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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11652 OF 2015

M/s.Harbell Hotels Pvt.Ltd and another .. Petitioners
Vs.
Mr.Mirza Nazeer Beg and others .. Respondents

Mr.G.S.Godbole, Senior Advocate i/b Mr.T.D.Deshmukh, for the Petitioners.
Mr.Wadikar i/b Nandu Vishnu Pawar, Advocate for the Respondent No.1.

CORAM : R.G.KETKAR, J.
DATED : 27th NOVEMBER, 2015

P.C. :

. Not on board. At the request of Mr.G.S.Godbole, taken up for admission.

2. Heard Mr.G.S.Godbole, learned Senior Counsel for the petitioners and Mr.Wadikar, learned Counsel for the respondent No.1 -original plaintiff at length. Rule. Mr.Wadikar waives service for respondent No.1. Mr.Godbole states that respondent No.1 is the only contesting respondent. He, therefore, seeks permission to delete respondents No. 2 &3. On the motion made by Mr.Godbole, leave to delete respondents No. 2 & 3 is granted. Amendment shall be carried out forthwith. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, original defendants No.1 & 3 have challenged the judgment and order dated 12/06/2015 passed by the learned Civil Judge, Senior Division, Satara below Exhibit 223 in Special Civil Suit No. 70 of 2010. By that order, the learned trial Judge allowed the application made by the first respondent, hereinafter referred to as the plaintiff and directed him to pay stamp duty of Rs. 25 lacs plus penalty of Rs.250/-in view of the report of the Collector of Stamps vide Exhibit 219 and compliance of order dated 19/05/2015 by the Court. Defendants No. 1 & 3 have also challenged order dated 14/10/2015 below Exhibit 228 by which their application for review of order dated 12/06/2015 was rejected.

4. Mr.Godbole submitted that in pursuance of the order passed by the learned trial Judge, power of attorney was referred to the Assistant District Registrar, Class – I & Collector of Stamps, Statara for determining true market value as also payment of stamp duty and penalty thereon. By order dated 16/05/2015, the Collector of the Stamps held that the market value of the property is Rs. 5 Crores and in view of Articles 48(g), 25(b) (iv-a) of Schedule – I of the Maharashtra Stamp Act (for short 'Act'), stamp duty payable is 5% of Rs.5 Crores, being the market value i.e. Rs. 25 lacs and penalty @ 2% per month as per Section 39 of the Act.

5. Mr.Godbole submitted that power of attorney was

executed on 05/10/2009. Though the Collector of Stamps held that penalty @ 2% per month is payable, till date respondent-plaintiff has not paid the penalty. The penalty @ 2% per month is, therefore, payable from the date of execution of the instrument i.e. 05/10/2009 till the payment. In any case, he submitted that the power of attorney is tendered in evidence in September 2015. The learned trial Judge, therefore, ought to have directed the plaintiff to pay 2% per month penalty from the date of the execution of the power of attorney till September 2015 when the document is tendered in evidence. He further submitted that as per Section 32(4) upon determination, the Collector of Stamps shall require the party liable to pay the duty, to make the payment of the amount required to make up the difference between the amount of duty determined under Sub-Section (4) and the amount of duty already paid by him and shall also require such party to pay in addition a penalty of 2% for every month or part thereof from the date of execution of the instrument on the differential amount of stamp duty and on such payment, the instrument received under Sub-Section (2) or (3) shall be returned to the officer or person referred to therein.

6. On the other hand, Mr.Wadikar submitted that the plaintiff is not disputing that the document is executed on 05/10/2009. The plaintiff is also not disputing that requisite stamp duty payable is Rs. 25 lacs and that he is liable to pay penalty @ 2%

per month from the date of the execution. The only dispute according to Mr.Wadikar is till what period, penalty @ 2% per month is payable. Mr.Wadikar submitted that the Suit is instituted on 05/04/2010 and along with the plaint, power of attorney was annexed. He, therefore, submitted that plaintiff is liable to pay 2% per month penalty from 05/10/2009, being the date of execution of the power of attorney to 05/04/2010, being the date of institution of the Suit. In support of his submission, he relied upon the decision of this Court in the case of *Krishna Sheena Shetty Vs. Suresh Anant Sawant,* **2008(5) Mh.L.J. 117** and in particular, paragraph 10 thereof.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the controversy between the parties is narrowed down only in respect of payment of 2% per month penalty from the date of the execution till what date, namely, whether till the date of payment of penalty or in the alternative, till the date when the instrument is tendered in the evidence as contended by Mr.Godbole or till institution of Suit on 05/04/2010 when the instrument was annexed to the plaint as contended by Mr.Wadikar.

8. Mr.Wadikar submitted that the plaintiff is liable to pay 2% per month penalty from 05/10/2009 till 05/04/2010 as the

document was annexed to the plaint. In paragraph 10 of **Krishna Sheena Shetty** *(supra)*, the learned Single Judge has observed thus :

> 10. Section 34 of the Act, thus, provides a procedure to recover the stamp duty and a penalty at the rate of 2 per cent of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of an instrument which either of the parties to the proceedings seeks to produce in evidence and which is either not duly stamped or insufficiently stamped. Perusal of section 34 of the Act clearly shows that though the date of execution of the instrument is relevant for both, duty and penalty, the duty payable would be at the rate prevailing on the date of execution of the instrument and the penalty would be at the rate prevailing on the date on which the insufficiently stamped instrument is sought to be tendered in evidence. This is logical, because, the duty becomes payable on execution, whereas, the penalty becomes payable when the deficiency in the instrument is sought to be removed or regularised. The use of the words "from the date of execution of such instrument" cannot be construed to mean that the penalty is leviable at the rate prevailing on the date of execution of the instrument. It merely means that the insufficiently stamped instruments executed prior to 1.5.2001 can become admissible in evidence, if penalty at the rate of 2 per cent of the deficient portion is paid from the date of execution of the instrument. Once Clause (a)(ii) of section 34 is substituted with effect from 1.5.2001, the substituted provision would apply for all the insufficiently stamped instruments whether executed prior or after 1.5.2001. The argument of the respondent that section 34 as amended by 2001 Amendment is not applicable to the insufficiently stamped instruments executed prior to 1.5.2001 runs counter to the expressed words used therein. If the intention of the leglislature was to restrict the amended provision to the instruments executed only after 1.5.2001 it would have expressly stated so. In the absence of any such restriction to read words "from the date of execution of such instrument" in the substituted section 34(a)(ii) to apply only to the instruments executed after 1.5.2001,

would mean adding the words to section which is not permissible in law.

9. Perusal of paragraph 10 extracted hereinabove clearly shows that the learned Single Judge observed that perusal of Section 34 clearly shows that though the date of execution of the instrument is relevant for both, duty and penalty, the duty payable would be at the rate prevailing on the date of execution of the instrument and the penalty would be at the rate prevailing on the date on which the insufficiently stamped instrument is sought to be **tendered in evidence**. This is logical, because, the duty becomes payable on execution, whereas, the penalty becomes payable when the deficiency in the instrument is sought to be removed or regularised. The use of the words "from the date of execution of such instrument" cannot be construed to mean that the penalty is leviable at the rate prevailing on the date of execution of the instrument. It merely means that the insufficiently stamped instruments executed prior to 1.5.2001 can become admissible in evidence, if penalty at the rate of 2 per cent of the deficient portion is paid from the date of execution of the instrument.

10. In paragraph 11, it is further observed that the provisions contained in Section 34 of the Act would come into play only when the insufficiently stamped document is produced on record in the proceedings before the Court and is sought to be relied

upon in evidence. Apart from that, it is not in dispute that in the present case, by order dated 24/02/2015, the trial Court impounded power of attorney dated 05/10/2009 and forwarded the same for adjudication to the Collector of Stamps, Satara.

11. Section 33 (1) provides that subject to the provisions of Section 32-A, 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 or any other officer, empowered by law to investigate offences under any law for the time being in force, 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 irrespective whether the instrument is or is not valid in law. Sub-Section (2) thereof provides that for that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed or first executed.

12. Section 34 lays down that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any

such person or by any public officer unless such instrument is duly stamped. Section 32A(4) requires the Collector of the District to determine i) the true market value of the immovable property which is the subject matter of the instrument ii) the proper duty payable thereon. Upon such determination, the Collector of the District shall require the party liable to pay the differential duty and penalty.

13. Mr.Godbole submitted that the plaintiff is liable to pay penalty from the date of execution of the instrument till actual payment is made. In alternate, in any case, the plaintiff is liable to pay penalty when the instrument was tendered in evidence i.e. in September 2015. As against this, Mr.Wadikar submitted that the plaintiff is liable to pay penalty from 05/10/2009 till 05/04/2010 when the document was annexed to the plaint.

14. In view of paragraphs 10 and 11 of **Krishna Sheena Shetty** *(supra)* as also in view of Section 34, it is only when the question of admissibility or otherwise of the instrument is considered by the Court, the question of payment of penalty will arise. It is only when the document is sought to be tendered in evidence and is impounded, the plaintiff is liable to pay the penalty. In the present case, the document was tendered in evidence in September 2015. In view thereof, the plaintiff is liable to pay penalty from 05/10/2009 till September 2015 when the instrument was tendered in evidence.

15. In view thereof, it is not possible to accept the

contention of Mr.Wadikar that document was sought to be tendered in evidence when it was annexed to the plaint instituted on 05/04/2010. Understood thus, in my opinion, penalty @ 2% per month is payable from 05th October 2009 till September 2015. In view thereof, the impugned order deserves to be modified in the following terms.

i) The impugned order dated 12/06/2015 is modified and the plaintiff is directed to pay stamp duty of Rs. 25 lacs plus penalty @ 2% per month from 05th October 2009 till September 2015.

ii) In view of this modification, no further order is necessary on the application below Exhibit 228.

16. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)