

(2004) 08 BOM CK 0103

In the Bombay High Court

Case No : Writ Petition No. 2161 of 2004

Sanman Trade Impex Pvt. Ltd.

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 23-08-2004

Acts Referred:

Bombay Stamp Act, 1958 — Article 25, 47(5), 48(1)
Bombay Stamp Rules, 1939 — Rule 21

Citation : AIR 2005 Bom 94 : (2004) 4 ALLMR 650 : (2005) 1 BomCR 181 :
(2005) 1 MhLj 1037

Hon'ble Judges : Khandeparkar R.M.S., J

Bench : Single Bench

Advocate : V.N. Kantawala, for the Appellant; K.R. Balosey, A.G.P., for the Respondent

Judgement

Khandeparkar R.M.S., J.—Heard the learned Advocates for the parties. Perused the records. Rule. By consent, the Rule is made returnable forthwith.

2. The petitioner challenges the order dated 4th December, 2003 passed by the Deputy Inspector-General, Registration and Stamps, Mumbai, the respondent No. 2 herein as well as the order dated 28th May, 2004 passed by the Appellate Authority, the respondent No. 3 herein, rejecting the claim for refund of stamp duty, which was preferred by the petitioner in terms of section 48(1) read with section 47(c)(5) of the Bombay Stamp Act, 1958 (hereinafter called as "the said Act"), being contrary to the provisions of law and illegal.

3. Few facts relevant for the decision are that the petitioner company is engaged in the business of imports and exports of various types of chemicals and being desirous of purchasing residential flat from the point of view of having accommodation for company's associates and business clients visiting India from abroad, entered into a transaction recorded in an document dated 27th March, 2003, with M/s. Mansingka Industries Ltd. in relation to a flat situated at a building known as Rambha at Nepean Sea Road, Mumbai. On execution of the

said document dated 27th March, 2003, petitioners paid a sum of Rs. 4,35,00,000/- to the said Mansingka Industries as also the stamp duty of Rs. 34,38,750/- thereon. In terms of the said document, the transferor company had agreed to deliver the physical possession of the flat to the petitioner company after a period of one month from the date of execution of that document. However, on account of refusal to move out on the part of the actual occupant of the said flat, the transferor company could not deliver the possession of the said flat to the petitioner company and consequently the deal failed and, therefore, the parties-the transferor company and petitioner company, executed yet another document on 23rd June, 2003 specifically recording that the document executed on 23rd March, 2003 could not be given effect to as the transferor company did not and could not deliver the possession of the flat on account of obstruction and/or resistance on the part of the person in physical occupation of the said flat. The document dated 27th March, 2003 as well as the latter document dated 23rd June, 2003 were duly registered before registering authorities of respondent No. 1. Consequent to the document of cancellation of the deal in respect of the said flat, the same having failed, petitioner company applied for refund of stamp duty which was paid on the date of execution of document dated 27th March, 2003 and same was filed on 19th July, 2003. Respondent No. 2 who is Competent Authority to deal with the matters relating to refund of stamp duty in terms of provisions of the said Act by his order dated 4th December, 2003 informed the petitioner that consequent to the investigation it was revealed that the amount in question was exceeded Rs. 1 lakh and that the request for refund was outside the scope of the said Act and therefore, the request could not be entertained and accordingly rejected the claim for refund of the stamp duty.

4. Aggrieved by the said order, petitioner" filed an appeal in terms of provisions of the said Act before respondent No. 3 which came to be rejected by an order dated 28th May, 2004 on the ground that the request was out of the purview of the provisions of the said Act.

5. While assailing the impugned order, learned Advocate appearing for the petitioner, drawing my attention to the provisions of law comprised under sections 47 and 48 of the said Act as well as Rule 21 of Bombay Stamp Rules, 1939 (hereinafter called as "the said Rules"), submitted that the transaction for the purchase of the flat having failed, the transaction which was sought to be drawn in terms of document dated 27th March, 2003 also failed and, therefore, the petitioner is entitled for refund of the stamp duty paid on the instrument in relation to such deal. According to the petitioner, the instrument dated 27th March, 2003 has been rendered spoilt as the deal has failed and the possession of the flat could not be delivered for the purpose of completion of sale which was the intention behind the execution of the said instrument and, therefore, the respondents could not have rejected the claim for refund on the ground that the same is out of purview of the provisions of the said Act. He also submitted that, admittedly, amount of stamp duty was paid under the said Act and the claim for

refund was also made under the said Act and in the circumstances, which are contemplated and covered under sections 47 and 48 of the said Act and Rule 21 of the said Rules exists for the purpose of entertaining the claim of refund of the stamp duty. Attention was also drawn to the decisions, one of the Apex Court in the case of *Veena Hasmukh Jain and Another Vs. State of Maharashtra and Others*, and of the Division Bench of this Court in the case of *Kotak Mahindra Finance Ltd. and Another Vs. State of Maharashtra and Others*, .

6. On the other hand, learned A.G.P. appearing for the respondents submitted that the instrument in question was a conveyance in relation to the sale of the flat and was not a mere agreement. The instrument which was covered u/s 48(1) of the said Act is an agreement for sale and not deed of sale. It was further sought to be contended that since the petitioner had paid entire consideration amount, the deal is complete as far as the sale of the flat is concerned and, therefore, it was a sale deed and therefore no fault can be found with the order refusing to grant refund on the ground that it was out of the scope of the said Act.

7. Section 48 deals with the subject of applications for reliefs u/s 47 of the said Act. Sub-section (1) thereof provides that application for relief u/s 47 shall be made within a period of six months from the date of the instrument, when a case falls under Clause (c)(5) of section 47. Proviso to the said sub-section provides that in case of an agreement to sale of immovable property on which stamp duty is paid under Article 25 of Schedule I, is presented for registration under the provisions of Registration Act, 1908 and if the seller refuses to deliver possession of the immovable property which is the subject-matter of such agreement the application may be made within two years of the date of the instrument. In other words in cases where the instrument is covered by Article 25 of the Schedule I of the said Act, the period of limitation prescribed for refund is of two years from the date of the instrument whereas when the instrument happens to be the one referred to under Clause (c)(5) of section 47, and other than the agreement covered by the provisions of the proviso to Article 25 of Schedule I of the said Act the period prescribed is of six months.

8. Section 47 deals with allowance for spoiled stamps. It provides that subject to such rules as may be made by the State Government as to the evidence to be required or the inquiry to be made, the Collector may, on application made within the period prescribed in section 48, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases enumerated under the said section. In cases of stamps used for an instrument executed by any party thereto which by reason of refusal of any person to act under the same or to advance any money intended to be thereby secured, or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose, then such case would be covered under Clause (c)(5) of the said section.

9. Rule 21 of the Bombay Stamp Act, 1958 provides for the procedure in relation to the evidence to be collected by the Collector in cases where a claim for refund

of stamp duty is made. Accordingly, the Collector may require any person claiming a refund under Chapter V of the said Act to make an oral deposition on oath or affirmation, or to file an affidavit, setting forth the circumstances under which the claim has arisen, and may also, if he thinks fit, call for the evidence of witnesses in support of the statement set forth in any such deposition or affidavit. Rule 22-A deals with the matters relating to deduction to be made from the amount of spoiled or misused or unused stamps. It provides that when any person in possession of spoiled stamp u/s 47 and he applies for making allowances in respect of the same, then the Collector may give in lieu thereof or may repay to such person the same value in money of such stamp or stamps or printed forms on stamped papers after deducting rupees ten for each stamp or printed form on stamped paper or an amount equal to two percent of the value of such stamp or such printed form, whichever is more.

10. The term "Spoiled stamps" has not been specifically defined either under the said Act or in the said Rules. However, section 47 sufficiently describes the instances under which the stamps can be said to "have been spoiled for the purpose of claim of refund in relation to such spoiled stamps. Sub-clause (5) of Clause (c) of section 47, as already mentioned above, enumerates the incidence of refusal or failure on the part of the transferor to perform his obligation under the instrument which is transcribed on the stamp paper in relation to the transaction agreed upon. In other words, in case the person agreeing to sell the property executes an instrument in that regard, on acceptance of consideration and after the execution of the instrument in that regard, fails to deliver the possession of the property agreed to be sold certainly the stamp paper on which the instrument is drawn can be considered to have been rendered spoiled which would entitle the party having incurred the expenses towards the purpose of such stamp paper to claim refund in terms of section 47(c)(5) in the manner provided u/s 48(1),

11. Similarly, even in case where an instrument in relation to such an agreement is recorded with the nomenclature of deed of sale and purchase of property but after execution thereof the transferor thereunder is rendered helpless in the matter of giving effect to the sale of the property agreed upon in the sense that he fails to deliver actual possession of the property to the purchaser, certainly in such cases, also it would amount to total failure of intended purpose within the meaning of the said expression under Clause (c)(5) of section 47 unless, the evidence produced before the Collector discloses that the claim for refund is either bogus or is made with sole intention to defraud the Government in relation to revenue or for any other purposes.

12. The expressions "the stamp used for an instrument executed" and "totally fails of the intended purpose" disclose that the "purpose" spoken of in sub-clause (5) of Clause (c) of section 47 of the said Act relates to the utility of the stamps for the matter for which the same was required to be used. Once the transferor fails to comply with the conditions in the agreement for sale and to deliver the

possession of the property, obviously the instrument is rendered ineffective and useless, unless of course, the transferee seeks for specific performance of such agreement. Otherwise, the purpose having failed, the party investing the money for purchase of the stamp in relation to the spoiled stamp papers, would be entitled to claim refund of the stamp duty, albeit, subject to other conditions specified in the said Act and the said Rules.

13. Undoubtedly, Explanation (1) to Article 25 of the Schedule I of the said Act provides that when an agreement to sale an immovable property is accompanied with the delivery of possession of the immovable property, which is the subject-matter of the agreement, would be deemed to be a conveyance of the property and, therefore, would require the payment of the stamp duty accordingly. In other words, even if an instrument is drawn with the nomenclature as agreement for sale but once it discloses delivery of possession of immovable property to the purchaser thereunder, the transaction would partake the nature of conveyance and would be deemed to be a deed of sale and, therefore, would warrant stamp duty payable on a deed of sale in relation to such property.

14. Considering the provisions of law referred to above, the contention on behalf of the respondent that payment of entire consideration price under the deed dated 27th March, 2003 would render the instrument to be a deed of conveyance and not an agreement and, therefore, would not be entitled to claim refund u/s 48(1) read with 47(c)(5) is totally devoid of substance. Clause (c)(5) of section 47 nowhere distinguishes between agreement of sale and the deed of sale. It applies to all instruments irrespective of the fact whether it is a deed of sale or a mere agreement for sale. What it provides is that the instruments should be rendered ineffective and unenforceable in the sense that the purpose for which it was executed should "totally fail". Once the party is able to establish that the purpose for which instrument was executed has totally failed, certainly the case would fall within the parameters of the provisions comprised u/s 47(c)(5) of the said Act. Indeed, this is also clear from plain reading of section 48(1) along with proviso thereof. In fact Clause (1) of section 48 does not distinguish between the sale deed and agreement for sale. Such a differentiation is to be found only under the proviso to the said Clause. Explanation 1 to Article 25 of Schedule I of the said Act nowhere provides that the mere payment of entire consideration amount would transform the agreement for sale into deed of sale. On the contrary it specifically refers to delivery of possession and not the payment therefor. In other words, even under the agreement for sale with part payment of consideration, if the possession of property is delivered, it would warrant stamp duty which is payable in respect of conveyance of such property in view of provisions of law contained in Explanation 1 of Article 25 of Schedule I of the said Act.

15. In any case, as already observed above, it is immaterial whether it is an agreement or deed of sale. It may be relevant only for the purpose of considering period of limitation to claim refund in case of agreement of the notice

covered by proviso to Article 25 of Schedule I of the said Act, the period of limitation would be of two years as per the proviso to section 48. However, it would restrict to period of six months in other cases. Undisputedly in the case in hand claim for refund was made on 19th July, 2003 whereas the instrument in question was drawn and was presented for registration on 27th March, 2003. In other words, claim was made within a period of six months as provided under sub-section (1) of section 48.

16. It is pertinent to note that order dated 4th December, 2003 as well as the order dated 28th May, 2004 speak of claim for refund being outside the scope of the said Act. Neither the order passed by respondent No. 2 nor the one passed by respondent No. 3 discloses as to how the claim for refund is outside the scope of the said Act. It is to be noted that in case of spoiled instrument within the meaning of the said expression u/s 47 of the said Act, it is the matter of right for the parties to claim refund of the stamp duty. Being so, the authorities empowered to deal with such claims and to pass order in relation to such claim, are also necessarily required to pass a reasoned order. The order on the face of it should disclose reason for the rejection of the claim. Merely stating that a claim is outside the scope of the said Act, cannot, under any circumstances be said to be disclosing the reason for rejection of the claim. It was necessary for the authorities to disclose as to how the claim for refund happens to be beyond the scope of the said Act. Learned A.G.P. tried to explain the same by contending that the instrument was a conveyance and not an agreement and, therefore, it did not fall within the provisions of section 48(1) of the said Act. However, as already seen above, arguments in that regard are totally devoid of any substance. No other explanation was sought to be given as to how the authorities found the claim beyond the scope of the said Act. It is really surprising that while collecting stamp duty it was collected under the said Act and when the party approached for refund of the same, the claim was sought to be rejected on the ground that it falls beyond the scope of the said Act. The lower authority having committed such mistake by order dated 4th December, 2003, atleast the Appellate Authority was expected to give proper reason if at all there is any, for rejecting the claim and not to just endorse the totally unsustainable order passed by the lower authority.

17. In the case in hand undoubtedly the instrument dated 27th March, 2003 disclosed the condition relating to delivery of possession of the flat after expiry of one month from the date of execution of instrument. The instrument also disclosed the purpose of purchase of the flat being in the occupation of the customer of the petitioner company. Undoubtedly, the occupant of the flat refused to vacate the same and the transferor company, therefore could not deliver the possession of the flat to the petitioner company. It is not the case of the respondent that the claim for refund is bogus or false or there has been any misrepresentation of facts by the petitioner in relation to the claim for refund. Under these circumstances, the application having been made within the prescribed time, the petitioners are entitled for refund of the stamp duty in

accordance with the provisions of law.

18. As regards the decisions sought to be relied upon by the learned Advocate for the petitioner, it is to be noted that the decision of the Division Bench in the case of Kotak Mahindra Finance (supra) the same was on the point of liability to pay stamp duty and it was not in relation to the refund claim. Undoubtedly, it was held that the transfer of shares in co-operative society does not amount to transfer of merely movable property but amounts to conveyance of immovable property as the same amounts to agreement for sale of immovable property along with the transfer of shares in the society. The decision of the Apex Court in the case of Veena Jain (supra) was also on the point that whether there is specific time for handing over the possession without executing conveyance and in such event, the document would fall within the scope of Explanation 1 of Article 25 of Schedule I to the said Act and, therefore, would attract the duty as if it is a conveyance.

19. For the reasons stated above, the petition succeeds. The impugned orders are hereby quashed and set aside and the respondents are directed to refund the stamp duty in accordance, with the provisions of law, also bearing in mind Rule 22-A of the said Rules within a period of four weeks. Rule is made absolute in the aforesaid terms with no order as to costs.