

(2012) 08 GUJ CK 0077

In the Gujarat High Court

Case No : Special Civil Application No. 15466 of 2010

Premal Sanjaybhai Patel

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 01-08-2012

Acts Referred:

Bombay Stamp Act, 1958 — Section 33, 37, 39, 39(1)(b), 53
Constitution of India, 1950 — Article 226

Citation : (2012) 3 GLR 2656

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : R.S. Sanjanwala with Karanjit Vadodaria, for the Appellant; P.K. Jani, Govt. Pleader and Notice Served, for the Respondent

Final Decision : Dismissed

Judgement

J.B. Pardiwala, J.—By way of this petition, the petitioner has prayed for the following reliefs:

(a) Be pleased to issue a writ of certiorari and/or any other appropriate writ, order or direction quashing and setting aside the order dated 20-8-2010 passed by the respondent No. 2;

(b) Pending admission and final hearing of this petition, be pleased to stay operation, implementation and execution of the order dated 20-8-2010 passed by the respondent No. 2;

(c) Be pleased to grant such other and further reliefs as the Hon''ble Court may deem fit in the facts and circumstances of the case.

The case made out by the petitioner in his petition may be summed up thus:

Petitioner seeks to challenge the order dated 20th August, 2010 passed by respondent No. 2 in purported exercise of powers conferred by Sec. 39 of the Bombay Stamp Act, 1958. The petitioner had to approach this Court as the

impugned order passed by respondent No. 2 is violative of the petitioner's fundamental rights guaranteed by Part-III of the Constitution of India. The impugned order has been passed without affording any opportunity of hearing to the petitioner and is also a non-speaking order. The impugned order is ex-facie without jurisdiction and authority.

1.1. It is the case of the petitioner that Multiple Entertainment Private Ltd. availed finance from the Ahmedabad People's Co-operative Bank Ltd. and against the finance availed, the finance amount was secured/mortgaged by deposit of title-deeds of the properties mentioned in the Memorandum dated 14-3-2000 executed with the Ahmedabad People's Co-operative Bank Ltd.

1.2. The petitioner along with five others and the Pvt. Ltd. Company had executed the said deed of Mortgage which, inter alia, provides that against the borrowing of Rs. 1 crore, the borrowers have agreed to and have in fact deposited title-deeds of properties, more particularly, described in the agreement.

1.3. It is indisputable that the document in question created mortgage by deposit of title-deeds. The said document was stamped on stamp paper of Rs. 1 lac and was presented for registration. The duly registered document was in possession of the Co-operative Bank.

1.4. The amount financed by the Bank was thereafter repaid on 13-12-2007, and thereafter, the Co-operative Bank executed the deed of Release of mortgaged property.

1.5. The petitioner was served with the impugned order dated 20-8-2010 which, inter alia, records that the document of 13-7-2001 registered at Sr. No. 1784 in the office of Sub-Registrar, Ahmedabad-3, Memnagar was scrutinized during audit and on the basis of the opinion of the Auditor General and on reading of the document, the document seems to be a deed of mortgage.

1.6. The said order further records that the notice was issued on 28-12-2005 under Sec. 39(1)(b) of the Stamp Act; that the petitioner did not remain present, and as such, orders in terms of the objections raised by the Auditor General are required to be passed. It was ordered that the petitioner is required to pay stamp duty of Rs. 8 lac and penalty of Rs. 500/-, thus aggregating to Rs. 8,00,500/-. The order does not explain as to how the deed in question attracts stamp duty of Rs. 8 lac and as to under which Article of the Bombay Stamp Act would the deed be liable to stamp duty of Rs. 8 lac. The impugned order is also silent about the precise objection raised by the Auditor General and the rationale behind the objection.

1.7. The order also does not describe the petitioner's name correctly. The order is issued to one Premal Jayantibhai Patel, whereas the petitioner is Premal Sanjaybhai Patel and the address in the order also makes reference to Ranip area of Ahmedabad.

1.8. Though, the deed of mortgage which is subject-matter of the proceedings

under Sec. 39 is executed by the Company as well as five others, the impugned order is issued against the petitioner alone. Though the order records that the notice dated 28-12-2005 was served upon the petitioner, the petitioner, in fact, has not come across any such notice. It is stated that had the petitioner been aware about the notice, and the proceedings under Sec. 39, the petitioner would have certainly appeared and objected to the proceedings. The impugned order, inter alia, records that the respondent No. 2 has the acknowledgment of service of notice.

1.9. The deed of mortgage, after its registration was with the Co-operative Bank. Upon repayment of the amount, the deed has been returned by the Bank to the Company and the deed is in possession of the Company and the petitioner. The deed was never impounded and the initiation of proceedings under Sec. 39 does not satisfy the condition precedent for exercise of powers under Sec. 39 inasmuch as respondent No. 2 has proceeded under Sec. 39 in absence of the document and without impounding the same.

1.10. The deed of Mortgage was on a stamp paper of Rs. 1 lac, and as such, is adequately stamped in accordance with the provisions of the Bombay Stamp Act read with the relevant Articles of the Stamp Act. The deed in question does not fall within the definition of conveyance and does not attract stamp duty which is otherwise payable while executing a deed of conveyance of property. The impugned order does not indicate the relevant provisions of the Stamp Act under which the stamp duty would attract duty of Rs. 8 lac. The impugned order is a non-reasoned, non-speaking order, and the same has been passed without hearing the petitioner and/or without giving adequate opportunity to show cause against imposition of additional duty or penalty.

1.11. Powers under Sec. 39 can be exercised in respect of documents which are impounded under Sec. 33 or issued under sub-sec. (2) of Sec. 37. In the facts of the present case, the document was not impounded when presented for registration nor was it referred to the respondent No. 2 under sub-sec. (2) of Sec. 37. That respondent No. 2 did not derive jurisdiction to proceed under Sec. 39 to adjudicate proper duty, and therefore, the impugned order is without jurisdiction and/or authority.

1.12. The impugned order suffers from total non-application of mind. It is apparent that such objection was raised during the audit by the Auditor General. It also seems that the impugned order bears two crucial corrections. Respondent No. 2 has mechanically issued the impugned order in view of objections raised during audit. The order has been issued obviously to avoid any responsibility in pursuance of the audit objection and is as such issued in mechanical and colourable exercise of powers without application of mind to the document or the relevant provisions of the Stamp Act.

1.13. According to the petitioner, he is entitled to approach the Chief Controlling Revenue Authority under Sec. 53 of the Stamp Act, however, such remedy is an

onerous remedy as the petitioner would be obliged to pay 25% of the ordered amount. Considering the fact that the impugned order is ex-facie, arbitrary, unsustainable and in breach of principles of natural justice, the petitioner has to approach this Hon"ble Court Art. 226 of the Constitution of India.

2. Notice was issued on the respondents and respondent No. 2, in response to the notice has appeared and opposed this petition by filing an affidavit-in-reply.

3. The stand of respondent No. 2 taken in the affidavit-in-reply may be summed up thus:

(a). An equitable mortgage-deed was executed by and between the petitioner and People's Co-operative Bank with respect to loan advanced by the said Bank to the petitioner.

(b) The said mortgage-deed was registered vide Registration No. 1784 on 13-7-2001 before the Sub-Registrar, Memnagar. In the year 2002, the Accountant General raised an objection pertaining to the said-deed executed on 13-7-2001 and held the said-deed to be a mortgage deed on considering the text of the said-deed and thereby directed to collect deficit Stamp duty on the said document.

(c) On 28-12-2005 the respondent Authorities issued show-cause notice calling upon the petitioner for hearing on 12-1-2006 and to produce documentary evidence in light of, imposition of deficit stamp upon the said document. The said notice was served upon the petitioner through R.P.A.D. Another notice was issued upon the petitioner on 11-12-2008 through R.P.A.D. calling upon the petitioner to remain present on 31-12-2008 for hearing and producing documentary evidence in light of imposition of deficit stamp upon the said document.

(d) On receipt of the said notice, noticee has not remained present for hearing nor produced any documentary evidence pertaining to the same, and therefore, it cannot be said that the petitioner was never granted any opportunity of hearing prior to passing the impugned order and it was only when the petitioner had not remained present for hearing on two occasions the respondent Authorities were constrained to pass an ex-parte order.

(e) The said proceedings are initiated against the petitioner under Sec. 39(1)(B) of the Bombay Stamp Act in accordance with Audit objection. The petitioner has not availed the remedy of appeal provided under the Statute and has directly approached this Hon"ble High Court for quashing the order dated 20-8-2010.

4. Petition deserves to be dismissed solely On the ground that there is an alternative efficacious remedy available to the petitioner in the form of an appeal before the Chief Controlling Revenue Authority under Sec. 53 of the Bombay Stamp Act. Since, there is statutory appeal provided, the present petition under Art. 226 of the Constitution of India is not maintainable.

5. Legal contentions on behalf of the petitioner.

(a) Mr. R.S. Sanjanwala, learned Counsel appearing for the petitioner has strenuously submitted that the impugned order under challenge can be termed as a non-speaking order as no reasons have been assigned by the authority concerned in reaching to the conclusion that the petitioner is liable to pay deficit stamp duty to the tune of Rs. 8 lac.

(b) Mr. Sanjanwala further submitted that there is no reference in the order as to within which Article of Schedule-I under the Act the document in question would fall so as to record a finding that there is deficit in payment of stamp duty.

(c) Mr. Sanjanwala further submitted that even assuming for the moment that the petitioner was not able to appear before the authority, still the authority was under a legal obligation to decide the issue in accordance with law.

(d) Mr. Sanjanwala submitted that the authority concerned ought to have appreciated an important question of law that document in question was an agreement relating to deposit of title-deeds and was covered under Art. 6 of Schedule-I of the Bombay Stamp Act.

(e) Mr. Sanjanwala submitted that the authority committed a serious error in construing the document as a mortgage deed not being an agreement relating to deposit of title-deeds covered under Art, 36 of Schedule-I.

6. Legal contentions on behalf of the respondent.

(a) Mr. P.K. Jani, learned Government Pleader appearing for the respondents vehemently submitted that this petition may not be entertained as there is an alternative efficacious remedy available to the petitioner to file an appeal before the Chief Controlling Revenue Authority under Sec. 58 of the Bombay Stamp Act.

(b) Mr. Jani further submitted that even on merits, the impugned order deserves to be confirmed as no error, much less an error of law could be said to have been committed by the authority.

(c) Mr. Jani further submitted that if a person does not appear in response to a notice, then he cannot challenge order before higher forum.

(d) Mr. Jani urged that this petition be dismissed.

7. Before entering into the merits of the main issue, I propose to deal with the preliminary contention of Mr. P.K. Jani, learned Government Pleader appearing for the respondents as regards the maintainability of this petition on the ground of an alternative efficacious remedy available to the petitioner in the form of an appeal under Sec. 58 of the Bombay Stamp Act.

8. It is true that power of the High Court to issue prerogative writs under Art. 226 of the Constitution of India is plenary in nature and cannot be curtailed by other provision of the Constitution of India or a Statute but the High Courts have imposed upon themselves certain restrictions on the exercise of such power. One of such restrictions is that if an effective and efficacious remedy is available, the

High Court would not normally exercise its jurisdiction under Art. 226 of the Constitution of India. But again, this rule of exclusion of writ jurisdiction on account of availability of an alternative remedy does not operate as an absolute bar to entertain a writ petition but is a rule of discretion to be exercised depending on the facts of each case.

On this aspect, the following observations by the Constitution Bench of the Supreme Court in *A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another*, which still holds the field, are quite apposite:

The passages in the judgment of this Court we have extracted would indicate (1) that the two exceptions which the learned Solicitor General formulated to the normal rule as to the effect of the existence of an adequate alternative remedy were by no means exhaustive, and (2) that even beyond them a discretion vested in the High Court to have entertained the petition and granted the petitioner relief notwithstanding the existence of an alternative remedy. We need only add that the broad lines of the general principles on which the Court should act having been clearly laid down, their application to the facts of each particular case must necessarily be dependent on a variety of individual facts which must govern the proper exercise of the discretion of the Court, and that in a matter which is thus pre-eminently one of the discretion, it is not possible or even if it were, it would not be desirable to lay down inflexible rules which should be applied with rigidity in every case which comes up before the Court.

9. In *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, enumerating the contingencies in which the High Court could exercise its writ jurisdiction in spite of availability of the alternative remedy, the Supreme Court observed thus:

... that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

10. In the present case, I have no doubt in my mind that there is a failure of principles of natural justice. I am of the view that even if the petitioner was unable to remain present before the Authority and make his submissions for any reason by itself would not absolve the authority from deciding the matter in accordance with law by assigning cogent reasons for reaching to a particular conclusion. A bare perusal of the impugned order goes to show that the Authority jumped to the conclusion that the document in question was a mortgage-deed and on the said mortgage deed, the requisite amount of stamp duty was not paid by the petitioner. The Authority, therefore, passed an order directing the

petitioner to pay the deficit stamp duty to the tune of Rs. 8 lac with fine of Rs. 500/-. The order is absolutely silent as to which Article of the Schedule under the Stamp Act was taken into consideration before passing the order under challenge. The order is also silent as regards the question whether the document should be construed as a mortgage falling within Art. 36 of Schedule-I to the Act, or was it merely an agreement or Memorandum of Agreement relating to deposit of title-deeds falling under Art. 6(1) of Schedule-I to the Act.

11. The power conferred upon the Collector under Sec. 39 of the Act is a quasi-judicial power and before exercising the power conferred upon him under the said Section, the Collector is obliged to 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. One of the facets of the principles of natural justice is to act fairly. Just because the petitioner failed to appear before the Collector in response to the notice issued, though this fact has been seriously disputed by the petitioner, but still even if it is believed that the petitioner had not remained present by itself would not confer jurisdiction upon the Collector to decide the matter in a slipshod manner, without assigning any reasons or referring to legal provisions applicable under the Act. It is true that Sec. 39 of the Act does not in terms cast a duty upon the Collector to act judicially. However, it is by now well established that the duty to act judicially is not required to be super-added or super-imposed by the Statute. Such a duty may be inferred or spelled out from the nature of the power conferred upon the authority. If the nature of the power is such that it empowers the authority to determine question which will prejudicially affect the subject, the judicial character of the duty has to be inferred from the very nature of the power conferred upon the Authority. It is now well settled that every administrative officer exercising quasi-judicial functions is bound to give reasons in support of the order he makes; *Gram Panchayat, Village Kum Kalan Vs. State of Punjab and Others*, . In the impugned order, the respondent has recorded a finding that the document is in the nature of mortgage deed, and therefore, the petitioner ought to have paid stamp duty of Rs. 9 lac. It appears that the original document is on the stamp paper of Rs. 1 lac. The Collector took the view that therefore, deficit stamp duty of Rs. 8 lac with fine of Rs. 500/- needs to be paid by the petitioner. The respondent ought to have indicated in his order the grounds and materials on the basis of which, he disagreed with the valuation of the document. As a matter of fact, the respondent failed even to notice that the document in question was executed on 14th March, 2000 and on payment of the entire loan amount, Deed of Release of Mortgage Property was also executed on 13th December, 2007, whereas the notice in this regard was issued on 28th December, 2005 and the final order was passed on 20th August, 2010.

12. The question whether a particular document should be construed as mortgage falling within Art. 36 of Schedule-I to the Act, or it is merely an Agreement or Memorandum of Agreement relating to deposit of title-deeds

falling under Art. 6(1) of Schedule-I to the Act came up for consideration before the Bombay High Court in a reference case reported in *In Re: The Indian Stamp Act, 1899*, . In the said case, the Division Bench speaking through His Lordship Chief Justice Chagla, observed that the Stamp Act, per se, made no distinction between a legal mortgage and an equitable mortgage. But the Legislature made a special provision in Art. 6, [present Art. 6(1)] which relates to that class of document which should be interpreted as an Agreement or Memorandum of Mortgage by deposit of title-deeds, and not a deed of mortgage in its own force. The principles of differentiation between the two categories was expressed by the Bench in the following words:

In the other words, if the document merely contains the bargain between the parties with regard to the deposit of title-deeds, then though it creates an interest in immovable property and although it is a mortgage deed, still by reason of the provisions of Art. 6 the duty payable is less than the duty which would have been payable if it had been a mortgage deed in the larger sense of the term. It is clear that what was intended by Art. 6 was a document which should merely contain the bargain between the parties with regard to the deposit of the title-deeds and may be conditions subsidiary or ancillary to the deposit of title-deeds. But if we have a document which contains all the provision which one would normally find in a mortgage deed, then mere fact that document also contains the bargain with regard to deposit of title-deeds would not make it an agreement for the deposit of title-deeds.

13. The covenants which one would normally find in a simple mortgage-deed, i.e. mortgage without possession, are as specified below:

- (1) Principal and interest shall immediately become due and payable on default;
- (2) Against redemption within a specified term;
- (3) Power of sale;
- (4) Appointment of receiver;
- (5) Mortgagor's covenant to insurance;
- (6) Mortgagor's covenant to repair the mortgaged property;
- (7) Covenant against encumbrance.

14. The authority must look at the document itself as it stands and while construing the instrument itself he should consider the important factor whether the instrument in question is merely containing the bargain between the parties with regard to deposit of title-deeds or it contains all the provisions which one would normally find in a mortgage-deed, as specified in Para (A) above, or it also contains conditions and/or recitals such as:

- (a) a condition enabling the lender to sell the property in question on default of payment on agreed date (*Muthis Chetty v. K. Chetty*, 32 MLO 347)

(b) a provision with regard to acceleration of the due date for the payment of mortgage debt; and

(c) an obligation which was undertaken by the mortgagor to pay the mortgage debt earlier than on due date, if he did not carry out any of the conditions mentioned in the document (ILR 1954 Bom. 1074).

(d) such terms as the properties shall remain as continuing security for the amount due to the mortgage; the expenses incurred by the mortgagee to keep the mortgaged premises insured shall be secured upon the mortgaged property; the mortgagor declares that the property belongs absolutely to them; or on default of payment of quarterly interest the entire amount due under the mortgage hereby created shall become due and payable. Chief Controlling Revenue Authority, Board of Revenue, Madras Vs. Jawahar Mills Ltd., Salem, .

15. In the aforesaid view of the matter, I am left with no other option but to hold that the impugned order passed by the Collector, Stamp Duty Valuation Cell, Ahmedabad in exercise of powers under Sec. 39 of the Bombay Stamp Act, 1958 is illegal and deserves to be set aside. In the result, the petition succeeds. The order passed by respondent No. 2 dated 20th August, 2010, Annexure (C) to this petition, is quashed and set aside. Rule made absolute. However, there shall be no order as to costs.