

(1976) 10 GUJ CK 0005
In the Gujarat High Court
Case No : Stamp Reference No. 2 of 1972

The Chief Controlling Revenue Authority, Ahmedabad	APPELLANT
Vs	
The Nutan Mills Ltd.	RESPONDENT

Date of Decision : 05-10-1976

Acts Referred:

Bombay Stamp Act, 1958 — Section 19, 2(1), 31, 33, 33(1)
Companies Act, 1956 — Section 125

Citation : AIR 1978 Guj 1 : (1977) GLR 409

Hon'ble Judges : Seshareddi Obul Reddi, J;M.P. Thakkar, J;B.K. Mehta, J

Bench : Full Bench

Advocate : J.R. Nanavati and R.M. Desai, of Ambubhai and Divanji, for the Appellant; K.S. Cooper, C.C. Gandhi and A.C. Gandhi, for the Respondent

Judgement

Thakkar, J.—This suo motu reference made by the Chief Controlling Revenue Authority under sub-section . 54 of the Bombay Stamp 7c), 1958 (hereinafter called the "Stamp Act") as applicable to Gujarat" highlights an instance of partial legislative misfire which has resulted in a situation where a document liable to stamp duty having been already acted upon, the revenue is not ~able to collect the duty which ought to have been paid on it or to enforce its payment. This has happened because the loophole which enabled a party to escape from payment of differential stamp duty on account of the different rates of stamp, duty prevailing in the State of Gujarat on one hand and the other States was plugged to an extent by making a provision for charging the duty but the Legislature failed to carry out its object completely inasmuch as it failed to make a provision in respect of collection of such duty if the document was already acted upon.

2. The history of the matter culminating in the present reference requires to be stat6d briefly. The Nutan Mills Limited (hereinafter referred to as the "Company") is a public limited Company having its registered office at Ahmedabad. A charge in relation to its immovable property situated at Ahmedabad was created in favour of the Bank of Baroda by issuance of debenture. In respect of this

transaction a Debenture Trust Deed was executed between the Company on one hand and the Bank of Baroda at Bombay on the other. The Company approached the competent authority at Bombay for adjudication with regard to the proper stamp duty payable thereon in accordance with the Stamp Act applicable to the State of Maharashtra. In accordance with the adjudication stamp of Rs. 67,516.50 was affixed on the document in question. Now, even though the properties on which the charge was created are situated at Ahmedabad, it is permissible under the relevant provisions of law to have the Trust Deed registered at Bombay under the Indian Registration Act. But as per the requirement of Section 125 of the Indian Companies Act of 1956 the document by which the charge is created Or evidence or a copy thereof verified in a prescribed manner Is required to be filed with the Registrar of Companies at Ahmedabad for registration under the Provisions of the India Company Act. As the law provides that the COMPANY can produce either the document in-original or a copy thereof, the Company produced & COPY of the original Instrument verified in the prescribed manner before the Registrar of Companies, Gujarat at Ahmedabad. The Registrar of Companies realised that even though the original instrument was executed in Bombay inasmuch as it related to properties situated in Gujarat, the instrument was liable to stamp duty in Gujarat for the amount representing the duty payable at the Gujarat rate (which was higher) and the duty payable as per the Maharashtra rate having regard to Section 19 of the Stamp Act (sic). It is Common ground that if the original Instrument had been brought to Gujarat, differential duty would have been payable at the aforesaid rate as per Section 19 of the Stamp Act and that the duty would have to be paid within three months after it was received in the State as provided in Section 18 of the Act. But then what was Produced before the Registrar of Companies was not the Original instrument but a verified copy thereof as it was permissible to do so having regard to the provisions contained in Section 125 of the Indian Companies Act. So far as the COPY was concerned. Section 7(1) was attracted and on a copy of the document according to the revenue, duty was payable on the same footing as was Payable on the original when it was received in the State. Now, the copy if it was chargeable with duty u/s 7 read with Section 19 was not admissible in evidence and/or could not have been acted upon or registered by any Public officer unless it was duly stamped. Now the Registrar of Companies before whom the Company Produced the copy of the Debenture Trust Deed was aware of the fact that the copy required to be stamped when it was received in Gujarat. It appears that even so, instead of refusing to act upon it the Registrar of Companies registered the charge in the relevant registers maintained by him. He, however, sent the copy to the Superintendent of Stamps for appropriate action. The Registrar of Stamps addressed a letter to the Company on September 10. 1971 (Annexure "C") and called upon the Company to explain why the document was registered in Bombay though the Properties were situated in Ahmedabad and to explain why the differential stamp duty was not paid up within three months of the receipt of the copy in Gujarat. After taking into account the explanation offered by the Company and hearing the advocate of the

Company, the Collector and Assistant Superintendent of Stamp. Gujarat State, Ahmedabad, by his order, Annexure "Fly, dated January 15, 1972 directed the Company to make good the differential stamp duty of Rs. 67,500/- which represented the difference between stamp duty payable at the Gujarat rate and the duty Payable at the Maharashtra rate as also a sum of Rs. 32,500/- by way of penalty. Thereupon the Company invoked the revisional jurisdiction of the Chief Controlling Revenue Authority (hereinafter referred to as "the Revenue Authority") by way of an application u/s 53 of the Act. The Revenue Authority was of the Opinion that the determination made by the Collector was Proper but, in exercise of the suo motu powers u/s 54(1) of the Stamp Act he made a reference to the High Court and sought the opinion of the High Court on the following two questions :-

"(1) Whether a copy of an instrument Produced u/s 125 of the Companies Act is an Instrument chargeable with duty u/s 7 11) read with Section 19 and Section 2 of the Bombay Stamp Act, 1958?

(2) Whether the Collector & Assistant Supdt. of Stamps was right in impounding the copy of the instrument and ordering levy of duty and penalty under the provisions of Sections 33 and 39 of the Bombay Stamp Act, 1958?"

3. Now, so far as the first question referred to the High Court by the Revenue Authority is concerned, the question posed is in substance regarding the claim of the revenue that even a copy of an instrument creating a charge in regard to the property situated in Gujarat is liable to payment of differential, stamp duty as is payable on the original instrument when it comes to Gujarat having regard to the fact that the duty payable under the Stamp Act applicable to Gujarat is higher than the duty payable under the Act applicable to Maharashtra. Now, it is not in dispute that if the original, instrument by which the charge was created at Bombay in respect of the property situated in Gujarat was received in Gujarat it would have been liable to differential stamp duty at the rate representing the difference between the Gujarat rate and the Maharashtra rate when the instrument is received in Gujarat having regard to Sections 18 and 19 of the Stamp Act. Section 19 in so far as material reads as under:-

"19. Where any instrument of the nature described in any article in Schedule I and relating to any property situate or to any matter or thing done or to be done in this State is executed out of the State and subsequently received in the State,

(a) the amount of duty chargeable on such instrument shall be the amount of duty chargeable under Schedule I on a document of the like description executed this State less the amount of duty, if any already paid under any law in force in India excluding the State of Jammu and Kashmir on such instrument when it was executed;

(b) and in addition to the stamps if any, already affixed thereto such instrument shall be stamped with the stamps necessary for the payment of the duty chargeable on it under Clause (a) of this section, in the same manner and at the

same time and by the same person as though such instrument were an instrument received in this State for the first time at the time when it became chargeable with the higher duty, and

x x x x x x x"

The original instrument creating the charge if it were received in the Gujarat State would attract the differential stamp duty representing the difference between the Gujarat rate and the Maharashtra rate in view of the aforesaid provision. This position is not disputed by the Company for it is incapable of being disputed. In the present case, however, what has been received in Gujarat is a copy of the original instrument by which charge was created. In regard to such a copy it is claimed by the revenue that differential duty is payable even on such a copy even if the original instrument is not received in Gujarat. Reliance is placed in this connection on Section 7 of the Act which is in the following terms-

"7. (1) Notwithstanding anything contained in Section 4 or 6 or any other enactment, unless it is proved that the duty chargeable under this Act has been paid,-

(a) on the principal or original instrument, as the case may be, or

(b) in accordance with the provisions of this section, the duty chargeable on an instrument of sale, mortgage or settlement other than a principal instrument or on a counterpart, duplicate or copy of any instrument shall, if the principal or original instrument would, when received in this State have been chargeable under this Act with a higher rate of duty, be the duty with which the principal or original instrument would have been chargeable under S. 19.

(2) Notwithstanding anything contained in any enactment for the time being in force, no instrument, counterpart, duplicate or copy chargeable with duty under this section shall be received in evidence unless the duty chargeable under this section has been paid thereon:

Provided that any Court before which any such instrument, duplicate or copy is produced may permit the duty chargeable under this section to be paid thereon and may then receive it in evidence."

On a plain reading of sub-section (1) of Section 7 it is clear that even a copy of an instrument is liable to differential duty which would be chargeable in respect of the original instrument u/s 19. It is evident that sub-section (1) of Section 7 is a charging provision in respect of counterparts, duplicates and copies (the reference to counterparts and duplicates is in the context of Sections 4 and 6 of the Act with which we are not concerned in the present case). The expression I copy of any instrument covers a situation like the present where instead of original instrument creating a charge a copy thereof is received. The whole purpose of subsection (1) of Section 7 appears to be to meet a situation like the - present where the law provides for production of either the original instrument or a copy and in order to avoid payment of duty a party instead of producing or

receiving the original instrument might produce or receive a copy thereof. Learned counsel for the Company under the circumstances did not contend that the copy of the original instrument was liable to differential stamp duty, under sub-section (1) of Section 7 if the copy was received in Gujarat. It must be realised that the manifest purpose of Section 19 is to discourage persons from executing documents outside the State of Gujarat in relation to property situated in Gujarat merely because the duty payable in Gujarat is at a rate higher than the duty payable in other States and Section 7 has been enacted for the manifest purpose of achieving the same goal in the context of a counterpart, a duplicate or a copy of an instrument. We have, therefore, no doubt that even a copy of any instrument which is liable to differential stamp duty u/s 19 is liable to such duty in view of sub-section (1) of Section 7. Counsel for the Company, however, contends that though sub-section (1) of Section 7 so provides for payment of duty and can be construed as a charging section, it does not provide as to "when" the duty would become payable. In other words, it is argued that sub-section (1) of S. 7 refers to the chargeability of the copy to differential duty treating it as if the original document was received in the State, the section does not provide for the time of payment of duty or the time at which the liability becomes effective and purposeless. I would be attracted. We are unable to accede to this submission for such a construction would render the provision ineffective and purposeless. In our opinion, sub-section (1) of S. 7 clearly provides that a copy of the instrument will attract a differential duty at the same rate as provided in S. 19 and also at the same point of time when the original would have been liable to such stamp duty viz. "when received in this State". The Legislature has incorporated by reference the same liability in respect of a copy as existed in respect of the original instrument in the context of S. 19 by employing the expression "the duty with which the principal or original instrument would have been charged under S. 19". So also the element as regards the point of time when the liability would arise has been incorporated by employing the expression "original instrument would, when received in this State have been chargeable under this Act.....". It is, therefore, clear that sub-section (1) of S. 7 has enveloped both the concepts viz. as regards the rate at which the duty is payable and with regard to the point of time at which the duty is payable by placing the liability at par with the liability attracted by the original instrument both in regard to the rate as well as in regard to the point of time. And the point of time which is contemplated by S. 19 and S. 7 is the point of time when the original instrument or a copy of the original instrument is received in the State of Gujarat. There is, therefore, no difficulty in answering the first question in the affirmative subject to the clarification that the Revenue Authority has used the expression "instrument" in a loose manner in framing the question for the copy of an instrument would not fall within the description "instrument" as defined by S. 2(1) of the Act. As to whether or not the document will fall within the definition of instrument under S. 2 is another question to which we shall presently address ourselves for though no pointed question in this behalf has in terms been referred to us, incidentally

this aspect would require consideration in the context of the second question which has been referred to us viz. the question as to where the Collector was right in impounding the copy of the instrument and ordering levy of the duty and penalty under the provisions of Ss. 33 and 39 of the Act.

4. The aforesaid question, the second question, referred to us has arisen because the Collector of Custom appears to have impounded the copy of the document which was sent to him by the Registrar of Companies for taking appropriate action. Now, the Registrar of Companies is a public officer who is charged with the duty of discharging his functions under the Companies Act and it is a part of his duty to effect registration under S. 125 in respect of a charge created by a Company. Under S. 125 the Company can produce the original instrument by which the charge is created or a copy thereof verified in the prescribed manner. When however, a copy is produced the Registrar of Companies has to examine and to satisfy himself that the document is duly stamped under the Stamp Act. If in his opinion, the document is duly stamped, he can proceed to effect the registration under S. 125 and the relevant provisions of the Companies Act. If, however, he is of the opinion that the document is not properly stamped as required by the relevant provisions of the Stamp Act, he must refuse to act on it. A public officer can refuse to take cognizance of a document which is not duly stamped in accordance with the required provisions of the Stamp Act. But the questions as to whether he can send it to the Collector and the Collector can impound it. Now, the facts as we find in the case started by the Revenue Authority would go to show that the document in question was impounded by the collector and the Assistant Superintendent of Stamps and not by the Registrar of Companies. We are, therefore, not concerned with the question whether the Registrar could have impounded the document under S. 33 of the Stamp Act. We are faced with the question as to whether the Collector to whom it was sent could have impounded the document upon it being sent to him by the Registrar of Companies for appropriate action. Now, sub-section (1) of S. 33 is in the following terms :-

"33(1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office except an officer of police before whom any instrument chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall if it appears to him that such instrument is not duly stamped, impound the same."

It was argued by the learned counsel for the Company that the copy in question was not produced before the Collector by the Company and therefore, it could not have been impounded by the Collector of Customs. Reliance was placed by the revenue on the expression "or comes in the performance of his functions" in order to contend that the document could have been impounded by the Collector as it had come before him in connection with the discharge of his functions as the Collector under the Stamp Act. This argument has been countered by the counsel of the Company by relying on S. 31 which related to adjudication as to

proper stamps and it has been contended that it is only a document which is brought to the Collector for adjudication by moving the machinery under S. 31 that can be impounded for it is only then that it can be said that the document has come before the Collector in the performance of his functions. It is no doubt true that in the present case the document does not appear to have been brought before the Collector to take appropriate action. Now there is no specific provision under which a public officer can send a document for appropriate action to the Collector. It is in the context of this circumstance that counsel argues that it cannot be said to have come before the Collector in the performance of his function. It is argued that the function must be located in a specific section in the Stamp Act and that unless it is shown that a public officer who was of the opinion that a document produced before him was not properly stamped, could send the document to the Collector for appropriate action and unless the power to determine the question in such circumstances was located in a specific section of the Stamp Act, it cannot be said that the document had come to the Collector in the performance of his function. We are not prepared to uphold the contention urged on behalf of the Company for in our opinion there is no warrant of justification for construing the aforesaid expression in such a narrow fashion. It is not necessary that the function must be in terms spelled out by a particular section. The question must be approached in a broad common sense fashion so that the provision is not rendered ineffective and inoperative except in the context of a proceeding under S. 31. In our opinion, the question which must be posed is, is it the business of the Collector and Assistant Superintendent of Stamps to ascertain and determine the proper stamp due payable on a , document or is it a matter with which he has no concern? Is it or is not a part of his official duty to determine what is the appropriate stamp duty payable on a document? In other words, when the Collector is required to determine the question, is he being called upon to do something which he has no business to do in the performance of his duties under the Act? We are not prepared to say that it is not the business or function of the Collector under the-Act to determine what is the proper duty payable on a document under the Stamp Act. In fact that is the principal function of the Collector under the Act. Whether the Collector is called upon to decide the question as regards the proper stamp duty payable on a document in the course of a proceeding under S. 31 or whether he is called upon to do so otherwise than under S. 31. as the Collector is empowered to determine this question, it must be said that the document has come to him in the Performance of his functions. The question whether or not it is his function does not. depend on whether he has approached through the channel of S. 31 or otherwise. Section 31 is only one of the modes of bringing the document to him. It cannot be said that that is the only way in which the document can be brought to him. Inasmuch as it is his function to determine this question, it cannot be said that merely because the document has not come to him by way of a Proceeding under S. 31, it is not his; function to determine the question as to whether or not the document properly stamped. In this view 5 the matter we are of the opinion that the document had come to the Collector in the course of the

performance of his duties. But then the next question which arises is as to whether he could impound the document under S. 39 and when he can require the payment of deficit duty and impose a penalty under S. 39 of the Stamp Act. For this purpose S. 39 in so far as it is material requires to be examined. It reads as follows:-

"39. (1) When the Collector impounds any instrument under S. 33, Or receives any instrument sent to him under sub-section (2) of S. 37, not being an instrument chargeable with a duty of twenty naye paise, or less, he shall adopt the following procedure:-

xx xx xx

(b) if he is of opinion that such instrument is chargeable with duty and is not duly stamped, he shall require the Payment of proper duty or the amount required to make up the same, together with a -penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of Eve rupees:

xx xx xx

> The expression employed by S. 39 is "instrument". Now, S. 2(1) of the Stamp, Act which defines "instrument" is in the following terms--

"2(1) "instrument" includes every document by which any right or liability is, or purports to be, created. transferred. limited, extended, extinguished or recorded but does not include a bill of exchange, cheque, promissory not, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and receipt;"

At this - point of time it must be recalled that we have already record ed a finding to the effect that a copy of a document creating a charge is also liable to stamp duty under S. 7 read with S. 19 of the Stamp Act. The question which now arises is as to whether a copy of such an instrument can itself fall within the four walls of the expression "instrument" within the meaning of S. 39 read with S. 2(1) of the Stamp Act. If it answers the description of an instrument under S. 2(1), then the Collector can recover the deficit stamp duty and also impose penalty under S. 39. It must be realised that this question has arisen in the context of a penal provision and, there fore, the question requires to be examined closely and carefully. The expression "instrument" is an inclusive one and takes within its sweep every document by which any right or liability is created or purported to be created or recorded. Now, it cannot be said that the copy of the original instrument creates a right or a liability. The right or the liability, as the case may be, is created by the original instrument which is executed and registered at Bombay on payment of appropriate stamp duty payable in Maharashtra. It is that document which creates the right or the liability in respect of the charge on the immovable properties at Ahmedabad. The

document with which we are concerned is a copy of this instrument. Now a copy of an instrument can also fall within the description of a "document". But then it is not the copy of the original instrument is a document which by itself creates any right or liability. The right or the liability as the case may be, is created by the original instrument and not by its copy. So also it cannot be said that the copy purports to create a right or a liability. The expression "instrument" in S. 2(1) refers to a document which itself creates a right or liability or purports to create a right or liability. It cannot refer to a copy of any such instrument. If the document creates or purports to, create a right or liability, it would fall under the description of an "instrument" but the copy of such a document cannot fall within the description of "instrument" for it is the copy which creates or to create a right but the original which creates or purports to - create a right. The expression "instrument" as used in S. 7 draws a clear distinction between the original instrument and a copy thereof. We need not reproduce the section at this stage for it has been quoted in the earlier portion of the judgment. Suffice it to say that Ss. 7(1) & 7(2) in terms draw a distinction between the original instrument which attracts the differential duty on one hand and a copy of such an instrument liable to stamp duty. S. 7 itself, therefore, recognises the clear distinction between an instrument and its copy and under the circumstances it is not possible to hold that the instrument which creates a charge as also its copy both would fall within the amplitude of the expression "instrument" particularly so when the expression "instrument" has been employed in the context of a provision under which penalty can be imposed. And if the copy of the original Instrument cannot be said to be instrument within the meaning of S. 39 read with S. 2(1) of the Stamp Act, the question posed by the Revenue authority viz. whether the Collector can impound a document and order the levy of duty and penalty must be answered against the Revenue Authority. The result would be that though differential duty is payable under S. 7 read with S. 19 of the Stamp Act in respect of a copy of an instrument creating a charge, the copy cannot be possible to hold that the copy of impounded and neither the duty nor original instrument is a document the penalty can be levied, for the which by itself creates any right or counsel for the revenue is unable to liability. The right or the liability point out any provision under which as the case may be, is created by the duty or Penalty can be recovered if original instrument and not by its the copy cannot be said to be instrument copy. So also it cannot be said that within the meaning of S. 39. the copy purports to create a right or By some mischance it appears to have a liability. The expression "instrument" escaped the attention of the come in S. 2(1) refers to a document which itself creates a right or amendments in Ss. 2, 7(2), 33, 34 liability or purports to create a right and 39 when the Legislature enacted or liability. It cannot refer to a S. 7(1) in order to meet a situation where parties would be encouraged to execute documents outside the State if it was permissible to do so in view of the higher rate of duty obtaining in the State in respect of such documents. The result will no doubt be unfortunate for by imposing a higher rate of duty even the duty which would have been recovered at the rate obtaining in the other states would be lost to the State. But then the

remedy lies in amending Ss. 2, 7(2), 33 and 39. In the absence of a clear provision empowering the competent authority to impound such a copy and empowering the competent authority to collect the deficit duty and to impose the penalty there on, resource cannot be made to Ss. 33 and 39. It gives us no pleasure to hold that while duty is payable, it cannot be recovered under any provision in the Stamp Act, we cannot do anything in the matter on our part, unfortunate as the result might appear to us to be. That is why we have said that it is a case of a partial legislative misfire. It is for the competent authority to take appropriate measures to remedy the situation with retrospective effect in so far as it can be legally and legitimately done if it so desires. Of course merely because the duty though payable under the Act is not recoverable under the machinery of the Act it need not deter the Company from paying it. And if the Company does so, it need not feel ashamed of it for it will only be showing its awareness of its national duty to pay the legitimate taxes (which might in any case have had to be paid if the Registrar of Companies was vigilant and had declined to act on the unstamped copy), and awareness of its obligation to listen to the counsel of its ethical conscience rather than to the counsel of its legalistic conscience. On our part, we have no option but to answer question No.2 in the negative.

Q.1 Whether a copy of an instrument produced under S. 125 of the Companies Act is an Instrument chargeable with duty under S. 7(1) read with S. 19 and S. 2 of Bombay Stamp Act 1958?

Ans. In the affirmative with the clarification that whilst a copy of the original instrument cannot be called an "instrument" within the meaning of the Act, such a copy would be liable to stamp duty under s. 7(1) read with S. 19 of the Act.

Q.2 Whether the Collector & Assistant Supdt. of Stamps was right in impounding the copy of the instrument and ordering levy of duty and penalty under the provisions of Ss. 33 and 39 of the Bombay Stamp Act, 1958?

Ans. In the negative.

5. In the result, the question referred to us are answered as under :-

6. Reference answered accordingly. Parties will bear their own- costs.

7. Mr. Gandhi for the Company has made an oral application for certificate of fitness to appeal to the Supreme Court under Art. 133(I) of the Constitution. We are unable to certify that any substantial question of law of general importance which, in our opinion, requires to be decided by the Supreme Court arises in this case. Certificate is refused. We would also like to point out that question No. 2 which really matters from the point of view of the opponent Company has in fact been answered in favour of the opponent Company.

8. Reference answered accordingly.