can determine which of the instruments employed shall be deemed to be the principal instrument. Therefore, if an agreement for sale followed by a Conveyance is executed and if prior to the 1990 situation the agreement for sale had carried a duty of Rs. 5/- or Rs. 10/- and the party concerned had determined the agreement for sale to be the principal instrument, then a party could get the Conveyance on payment of Rs. 1/- only. In order to ensure that the highest duty is paid, I think, the proviso to Sub-section (2) of Section 4 of the Act was provided. In terms thereof in such a case the Conveyance, by reason of the mandate contained in the proviso, would become the instrument determined as the principal instrument.

19. In those circumstances, the petition is allowed with a direction upon the Registrar to register the deed in question as soon as possible but not later than four weeks from the date of service of the copy of this order upon him without claiming 1% stamp-duty from the petitioner.

20. It is made clear that I have not gone in as to whether the petitioner has paid all other charges namely, the registration charges, the surcharge on account of CIT Act etc. and accordingly, if there be any shortfall on those accounts the Registrar shall be entitled to recover the same from the petitioner.

21. This disposes of the writ petition.

22. There shall be no order as to costs.

23. Let xerox certified copies of this judgment and order be made available to

the parties, if applied for, on the usual undertaking.

Barin Ghosh, J.