IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION (STAMP) NO.775 OF 2015

1. Rajnikant H. Mehta	)
An adult Indian Inhabitant having his office	)
at 44/A, Government Industrial Estate,	)
Opp. Ganesh Hotel & JPCA Lab, Charkop,	)
M. G. Road, Kandivali (W), Bombay-400 067.	)
2. Pankaj L. Dave,	)
An adult Indian Inhabitant, having his office	)
at 44/A, Government Industrial Estate,	)
Opp. Ganesh Hotel & JPCA Lab, Charkop,	)
M. G. Road, Kandivali (W), Bombay-400 067	.. Petitioners.

Versus

1. Parag R. Kotadia,	)
An Adult Hindu, Indian Inhabitant carrying on	)
business in the firm name and style of	)
M/s. Kotadia Builders & Developers,	)
as a proprietor thereof having office at 16,	)
Shri. Krishna Niwas "B" Wing, 2nd Floor,	)
R. T. Road, Vile Parle (W), Bombay-400 056.	)
2. Smt. Yamuna Harishchandra Chamar	)
3. Shri. Dayaram Dharia Bhandari	)
4. Smt. Vatsala Parushram Bhandari	)

5. Shri. Kamalakar Dharta Bhandari,)
All of Bombay, Indian Inhabitants,)
residing at Village Charkop,)
Kandivali (W), Bombay-400 067.)

6. Smt. Rajani Harishchandra Bhandari,)
An adult, Indian Inhabitant, residing at)
Bhandari House, Charkop Kandivali (West),)
Bombay-400 067.)

7. Shri. Bharati Bhalchandra Kamble,)
An adult, Indian Inhabitant, residing at)
Charkop, Kandivali (W), Bombay-400 067.)

8. Shri. Rajesh Chandrakant Zande,)
An adult, Hindu Indian Inhabitant,)
residing at Charkop, Kandivali (W),)
Bombay-400 067.)

9. Shri. Chandrakant Dattaram Zande)
An adult, Hindu, Indian Inhabitant,)
residing at Charkop, Kandivali (W),)
Bombay-400 067 .. Respondents

Mr. Rajiv Narula with Mr. Bhupesh Dhumatkar i/b M/s. Jhangiani Narula & Associates, for the Petitioners.

Mr. S. U. Pandey with Mr. M. S. Pandey, for the Respondent No.1.

CORAM : R.M. SAVANT, J.
DATE : 23rd JANUARY, 2015

ORAL JUDGMENT

1. Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

2. At the outset the learned counsel for the Petitioners seeks deletion of the Respondents No.2 to 9 in the above Petition as according to him they are formal parties in the context of the challenge raised in the above Petition.

3. The writ jurisdiction of this Court is invoked against the orders dated 1st September, 2014 and 6th December, 2014 passed by the Learned Judge of the City Civil Court at Bombay, by which orders the objection of the Petitioners to exhibiting the document Exh.6 from list Exh.4A and the application of the Defendants to impound the document Exh.6 and send it to the Collector of Stamps for adjudication came to be rejected is taken exception to by way of the above Petition.

4. It is not necessary to burden this order with unnecessary details. Suffice it to say that the suit in question being SC Suit No.7160 of 2005 has been filed for specific performance of the agreement dated 27th June, 1995 which is in respect of suit property bearing CTS No.813 admeasuring about 387 sq. meters or thereabouts situated at Village

Kandivali, Taluka Borivali, Bombay. The second relief sought by the Plaintiffs is to direct the Defendants to restore possession of the suit property to the Plaintiffs. It is required to be noted that in the plaint in paragraph 9, it has been pleaded that after the execution of the said agreement dated 27^{th} June, 1995, between the Plaintiffs and Defendants No.1 and 2, the Plaintiff has been in use, occupation and possession of the suit property thereafter there is an averment as regards the payment of consideration.

5. In paragraph 10 of the plaint, it has been averred by the Plaintiff that after the execution of the agreement dated 27^{th} June, 1995, the Plaintiff has been in use, occupation and possession and that the Plaintiff caused to take photograph in respect of the suit property. Thereafter in paragraph 13, it has been averred that the Defendants No.1 and 2 have all of sudden at about 7.00 p.m. on 26^{th} June, 1996 have pulled down and/or broken the board of the Plaintiff and illegally, authorisedly and/or forcefully entered into the suit property. As indicated herein before, the suit has been filed for specific performance and for possession.

6. In the affidavit of evidence filed on behalf of the Plaintiffs, the case appearing in the plaint is sought to be supported, in so far as the

execution of the agreement, the possession being handed over and the fact of the alleged dispossession is concerned.

7. The said document i.e. agreement dated 27th June, 1995 was produced by the Plaintiffs and was marked as an exhibit by the Trial Court by overruling the objection of the Defendants No.1 and 2 to the said document being admitted in evidence on the ground that the said document was not properly stamped. The Defendants No.1 and 2 thereafter filed the instant application Exh.4A seeking the impoundment of the said document and it being sent to the Collector of Stamps in view of the mandate of Section 33 and 34 of the Bombay Stamp Act. The Trial Court i.e. Learned Judge of the City Civil Court has rejected the said application on the ground that the said document is by way of articles of agreement. It was prepared on 27th June, 1995 and by the said document, no right, title or ownership is created in favour of Plaintiff. The Trial Court has further observed that as and when the document for creation of right, title and ownership would come in picture, the same would be chargeable with stamp duty in accordance with the value of the subject matter of the document. The Trial Court further observed that the Plaintiff has not succeeded for getting any such document or conveyance from the Defendant. The Trial Court has lastly observed that in the event a decree of specific performance is passed, then the Defendant can be called upon

to execute the document before the competent authority and it is on the said occasion that the need to pay stamp duty would arise. The Trial Court as indicated above has accordingly rejected the said application by the impugned order dated 06.12.2014.

8. Heard the learned counsel for the parties.

9. The learned counsel appearing on behalf of the Petitioners in support of the Petitioners contention that the document was required to be impounded as it was insufficiently stamped placed reliance on Article 25 and Explanation-I thereof of the Bombay Stamp Act. The learned counsel would contend that since possession is shown to be handed over and since it is the case of the Plaintiff that he was in possession and has been dispossessed, Explanation 1 would come into play. The learned counsel placed reliance on the judgment of the Apex Court reported in (**1995) 5 SCC 725** in the matter of **Veena Hasmukh Jain and another Vs. The State of Maharashtra and others** and the Division Bench judgment of this Court reported in **2006(5) Mh.L.J. 306** in the matter of **Balwantgir Ganpatgir Giri Vs. Manasi Construction and Developers**. The learned counsel would contend that for the purposes of stamp duty the test laid down by the Apex Court is the nature of the transaction and not the document. In the instant case, the document was required to be sent to

the Collector of Stamps as the same is insufficiently stamped having regard to Explanation 1 to Article 25 of the Bombay Stamp Act.

10. Per contra, the learned counsel Mr. S. U. Pandey would seek to support the impugned order and would contend that the Plaintiff is in fact the vendor and it is by way of consideration that the suit property admeasuring 387 sq. meters has been given to the Plaintiff by way of the said agreement dated 27th June, 1995. The learned counsel would therefore contend that there is no warrant to impound the document as there is no obligation of the Plaintiff to pay the stamp duty having regard to the nature of the document.

11. Having heard the learned counsel for the parties, I have considered the rival contentions. Since the reliance of the learned counsel for the Petitioners herein i.e. Defendants No.1 and 2 is on Explanation 1 to Article 25 of the Bombay Stamp Act, it would be apposite to reproduce the said provision. The same is reproduced herein for the sake of ready reference-

> “25. Where any property is transferred to any person-
>
> (a) in consideration, wholly or in part, of any debt due to him; or
>
> (b) subject either certainly or contingently to the payment

> or transfer (to him or any other person) of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money or stock, shall be deemed to be the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with ad volorem duty:
>
> Provided that, nothing in this section shall apply to any such certificate of sale as is mentioned in Article 16 of Schedule I.
>
> Explanation.- Where property is sold and sale is subject to a mortgage or other incumbrance, any unpaid mortgage-money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale, whether or not the purchaser expressly undertakes with the seller to pay the same or indemnify the seller if the seller has to pay the same:"

12. The intent and purpose of incorporating the said Explanation 1 to Article 25 of the Bombay Stamp Act has been exposited in the judgment of the Division Bench. It is not necessary to go into the details of the object introducing the said Explanation. Suffice it to say that the said Explanation was introduced to plug the loop holes so as to see to it that the revenue of the State is not affected. The substance of Explanation 1 is to the effect that if possession is handed over prior to the agreement being executed or after agreement or at the time of the agreement or at the time of the agreement then the document amounts to a conveyance and would be chargeable to the same duty on the basis that it is a conveyance. The said provision was the subject matter of interpretation before the Apex

Court in *Veena Hasmukh Jain's* case *(Supra)*. Paragraph 8 of the judgment of the Apex Court is material and is reproduced herein under.

> "The duty in respect of an agreement covered by the Explanation is leviable as if it is a conveyance. The conditions to be fulfilled are that if there is an agreement to sell immovable property and possession of such property is transferred to the purchaser before the execution or at the time of execution or subsequently without executing any conveyance in respect thereof, such an agreement to sell is deemed to be a "conveyance". In the event a conveyance is executed in pursuance of such agreement subsequently, the stamp duty already paid and recovered on the agreement of sale which is deemed to be a conveyance shall be adjusted towards the total duty leviable on the conveyance. Now, in the present case, the agreement entered into clearly provides for sale of an immovable property and there is also a specific time within which possession has to be delivered. Therefore, the document in question clearly falls within the scope of Explanation I. It is open to the legislature to levy duty on different kinds of agreements at different rates. If the legislature thought that it would be appropriate to collect duty at the stage of the agreement itself if it fulfils certain conditions instead of postponing the collection of such duty till the completion of the transaction by execution of a conveyance deed inasmuch as all substantial conditions of conveyance have already been fulfilled such as by passing of a consideration and delivery of possession of the property and what remained to be done is a mere formality of execution of a sale deed, it would be necessary to collect duty at a later (sic agreement) stage itself though right, title and interest may not have passed as such. Still, by reason of the fact that under the terms of the agreement, there is an intention of sale and possession of the property has also been delivered, it is certainly open to the State to charge such instruments at a particular rate which is akin to a conveyance and that is exactly what has been done in the present case. Therefore, it cannot be said that levy of duty is not upon the instrument but on the transaction. Therefore, we reject the contention raised on behalf of the

appellants in that regard."

13. The Apex Court has held that the legislature by introducing Explanation 1 thought that it would be appropriate to collect duty at the stage of the agreement itself if it fulfils certain conditions instead of postponing the collection of such duty till the completion of the transaction by execution of a conveyance deed inasmuch as all substantial conditions of a conveyance have already been fulfilled such as by passing of consideration and delivery of possession of the property and what remained to be done is a mere formality of execution of a sale deed. The Apex Court held that it is certainly open to the State to charge such instruments at a particular rate which is akin to a conveyance and that is exactly what has been done in the said case. The Apex Court crystallized the proposition of law by observing that the levy of duty is not upon the instrument but on the transaction.

14. In so far as the judgment of the Division Bench of this Court in *Balwantgir Giri's* case *(Supra)* is concerned, the Division Bench also interpreted the said Explanation by holding that on an interpretation of the Explanation the same would require that every agreement which contemplates delivery of possession at any time after the execution of such agreement should be construed as a conveyance and would attract the stamp duty payable on conveyance. Hence, the proposition of law has

been well settled by the judgments of the Apex Court. In *Veena Hasmukh Jain's* case *(Supra)* as well as *Balawantgir Ganpatgir Giri's* case *(Supra)*, namely that if possession has been handed over prior to the agreement or at the time of execution of the agreement or after agreement before the conveyance is executed, then it is exigible to payment of stamp duty akin to a conveyance.

15. The facts of the present case have been mentioned herein above. The suit is for specific performance of the said agreement, where the averment is that the possession is shown to be handed over and it also is for the recovery of possession as it is alleged that forcible possession has been taken over by the Defendants. In my view, having regard to the Explanation 1 of Article 25 and the judgments of the Apex Court as well as this Court, the Trial Court has fallen into an error in holding that there is no need to impound the said document. The impugned order is accordingly required to be quashed and set aside. The Trial Court would impound the document and send it to Collector of Stamp for adjudication. Though the document is marked as Exhibit-6, the same would be construed as only taking the document on record only and marked as an article subject to admissibility and proof, which would hinge upon the outcome of the adjudication before the Collector of Stamps. The order dated 1st November, 2014 is accordingly quashed and set aside and the

Trial Court is directed to impound the document and send it to the Collector of Stamps for adjudication. In so far as the order dated 6th December, 2014 is concerned, the same would also stand set aside to the extent it records that the said document is marked as Exh.-6. It would therefore be construed that the said document is only marked as an article subject to proof and admissibility. It would be contingent upon the orders passed by the Collector of Stamps and compliance thereof by the Petitioner that the document would be admitted in evidence subject to proof. The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute in the aforesaid terms with parties to bear their respective costs.

[R.M. SAVANT, J]