

(2005) 10 BOM CK 0029
In the Bombay High Court
Case No : Writ Petition No. 737 of 1994

Omprakash Jagannath Agrawal and Another	APPELLANT
Vs	
State of Maharashtra and Others	RESPONDENT

Date of Decision : 28-10-2005

Acts Referred:

Bombay Stamp Act, 1958 — Article 40, 48, 5, 31(1)
Constitution of India, 1950 — Article 226, 227

Citation : (2006) 3 ALLMR 180 : (2006) 3 BomCR 911

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

Bench : Single Bench

Advocate : Avinash Gordey, for the Appellant; S.G. Loney, A.G.P., for the Respondent

Final Decision : Dismissed

Judgement

Dharmadhikari B.P., J.—By this writ petition under Articles 226 and 227 of Constitution of India the petitioners are challenging the order dated 7-2-1994 of respondent No. 2/3 acting as Collector of stamps. By said order, said authority has found that as the earlier hypothecation deed dated 5-2-1994 executed by petitioner No. two in favour of a Co-operative Bank was not sufficiently stamped, a subsequent Mortgage deed executed by petitioner No. 1 in favour of said bank as collateral security could not be treated as such under Article 40(c) and was therefore liable to be charged with full stamp duty. As per interim order dated 12-4-1994 while issuing the rule in the matter, this Court directed respondents to accept stamp duty of Rs. 8000/- and to register mortgage deed.

2. Petitioner No. 1 is the husband while petitioner No. two is the wife. It is the allegation in petition that petitioner No. 2 is sole proprietor of business establishment under the name and style M/s. Agarwal Bicchayat Kendra (a tent house) and supplies Articles and utensils on hire. Nagpur Nagarik Sahkari Bank (for brevity Co-operative Bank, hereafter) is a Co-operative Bank registered and functioning as such under the provisions of Maharashtra Co-operative Societies

Act and petitioner No. two has availed loan facility of Rs. 2 lakhs from it. It is against hypothecation of goods of her business and petitioner No. one is the guarantor for that loan. The deed . of hypothecation is stamped at Rs. 30/- as per provisions of Article 5(h) read with Article 48 of Schedule I of Bombay Stamp Act, 1958; mentioned as Act hereafter. Later on guarantor husband i.e. petitioner No. 1 executed a mortgage deed of his shop block consisting of two rooms with undivided 1/4th interest in the piece of land in favour of Cooperative Bank. This mortgage deed has been executed by petitioner No. 1 by paying stamp duty of Rs. 100/- as per provisions of Article 40(c) of the Act. The Bank advised petitioner No. 1 to get proper stamp duty worked out and accordingly petitioner No. 1 moved respondent No. 2 Collector of stamps u/s 31(1) of the Act for his opinion/order as to under which Article of Schedule 1 said mortgage deed is to be assessed to stamp duty. By the impugned order dated 7th February, 1994 said authority held that stamp duty on mortgage deed is Rs. 8000/- as the principle document/security in the shape of hypothecation was not executed with adequate stamp duty of Rs. 8000/- under Article 6(2) of Schedule I of the Act. The authority observed that exemption given to hypothecation deed was withdrawn by Government Notification dated 29-11 -1990. It is this order, which has been challenged in present writ petition.

3. I have heard Advocate Shri Gordey for the petitioners and Shri Loney, A.G.P. for the respondents. It is here pointed out that respondent No. 3 has been joined as party in person and at the relevant time he was Joint Sub-Registrar working as Collector of stamps at Nagpur.

4. Advocate Gordey has invited attention to provisions of Article 40(c) read with Article 5(h) to contend that the said authority has acted without any application of mind. He states that in view of withdrawal of exemption only stamp duty of Rs. 30/- has been paid on hypothecation deed. Earlier, in view of the Government notification dated 2-8-1963 no stamp duty was required to be paid on such document. Allegations of personal bias and mala fides are made against respondent No. 3 and it is stated that in cases of identical nature, he has accepted stamp duty of Rs. 100/- only under Article 54(ii).

5. Shri Loney, Assistant Government Pleader for respondents has denied any personal bias or mala fides against petitioner in the matter. He has contended that Article 5(h) has no application and in view of Article 6(2) of Schedule I, stamp duty is required to be paid by petitioner No. 2 under Article 13 as if the document was Bond and, hence hypothecation deed ought to have been on stamp paper of Rs. 8000/-. In relation to the instances placed on record by petitioner to point out the discriminatory treatment extended by respondent No. 3, he contends that details of those documents are not available and in any case, order passed in case of petitioners is as per prevailing law. He therefore requested for dismissal of writ petition.

6. Perusal of impugned order passed on 7-2-1994 reveals that the said authority found that the deed of mortgage has been executed as collateral security and

stamp duty of Rs. 100/- only is paid on it. The authority has further found that if on the principal document requisite stamp duty due on it has been paid, then only under Article 40(c) the stamp duty of Rs. 100/- only is payable on such mortgage deed. It therefore scrutinised the deed of hypothecation which is principal document in this case and found that stamp duty of Rs. 8000/- only should have been paid on it. As such stamp duty of Rs. 8000/- has not been paid on said hypothecation deed, it treated the mortgage deed as principal document and directed payment of stamp duty of Rs. 8000/- only on mortgage-deed.

7. Contention of petitioner is that proper stamp duty of Rs. 30/- has been paid on deed of hypothecation i.e, stamp duty of Rs. 20/- is paid under Article 5(h) while stamp duty of Rs. 10/- only is paid Article 48 of Schedule I. Perusal of Article 5 shows that it deals with "Agreement or its records or Memorandum of an agreement". Sub-clause (h) is a residuary clause and at the relevant time it read: "(h) if not otherwise provided for twenty Rs. ", Article 48 to which petitioners have made reference deals with power of attorney. Article 5 and Article 48 would be relevant if there is no entry expressly taking care of "hypothecation deed". Article 6 deals with "Agreement relating to deposit of title deeds, pawn, pledge or hypothecation". Prior to 29-11-1990, Entry (1) below the head exemption at the end of this article exempted deed of hypothecation of goods, if unattested. It is admitted position that in view of Government Notification dated 29-11-1990, said exemption given to deed of hypothecation of goods has been withdrawn. In view of this withdrawal, Clause (2) of Article 6 became relevant. At the relevant time said clause read as under:

6. Agreement relating to deposit of title deeds, pawn, pledge or hypothecation, that is to say, any instrument evidencing an agreement relating to -

(1) Note : not reproduced, as not relevant.

(2) the pawn, pledge or hypothecation of movable property, where such pawn, pledge or hypothecation has been made by way of security for their repayment of money advanced or to be advanced by way of loan or an existing or future debt -

(a) if such loan or debt is repayable on demand Same duty or more than three months from the date as per Bond (Article 13) for the amount of the instrument evidencing the agreement so secured.

Sub-clause (b) takes care of cases in which loan is repayable not more than three months from the date of such instrument and stamp duty prescribed is half of what is payable under Sub-clause (a) above. The Court is concerned with Sub-clause (a) only. In view of this specific provision in Article 6, it is more than apparent that Article 5(h) is not available to the case of petitioners. In fact at one stage petitioners argued that stamp duty has been paid by them in view of withdrawal of exemption by Government Notification dated 29-11-1990. However, it is not necessary now to go into that controversy. The specific entry in relation to hypothecation deed governs the document dated 5-2-1994 executed

by petitioner No. 2 in favour of the Co-operative Bank. In this background, when provisions of Article 13 are looked into, the same at the relevant time read as under :

13. Bond not being a Twenty Rs. debenture and not being otherwise provided for by any provisions of this Act (whether or not such provisions relate to any particular types of Bonds), or by the Bombay Court Fees Act, 1959, for part thereof.

Below this Article there is an exemption clause which deals with local income derived from private subscriptions or charitable dispensary or hospital or any other object of public utility and it is not relevant for present controversy.

8. Thus the agreement of hypothecation dated 5-2-1994 executed by petitioner No. 2 in favour of Co-operative Bank ought to have been assessed to stamp duty under this Article 13 and, accordingly, stamp duty of Rs. 8000/- only should have been paid on it because the loan amount for which it is executed is Rs. 2 lakh. In this background, it will be appropriate to refer to provisions of Article 40 as it stood at the relevant time :

40. Mortgage deed, being an agreement relating to Deposit of tide deed so, Pawn or pledge or Hypothe- cation (Article 6) Bo- ttomry Bond (Article 14), Mortgage of a crop (Article 41), Respondents. Bond (Article 53), or security bond or Mortgage deed (Article 54). (a) When possession The same duty as of the property or is leviable on a co- any part of the pro- nveyane under Cl- perty comprised in auses (a), (b), (c) or such deed is given (d), as the case may be, by mortgagor or be, of Article 25 for agreed to be given; the amount secured by such deed. (b) when possession The same duty as is not given or a Bond (Article 13) agreed to be given for the amount se- as aforesaid. cured by such deed Explanation, - A mor- tgagor who gives to the mortgagee a power of attorney to collect rents or a lease of property mortgaged or part thereof, is deemed to give possession within the meaning of this Article. (c) when the collate- The same duty as rial or auxiliary or a Bond (Article 13) additional substitute - for the amount se- ted security, or by ured, subject to a way of further ass- maximum of Rs. urance for the above- 100/- . mentioned purpose where the principal or primary security is duly stamped.

At the end of this Article, exemptions are provided for instruments executed by certain persons and also for letter of hypothecation accompanying a bill of exchange. As the same are not relevant, it is not reproduced.

9. Article 54(ii) also prescribes stamp duty of Rs. 100/-. However, it 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, or by a surety to secure 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 security, either under Article 6 or Article 40 of the 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 as loan. The basic purpose of document covered under Article 54 appears to be to secure discharge of some obligation from, the executor of the document. Thus the executor of document executes it to inspire confidence in other side that he is concerned and serious about the obligations already accepted by him. In it, thrust is primarily on the discharge of obligation accepted by executor and not on the document. The obligation is already incurred and may not spring from such document. In Article 40 thrust is on document itself because there is no other obligation on executor of that document independent of or in absence of such document itself. Obviously said Article 54(ii) has no application here.

10. Bare perusal of Article 40 is sufficient to show that when it is executed as collateral or additional security, stamp duty of Rs. 100/- only will be payable only if principal or primary security in transaction in which it is offered is duly stamped. Here, as is apparent, principal or primary security was to be hypothecation deed dated 5-2-1994 executed by petitioner No. 2 wife in favour of Co-operative Bank and it is not "duty stamped". Stamp duty of Rs. 30/ only is paid on it by invoking Article 5(h) read with Article 48 of Schedule I of the Act. It is already demonstrated above that these Articles are not relevant and the specific Article namely Article 6(2)(a) read with Article 13 govern said document. The respondent No. 2 authority is therefore, justified in observing that stamp duty of Rs. 8000/- only ought to have been paid on this document. As this has not been done, provisions of Article 40(c) are not attracted and stamp duty of Rs. 100/- only paid by petitioner No. one on mortgage deed is inadequate. In view of Article 40(b), said authority has correctly worked out stamp duty payable at Rs. 8000/- only. I, therefore, do not find any jurisdictional error or perversity in the impugned order.

11. In this background, when the other two orders passed by respondent No. 3 are perused, in first order dated 8-2-1994 in case of one Dipak Babulal Mehata; it has been held that principal document of hypothecation deed executed for sum of Rs. 174 lakhs on stamp papers of Rs. 20/- only is proper. In view of this finding, mortgage deed executed by stranger as security/additional security has been treated as governed by Article 54(ii) of Schedule I and stamp duty of Rs. 100/- only has been held to be proper in it. Similarly in case of other document of mortgage dated 26th February, 1993 between Smt. Premadevi Maloo with four other ladies from same family and Oriental Bank of Commerce, it appears that a certificate has been issued that stamp duty of Rs. 80/- only paid on it under Article 40(c) read with Articles 54(ii), 48(d) and 5(h) of the Act is proper. Prima facie itself, it is apparent that there is some mischief or mistake in these matters. However, the documents are not before this Court and also be concerned parties are not arrayed as respondents in this writ petition. But respondent Nos. 1 and 2 may inquire into the matter as it pertains to recovery of public revenue. I,

therefore, direct respondent Nos. 1 and 2 to hold appropriate inquiry in relation to these two matters and such other matters, if any and to take appropriate steps for recovery of Government revenue, if found to have been evaded. Such inquiry should be conducted within six months from the receipt of this order by respondents Nos. 2 and 1. Report thereof should be submitted to the registry of this Court expiry of said period of six months.

12. No case is made out for interference in writ petition by the petitioners. The writ petition therefore fails and is dismissed, however with directions to respondent Nos. 1 and 2 to hold appropriate inquiry as mentioned in para above. No costs.