(2017) 08 CAL CK 0037

In the Calcutta High Court

Case No : 2473 of 2016

The State of West Bengal and Anr. APPELLANT

Vs

Subrata Saha RESPONDENT

Date of Decision : 01-08-2017

Acts Referred:

Registration Act, 1908, Section 91, Section 78 - Fees to be fixed by State Government
Stamp Act, 1899, Section 9(1)(a) - Power to reduce, remit or comp

Citation : (2017) 08 CAL CK 0037

Hon'ble Judges : Nishita Mhatre, Tapabrata Chakraborty

Bench : DIVISION BENCH

Advocate : Abhratosh Majumder,?Ayan Banerjee, Taley Masood Siddique,? Debajyoti Basu, Suvadip Bhattacharya

Final Decision : Disposed off

Judgement

1. Writ petitions were preferred by the apartment owners of a housing complex, namely, Sisir Kunja situated at Madhyamgram, district - North 24 Parganas (hereinafter referred to as the said property) claiming remission of stamp duty and registration fees in terms of a notification dated 23rd March, 2012 issued by the Secretary to the Government of West Bengal, Finance Department (Revenue) in exercise of the power conferred under Section 9(1)(a) of the Indian Stamp Act, 1899 and Section 78 of the Registration Act, 1908 contending, inter alia, that they purchased their respective apartments by registered deeds of conveyance executed by the vendor, namely, West Bengal Housing Board (hereinafter referred to as the Board) and that as the Board is a statutory authority under the State Government and has transferred the apartments in question upon receiving the consideration amount, the respective deeds of conveyance come within the purview of the said notification.

2. The learned Single Judge by a composite order dated 10th February, 2016 upheld the contention of the writ petitioners and directed the State and its

agencies to forthwith ensure that the benefits under the said notification are made available to each set of the writ petitioners in respect of the deeds of conveyance. Upon consideration of an indenture dated 2nd August, 2005, a development agreement dated 15th February, 2006 and a deed of conveyance dated 20th April, 2013, the learned Single Judge observed that "since it is the Housing Board which has sold the flats and the proportionate areas of land to the several sets of petitioners herein and the Housing Board is, unquestionably, an authority under the State government or an undertaking of the State government, the benefit of payment of reduced stamp duty under the notification of March 23, 2012 has to be extended to all the petitioners without exception".

3. Mr. Majumder, the learned Additional Advocate General appearing for the appellants submits that the Single Judge ought to have ascertained the true nature of the transactions upon ensuring the presence of the Board. Not a single penny was paid to the Board as consideration money for the said sale and as such the purchase made by the writ petitioners cannot come within the purview of the notification dated 23rd March, 2012. From the transactions, not a single farthing was earned by the Board or the State. There was no conferment of ownership upon the Board and it did not acquire any title over the said property and in such circumstances the learned Single Judge ought to have applied the doctrine of lifting the corporate veil. In support of such contention, reliance has been placed upon the judgment delivered in the case of Vodafone International Holdings B.V. -vs- Union of India & Anr ., reported in (2012) 6 SCC 613.

4. Drawing the attention of this Court to the indenture dated 2nd August, 2005 executed by the Sale Committee appointed by the Kolkata Debts Recovery Tribunal in favour of the Board in which Appu Estates Private Limited (hereinafter referred to as Appu) and Sri Tuhin Kanti Ghosh were confirming party nos.1 and 2 respectively, he argues that the learned Single Judge failed to look into the matter from a practical perspective and to ascertain the actual nature of the sale by which Appu purchased 762 cottas of land in the name of the Board. Appu appointed the Board as its nominee for acquiring the land in question. Such right to acquire as a nominee did not confer any ownership upon the Board.

5. He further argues that a composite reading of the indenture dated 2nd August, 2005, the development agreement dated 15th February, 2006 entered into by the Board with Bengal Shelter Housing Developing Limited (hereinafter referred to as Bengal Shelter) and the deed of conveyance dated 20th April, 2013 executed by the Board in favour of the respective writ petitioners in which Bengal Shelter was a confirming party, would reveal that the land in question was purchased by Late Tushar Kanti Ghosh & others by various deeds of conveyance. The said purchasers (Tushar Kanti Ghosh & others) constituted companies, namely, Amrita Bazar Patrika Limited, Jugantar Limited and Allahabad Patrika Private Limited (hereinafter referred to as the said companies). The said companies obtained loan from different banks against security of mortgage by deposit of title deeds of the said property. As the loan could not be

repaid, the bank, namely, United Bank of India filed a Title Suit No.511 of 1990 against Jugantar Limited which was ultimately settled out of Court. The consortium of banks initiated proceedings before Kolkata Debt Recovery Tribunal which was also settled on 8th January, 2004. As per the terms of settlement, a Sales Committee was constituted which published a sale notice and the second highest bidder, namely, Appu tendered the purchase money on behalf of the Board and thereafter a housing scheme was formulated and the Board entered into a development agreement dated 15th February, 2006 with Bengal Shelter Housing Development Limited (hereinafter referred to as Bengal Shelter). Pursuant thereto, the said property was developed by Bengal Shelter for and on behalf of the Board and the deed of conveyance was executed and upon availing the consideration amount, Bengal Shelter issued letters of allotment in favour of the respective purchasers. From the said sequence of facts, it is explicit that the Board was a mere name lender and not the owner.

6. Mr. Basu, learned advocate appearing for some of the writ petitioners submits that the writ petitioners purchased their respective flats from the Board on the rudiments of valid deeds of conveyance and as the Board is an instrumentality of the State, the petitioners acquired a legal right to avail benefits of remission in terms of the said notification. Such right cannot be denuded on a purported plea that the transactions are sham and that the Board was not the owner of the said property. The genuineness of the deeds have not been questioned by the Board nor has it raised any objection against incorporation if it''s name in the deed of conveyance as the vendor. In spite of notices being issued, no one appeared on behalf of the said Board at the time of hearing of the writ petitions.

7. Placing reliance upon the downloaded documents from the website of Bengal Shelter, Mr. Basu submits that the Board is the 50% share holder of Bengal Shelter. Assuming that the consideration money towards sale of apartments had been received by Bengal Shelter, the profit pertaining to such transactions had been equally enjoyed by the Board. The Board had been a backdoor beneficiary and as such the argument of Mr. Majumder to the effect that the Board was merely a name lender is not sustainable.

8. He further submits in terms of Section 91 of the Indian Evidence Act, once the terms of contract have been reduced to the form of a document, no evidence is required to be given in proof of the terms of the contract and as such the State is estopped from raising a plea that the Board was not the owner of the property in respect of which the deeds of conveyance have been executed.

9. Mr. Basu further argues that when the validity of the deeds of conveyance have not been disputed, it cannot be urged that there was no privity of contract between the writ petitioners and the Board. Such a plea is unintelligible as the Board in this case has executed the deeds of conveyance stating that it is the owner of the property. The writ petitioners accepted the covenants of the said deeds and paid the consideration money as also stamp and registration charges, etc. There is therefore no substance in the contention relating to privity of

contract. In support of such contention reliance has been placed upon the judgment delivered in the case of B. Himantharaju Setty -vs- Corporation of the City of Bangalore, reported in AIR 1954 Mysore 145.

10. Mr. Basu further argues that the State cannot challenge its own policy decision. The Board being an instrumentality of the State had sold the property and as such the writ petitioners are entitled to the benefits in terms of the notification. The doctrine of lifting of corporate veil is not applicable to the facts of the case since it is not a case of evasion of tax and as such, the judgment in Vodafone (supra) has no manner of application.

11. Adopting the submissions of Mr. Basu, Mr. Mukherjee, learned advocate appearing for another set of writ petitioners adds that the argument advanced on behalf of the State to the effect that the transactions were circuitous and designed to evade tax is absolutely untenable. The deed of conveyance was executed by the Board as vendor. The genuineness of the said deed has not been disputed and as such in terms of the said notification, State cannot deny the benefits.

12. Drawing the attention of this Court to the provisions of Sections 2(6A), 2(12A), 3, 5, 15 & 27(A) of the West Bengal Housing Board Act, 1972 (hereinafter referred to as the said Act of 1972), Mr. Mukherjee submits that Bengal Shelter is a joint sector company in which the Board has 50% share. The Chairman of the Board is the Minister-In-Charge of the Housing Department, Government of West Bengal and majority of the members of the said Board are appointed by the State Government and as such the Board clearly comes under the purview of Article 12 and now State cannot take a stand that the notification is not applicable in respect of a transaction executed by the Board moreso when the contract entered into by the Board, involving an expenditure of more than a crore, must have obtained previous sanction of the State and the housing scheme must have availed prior approval of the State in terms of section 15 and section 27A of the said Act of 1972, the principles of estoppel become squarely applicable to the facts of the case and the State cannot change its stand. In support of such argument reliance has been placed upon the judgment delivered in the case of West Bengal Housing Board Etc. -vs- Brijendra Prasad Gupta & Ors., reported in (1997)6 SCC 207.

13. In reply, Mr. Majumdar submits that the fact that Bengal Shelter is a joint sector company and that Board is 50% shareholder of Bengal Shelter does not improve the case of the writ petitioners in any manner in as much as action of a joint sector company is not covered under the said notification. Stamp duty is a revenue earned by the State and the State cannot be deprived of such revenue since the name of the Board appears as the vendor.

14. We have given our thoughtful consideration to the arguments advanced by the learned advocates appearing on either side and have gone through the materials placed before us and considered the contents of the indenture dated

2nd August, 2005, the development agreement dated 15th February, 2006 and the deed of conveyance dated 20th April, 2013, the relevant clauses of which we propose to quote hereunder in order to appreciate the question raised.

15. Clauses 20 and 29 of the indenture dated 2nd August, 2005 run as follows :

Clause 20 - Under the compromise and the Terms of Settlement filed on 8th January, 2004, before the Kolkata Debts Recovery Tribunal No.1, Kolkata, it was, inter alia, agreed and decided that the mortgaged assets, including the said property would be sold and the settled amount of the debt due and owing to the said Banks, as accepted under the compromise, would be paid up or distributed out of the said proceeds.

Clause 29 - In a resolution of the Board of Directors passed on 22nd June, 2005, Appu Estates Pvt. Ltd. the Confirming Party No.1 duly appointed and/or nominated West Bengal Housing Board,...... as its nominee for acquiring an area of 743 Cottahs........ at or for a consideration of Rs.9,02,49,800/- (Rupees nine crore two lacs forty nine thousand and eight hundred only) being the proportionate price of the land and the Sale Committee accepted the nomination of the purchaser as the nominee of the Confirming Party No.1 for acquiring the said land........ It is recorded that the consideration money of Rs.9,02,49,800/- (Rupees nine crore two lacs forty nine thousand and eight hundred only) paid by the Confirming Party No.1 herein to the Vendor is payment of consideration money paid by or on behalf of the Purchaser herein.

16. Clauses E, F, G, I, J, K, L, M, N of the development agreement dated 15th February, 2006 run as follows :

Clause E - Pursuant to the said order dated 11.02.2004 passed by the Presiding Officer of the Kolkata Debts Recovery Tribunal No.1, Kolkata, a Sale Committee was formed headed by Mr. K. P. Mishra (who was the receiver over the said properties) comprising representative of the 5 members Banks of the Consortium and representative of the Management of Amrita Bazar Patrika Limited and its legal heirs for the effective compliance of the Order.

Clause F - In response to the above, Sale Notice issued by the said Sale Committee was published in different leading Newspapers in different versions, inviting officers from public to purchase the said property on as is where is basis.

Clause G - In response to the said Sale Notice, one Appu Estates Pvt. Ltd. made the effective highest offer of the said property against a sum of Rs.9,11,00,000/- (Rupees Nine Crores Eleven Lacs only), which was accepted by the D.R.T.

Clause I - That due to unavoidable reasons the said Appu Estates Pvt. Ltd. decided not to retain the land and on being approached by M/S. Bengal Shelter Housing Development Ltd., the Second party herein, agreed to assign by the way of nomination their rights for the land is mentioned in the schedule hereunder.

Clause J - That the Second Party herein have paid a sum of Rs.9,02,49,800/-

(Rupees Nine Crore Two Lacs Forty Nine Thousand Eight Hundred only) to the said Receiver and Chairman of the Assets Sale Committee through Appu Estate in following manner ....

Clause K - That on receipts of the full and final payment by the Second Party and as per the request by the Second Party and Appu Estates Pvt. Ltd. duly requested the Receiver to execute the Deed of Conveyance in Govt. of West Bengal Housing Board,...... as its nominee for acquiring an area of 743 Cottahs (but on physical verification and actual survey and measurement the same was found to be 762 Cottahs more or less by the Purchaser) hereinafter referred to as the "SAID LAND" and more particular described in the FIRST SCHEDULE hereunder written and the Sale Committee accepted the nomination of the said purchaser.

Clause L - That the Second Party has taken the possession of the said place of land and retained the same for and on behalf of the First Party herein on 21.06.2005 onwards.

Clause M - Sri K. P. Mishra, Receiver & Chairman of the Sale Committee being duly authorised by the Sale Committee to sign all Deed of conveyance in favour of the Purchaser, the West Bengal Housing Board, in terms of the Order dated 11.02.2004 passed by the Learned Presiding Officer, Kolkata Debts Recovery Tribunal No.1 have executed the Deed of Conveyance for the land measuring 762 Cottahs described in the schedule written hereunder, where the Appu Estates Pvt. Ltd. and for and on behalf of the previous Owners, Sri T. K. Ghosh have joined as the Confirming Parties in favour of the First Party which was duly registered .... on payment of requisite fees, charges by the Second Party herein and thus the sale have reached its finality.

Clause N - That the Second Party viz. Bengal Shelter Housing Development Limited had made a joint declaration in a non-judicial stamp paper with M/S Appu Estates Pvt. Ltd. regarding the modalities of transfer of ownership of the land mentioned hereinabove in favour of West Bengal housing Board.

17. Clauses 4.4 and 4.6 of deed of conveyance dated 20th April, 2013 run as follows :

Clause 4.4 - That on receipt of the full and final payment by Bengal Shelter Housing Development Ltd. on behalf of the Board and decided to have executed and registered the Deed of Conveyance of the property in favour of The Board, which admits and acknowledges by the BOARD, which has been duly registered and recorded being No.1-04932 dated 02-08-2005 measuring about 12.57(762 Cottah) acres more or less, in the office of the Addl. Registrar of the FIRST SCHEDULE and the land has duly been mutated in the name of the Board from B.L. & L.R.O. The residential complex of the project has been built up with an area of 10.186 Acres more or less out of 12.57 acres, which is mentioned in the FIRST SCHEDULE.

Clause 4.6 - The Board entered into a development agreement dated 15-02-2006 for the development of the property to a Residential Complex (namely "SISIRKUNJA") and appointed the Company as its Developer and or agent for the development and construction of the complex on the land and it was agreed that the Company will develop the land and enter into contracts on behalf of the Board with prospective allottees/purchasers for sale of units in the complex.

18. The crux of the dispute is thus as to whether the Board received any consideration money for the sale and as to whether it did acquire any title over the said property and assuming that the consideration money towards sale of apartments had been received by Bengal Shelter, whether the profit pertaining to such transactions had been equally enjoyed by the Board with Bengal Shelter.

19. The object of the Indian Stamp Act is to collect proper stamp duty on an instrument or conveyance on which such duty is payable. This is to protect the State revenue. Stamp duty is a revenue earned by the State. The contents of the notification dated 23rd March, 2012 granting remission of stamp duty are to be strictly construed and the same can neither be tinkered with nor diluted. There cannot be any addition or subtraction from the contents of the said notification.

20. From the contents of the indenture dated 2nd August, 2005, it appears that Board acted as a nominee of Appu to acquire the said property and that the genesis of the transactions was a settlement arrived into by the parties to repay the debt of the bank and to obliterate the shackles of mortgage upon the said property and to develop the same upon formulation of a scheme framed under the Act of 1972. No document could be produced to establish that money was paid by the writ petitioners to the Board at the time of execution of deed of conveyance. Rather upon final payment, the allotment letter was issued by Bengal Shelter.

21. The State says that there was no conferment of ownership upon the Board and the Board did receive any consideration money for the sale and did not acquire any title over the said property whereas the writ petitioners being the respondents contend that they purchased their respective flats from the Board on the rudiments of valid deeds of conveyance and as the Board is an instrumentality of the State, the writ petitioners acquired a legal right to avail benefits of remission in terms of the said notification. They further contend that the genuineness of the deeds have not been questioned by the Board and that the Board is also 50% shareholder of Bengal Shelter. Such controversies among the warring litigants demanded a categoric finding as to whether the consideration money for the sale was shared by the Board and Bengal Shelter in any proportion and as to whether the rigors of ownership and the consequential rights were vested upon the said Board through the transactions.

22. Records reveal that the writ petitions being WP 331 of 2014 and WP 334 of 2014 were filed on 7th April, 2014 and on 8th April, 2014 respectively. The writ petitions being WP 341 of 2014 and WP 342 of 2014 were filed on 11th April,

2014. In the writ petitions being WP No.331 of 2014 and WP 334 of 2014, Board was served on 8th April, 2014 and 17th April, 2014 respectively. In writ petitions being WP No.341 of 2014 and WP No.342 of 2014, the Board was served on 17th April, 2014. All the said writ petitions which were filed in the Original Side were released on personal ground by Datta J. on 25th April, 2014. Thereafter the same appeared before Pal, J. and direction for exchanging affidavits was passed on 13th May, 2014. On 11th September, 2015, the matters were, however, released by Pal, J. The records do not reveal as to whether fresh service was effected upon the Board after the matters were released by Datta, J. and by Pal, J. The matters thereafter appeared before Banerjee, J. on 1st October, 2015 when none appeared on behalf of the writ petitioners and thereafter on 11th December, 2015 a writ petition involving the identical issue and filed in the Appellate Side being WP 21557 (W) of 2014 was directed to appear along with the other writ petitions. The writ petition being WP 21557 (W) of 2014 was filed in the Appellate Side on 24th July, 2014. The Board and Bengal Shelter were served on 24th July and 25th July, 2014 respectively. Thereafter, direction for exchanging affidavits was passed but by an order dated 6th July, 2015 the matter was released by Datta, J. Thereafter, the said writ petition was dismissed for default on 16th July, 2015 and a restoration application being CAN 7904 of 2015 was filed on 7th August, 2015. The affidavit of service filed in connection with CAN 7904 of 2015 does not reveal that service of the said restoration application was effected upon the Board and Bengal Shelter. However, the restoration application was allowed by an order dated 18th September, 2015 and the said writ petition along with the writ petitions filed in the Original Side were thereafter finally heard on 5th February, 2016 and disposed of by a common judgment delivered on 10th February, 2016. From such sequence it appears that service upon the Board and Bengal Shelter was not satisfactory.

23. A writ petition is required to be disposed of on the basis of "affidavit evidence" [See the judgment delivered in the case of Barium Chemicals Ltd. and another -vs- Company Law Board and Others, reported in AIR 1967 SC 295]. The Board and Bengal Shelter were not represented before the learned Single Judge and no affidavit was filed on their behalf. As a general rule, lack of proper adjudication in the presence of all the parties by the trial body cannot stand cured when the party absent before the trial body is heard by the appellate body [See the judgment delivered in the case of Institute of Chartered Accountants of India -vs- L.K. Ratna and others, reported in (1986) 4 SCC 537].

24. Though Bengal Shelter was a party in the writ petition being WP 21557 (W) of 2014 filed in the Appellate Side, it was not made a party in the writ petitions filed in the Original Side, whose presence was necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the matter.

25. The decision arrived at becomes vulnerable since the writ petitions were heard in the absence of the Board and Bengal Shelter and a finding was arrived

at that the Board had sold the flats and the proportionate areas of land to the several sets of writ petitioners. The contention of the Board would be relevant in this case as it has been named as the vendor in the conveyance. We cannot presume that it did not receive the consideration or a percentage thereof only on the basis of the arguments advanced on behalf of the State. In our opinion, unless we intervene at this stage, the flaws, if any might earn immunity. At the same time it needs to be borne in mind that such intervention might delay the proceedings and give a litigant undeserved lease of life. In the present case the Board and Bengal Shelter did not appear before us and the learned Single Judge and as such in the event upon remand the Court holds that the respondents are entitled to the benefits of the notification dated 23rd March, 2012, they would be entitled to interest at the rate to be determined by the Court over the payment of reduced stamp duty under the said notification.

26. For the reasons discussed above, we set aside the order dated 5th February, 2016 passed by the learned Single Judge in the writ petitions and remand the writ petitions for hearing afresh without being influenced by the observations made in the present judgment and upon impleading Bengal Shelter in the writ petitions filed in the Original Side.

27. With the above observations and directions all the appeals and the connected applications are disposed of.

There shall, however, be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

