

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 05.01.2015

+ **WP(C) 2907/2013**

SHOBHA SHRESTHA Petitioner

Versus

GOVT. OF NATIONAL CAPITAL TERRITORY
OF DELHI & ORS. Respondents

Advocates who appeared in this case:

For the Petitioner: Mr Atishi Dipankar, Advocate

For the Respondents: Ms Zubeda Begum, Standing Counsel with Ms Sana Ansari,
Advocate.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER,J

1. This is a writ petition directed against order dated 11.02.2013 passed by respondent no.3. The petitioner had approached this court in the previous round, at which stage her grievance was that no adjudication had taken place in respect of the document in issue, i.e., the conveyance deed qua which a substantial sum towards stamp duty, amounting to Rs. 1,43,57,680/-, had been paid; albeit under protest.

1.1 The petitioner thus had sought an adjudication under Section 31 of the Indian Stamp Act, 1899 (in short the Act). This writ petition was numbered as WP(C) 44/2013, and was disposed of on 07.01.2013. By this order a direction was issued to the respondents to adjudicate upon the document in issue and determine the stamp duty to be paid thereon, as expeditiously as possible, though not later than four (4) weeks from the date of the order. A

further direction was given that a copy of the order will be supplied to the petitioner within three (3) days of the same being passed.

2. The record shows that respondent no.3 did pass an order on 11.02.2013, though, after the expiry of the period prescribed by this court. As a matter of fact, the petitioner had to write to the respondent which, she did, vide communication dated 05.02.2013 that she had not been supplied a copy of the order as per the direction of this court contained in order dated 07.01.2013. In this writ petition, accordingly, order dated 11.02.2013 has been assailed.

3. Before I proceed further, I may only indicate the broad facts, which have led to the filing of the instant writ petition.

3.1 The petitioner had embarked on a venture for purchasing an immovable property, situate at 34, Vasant Vihar, New Delhi – 110 057 (hereinafter referred to as the property). The said property was co-owned by six persons and, accordingly, it appears that three agreements to sell had to be executed. These three agreements to sell are dated: 13.08.1988, 22.08.1988 and 24.02.1990.

3.2 The total consideration agreed to amongst the petitioner and the said co-owners was a sum of Rs. 1,33,75,000/-.

3.3 In view of the provisions of law then obtaining, including Section 269(3) of the Income Tax Act, 1961 (in short I.T. Act) and Section 31(1) of the Foreign Exchange Regulation Act, 1973 (in short FERA), due approval was sought of both the Appropriate Authority, under the I.T. Act, and of the Reserve Bank of India (RBI), under FERA. The approval of the concerned authority under FERA had to be sought, since four out of the six co-owners were Non-Resident Indians (NRIs).

3.4 The Appropriate Authority under the I.T. Act gave its approvals vide

three separate orders dated 27.10.1988, 25.11.1988 and 20.04.1990. Similarly, the RBI gave its approval vide order dated 21.09.1989.

3.5 It appears that one of the co-owners, who owned, approximately, 6.25 percentage of the property, refused to execute a sale deed even though on his behalf an agreement to sell had been executed via a power of attorney holder. Consequently, the petitioner was constrained to file civil suits, whereby, specific performance was sought of the aforementioned agreements to sell. These civil suits were instituted in 1996 and, were registered as suit nos.: 471/1996, 472/1996 and 473/1996.

3.6 Evidently, the co-owners who were defendant in the suits arrived at a compromise, and resultantly, a consent decree was passed in the aforementioned suits, on 22.01.2007.

3.7 As a logical corollary to the above events, the co-owners made an application to the Delhi Development Authority (in short DDA) for conversion of the land, on which the said property had been constructed, from leasehold to freehold. This application was filed with the DDA, on 08.03.2007. Along with the application, the requisite fee for conversion in the sum of Rs. 54,45,731/- was deposited by the petitioner.

3.8 There was an enormous delay of nearly five (5) years, in the conversion of the property. Finally, the DDA converted the property to freehold, on 05.03.2012. A conveyance deed of even date, i.e., 05.03.2012 was executed in favour of the six co-owners referred to above.

3.9 The petitioner, wanting an expedition in the matter, on 22.05.2012 wrote to respondent no.3, that he should adjudicate upon the proposed sale deed, which the co-owners were wanting to execute, in her favour, in view of conveyance deed dated 05.03.2012, having been executed in their favour by the DDA.

4. Since, the petitioner, did not receive any response, a reminder was sent vide communication dated 01.08.2012. It appears that the petitioner having reached a point of exasperation wrote to respondent nos. 2 and 3, that since, her application had not been adjudicated upon, she would deposit the stamp duty in the sum of Rs. 1,43,57,680/- as per the attested challan received from their office; albeit under protest.

4.1 Accordingly, the stamp duty was paid by the petitioner. It may also be noted that, consequent thereto, the co-owners executed a sale deed in favour of the petitioner, which is, dated 23.08.2012. The consideration referred to in the said sale deed is a sum of Rs.1,33,75,000/-.

4.2 The petitioner, in the hope, that the respondents would adjudicate upon her application for determination of stamp duty, at least after the execution of sale deed in her favour, wrote to respondent no.3 for the very same purpose, vide communication dated 15.09.2012. This exercise was repeated vide yet another communication dated 22.10.2012.

4.3 Having received no response, as indicated above, the petitioner approached this court by way of a petition under Article 226 of the Constitution. The said writ petition bearing no. 44/2013, was disposed of on 07.01.2013. The impugned order has been passed pursuant to direction issued by this court, on 07.01.2013.

5. Notice in this petition was issued on 06.05.2013, on which date Ms Zubeda Begum, entered appearance on behalf of the respondents. Since then, Ms Zubeda Begum has filed a counter affidavit on behalf of the respondents. Rejoinder thereto, has also been filed on behalf of the petitioner.

5.1 Arguments in the matter have been advanced on behalf of the petitioner by Mr Atishi Dipankar, while on behalf of the respondents,

submissions have been made by Ms Zubeda Begum.

6. Mr Dipankar submitted that the impugned order is flawed for the following reasons:

(i) The respondent no.3, while dealing with an application for adjudication under Section 31 of the Act, has taken recourse to an amendment which is applicable to the National Capital Territory of Delhi; the amendment in issue being the insertion of Section 47A. Section 47A, which was brought on to the statute book on 02.11.2001, requires a particular procedure to be followed, including grant of reasonable opportunity to the effected party of being heard. The provisions of Section 47A can only be triggered if the registering officer, while registering the instrument in issue, whereby an immovable property is sought to be transferred, has *reason to believe* that the value of the property in issue, or the consideration, as the case may be, has not been truly set forth in the instrument in issue. It is only upon formation of such an opinion that the registering officer, may, after registering the instrument, refer the matter to the Collector of Stamps for determination of the value or consideration, as the case may be, to enable levy of proper stamp duty. The determination by the Collector of Stamps requires grant of reasonable opportunity and, an inquiry, to be held in the matter. The petitioner was neither given an opportunity of hearing, nor was an inquiry held, as contemplated under Section 47A of the Act.

(ii) In case the matter was not referred to the Collector of Stamps by the registering office under sub-Section (1) of Section 47A, it was open to him to *suo motu* call for and examine the instrument for the aforesaid purpose; albeit within a period of two (2) years of the registration of the instrument, i.e., the sale deed. The limitation having expired, the Collector would have

no jurisdiction to adjudicate upon the instrument in issue, to determine, factum of, the proper stamp duty to be levied on it.

(iii) In any event, power under Section 47A of the Act is available to the Collector of Stamp, only if, he comes to a conclusion, based on relevant material placed before him, that the property in issue, has been under-valued. The mere fact that the value is less than the market value, is not good enough reason to invoke the power under Section 47A of the Act, unless it can shown that there was wilful under-valuation of the subject property, with a fraudulent intention to evade duty. For this purpose, reliance was placed on two judgements of the Supreme Court. The first judgement is a judgement of a Three-Judge Bench of the Supreme Court, passed in the case of: *V.N. Devadoss vs Chief Revenue Control Officer-cum-Inspector & ors. (2009) 7 SCC 438*. The second judgement is, a Division Bench judgement, passed in the case of *Residents Welfare Association, NOIDA vs State of Uttar Pradesh & Ors. (2009) 14 SCC 716*.

(iv) In determination of the value to be adopted qua the property in issue, the consideration referred to in the aforementioned agreements to sell, will have to be taken into account, as it was the real consideration exchanged between the parties. Though Section 47A of the Act was brought on to the statue book in November, 2001, the relevant rules framed by the Government of NCT of Delhi, called the Delhi Stamp (Prevention of Undervaluation of Instrument) Rules, 2007 (in short 2007 Rules), were notified only on 18.07.2007; albeit after the decree had been passed in the petitioner's suits. In other words, there were no circle rates obtaining either on the dates when the agreements to sell were executed, or on the date when, the decree was passed in the suits instituted by the petitioner, and therefore, respondent no.3 could not have taken recourse to the circle rates notified

thereafter.

(v) The delay in the conversion of the property in issue between 08.03.2007 and 05.03.2012, was clearly attributable to the State (as in the DDA) and, therefore, the petitioner could not be made to suffer on that account. The stamp duty levied is expropriatory, in as much as, the petitioner has paid towards stamp duty, an amount, which is more than the total sale consideration paid for purchase of the property in issue.

7. On the other hand, Ms Zubeda Begum, learned standing counsel for the respondents, made the following broad submissions:

(i) That the petitioner had not challenged the order of adjudication dated 14.08.2012. By getting the sale deed dated 23.08.2012 executed in her favour, the petitioner, in a sense, had acquiesced to the stamp duty being determined in the matter. This order was passed under Section 31 of the Act.

(ii) That Section 31 of the Act was applicable only in respect of those instruments which were not registered, and therefore, by 15.09.2012 (when yet another communication was issued for adjudication, under Section 31 of the Act), the said provision became inapplicable as the sale deed was already executed, i.e., on 23.08.2012.

(iii) Accordingly, that order dated 11.02.2013 was passed by taking recourse to Section 47A of the Act. In passing the said order, the respondent no.3 had relied upon, simply, the circle rates to determine the market value of the property in issue and, in that behalf, not only the provisions of Section 47A of the Act, but also the 2007 Rules were taken into account.

(iv) That respondent no.3 has correctly come to the view that the value of the property, for the purpose of levy of stamp duty, had to be calculated when the instrument in issue was tendered. In this case the sale deed was

executed in favour of the petitioner, on 22.03.2012, after a conveyance deed, was executed in favour of the sellers, i.e., the co-owners, referred to above, by the DDA, on 05.03.2012. Therefore, the applicable date for determination of the value of the property in issue, for the purposes of levy of stamp duty, could be only 22.03.2012. In support of her submission the learned counsel relied upon the following judgements: *Addl. Distt. Sub Registrar, Siliguri vs Pawan Kumar Varma & Ors. AIR 2013 SC 1886*; *State of Rajasthan v. M/s Khandaka Jain Jewellers 2008 AIR (SC) 509*; and *State of MP v. Rambabu Agrawal AIR 2004 (M) 104*.

REASONS

8. I have heard the learned counsels for the parties and perused the record. What emerges from the record is as follows:

- (i) The petitioner, based on the three agreements to sell, referred to above, obtained a decree dated 22.01.2007.
- (ii) The total consideration referred to in the agreements to sell is a sum of Rs. 1,33,75,000/-.
- (iii) The consideration referred to in the agreements to sell received the approval of the appropriate authority under the I.T. Act and of the RBI under FERA, between October 1988 and April 1990; specific dates in that behalf have already been indicated above.
- (iv) The petitioner, applied for conversion of the property in issue (to the DDA), from leasehold to freehold on 08.03.2007, and for this purpose, deposited an amount of Rs. 54,45,731/-, on the said date.
- (v) An application for adjudicating the stamp duty to be paid was made, for the first time, by the petitioner on 22.05.2012.
- (vi) There is no adjudication order dated 14.08.2012 placed on record by the respondents. On being queried, I was informed by Mr Dipankar that

only an attested challan was issued based on which stamp duty was deposited. albeit under protest by the petitioner. Ms Zubeda Begum could not refute this aspect. No document was shown to me by Ms. Zubeda Begum which would establish the stand taken to this effect in the counter affidavit.

(vii) The conversion was allowed and a conveyance deed was executed in favour of the co-owners only on 05.03.2012.

(viii) The petitioner, in turn, got a sale deed executed in her favour on 23.08.2012.

(ix) The order on the petitioner's application for determination of the stamp duty was passed only on 11.02.2013, after she had approached the court by way of a writ petition, which was disposed of on 07.01.2013.

9. In the background of the above, three things are clear. Firstly, when the application dated 22.05.2012 was made, to respondent nos. 2 and 3, for adjudication, that application was preferred under Section 31 of the Act. Secondly, there was no order of adjudication passed, which is why, the petitioner approached this court by way of a writ petition. The direction issued by this court led to passing of the order on petitioner's several applications for adjudication, made in that behalf. Lastly, the impugned order dated 11.02.2013 has, however, been passed by respondent no.3 by taking recourse to Section 47A of the Act.

9.1 Therefore, in these circumstances, the respondents will have to survive or fall by what is adverted to in the impugned order. The counter-affidavit filed on behalf of the respondents cannot portray a stand different from that which is reflected in the impugned order. The validity and/or the legal tenability of an order passed by the statutory authority has to be gauged from the reasons supplied in the order. The order of the statutory authority

cannot be sustained or supplemented by fresh reasons supplied, in the shape of an affidavit. [See *Mohinder Singh Gill & Anr. Vs The Chief Election Commissioner (1978) 3 SCR 372*]

9.2 Even otherwise, I am not in agreement with the submission of Ms Zubeda Begum that Section 31 of the Act had no applicability as it applied only to documents which stood executed. This stand has been taken by the respondents in paragraph 4 of their counter affidavit. A plain reading of Section 31 of the Act would show that it applies to both executed as well as documents, which are not executed. Therefore, this contention, even otherwise, is not sustainable.

10. This brings me to the issue that if, respondent no.3, chose to take recourse to provisions of Section 47A of the Act, could he do so without according reasonable opportunity to the petitioner of being heard in the matter and carrying out a requisite inquiry. This minimum guarantee is accorded to the affected party by the provision itself. Admittedly, the petitioner was given no notice of hearing.

10.1 Respondent no.3, in passing the impugned order, has simply taken recourse to the “prevailing” circle rates notified by respondent no.1, i.e., Govt. of NCT of Delhi.

10.2 As a result, various submissions advanced on behalf of the petitioner in this court, could not be dealt with by respondent no.3, which includes, *inter alia*, the submissions pertaining to limitation as well as with regard to his jurisdiction to take recourse to the circle rates without forming a view that he had *reason to believe* that the value of the property, or the consideration indicated therein, had not been truly set forth in the sale deed. In forming this view, respondent no.3 was required to ascertain not only the fact that the value mentioned in the sale deed was less than the market value,

but also that the petitioner had wilfully under-valued the property, with a fraudulent intention to evade proper stamp duty. [See observations in *V.N. Devadoss* case, made in paragraph 13 at pages 442 and 443, and those, made in the case of *Resident Welfare Association, Noida* in paragraphs 48 to 51 at pages 731-732]

10.3 Respondent no.3 was, in my view, also required to ascertain the relevant date on which the value of the property in issue had to be determined. In other words, could it be the date on which the three agreements to sell were executed or, the date on which the decree in the aforementioned suits was passed or, even the date on which the sale deed was executed in favour of the petitioner. [See observations made in *Resident Welfare Association, Noida* in paragraphs 54 to 56 at pages 732-733].

10.4 None of the above was considered since respondent no.3 chose not to notice the petitioner. Consequently, the impugned order is liable to be set aside and, a *de novo* hearing, would have to be, accordingly, accorded to the petitioner.

11. In so far as Ms Zubeda Begum's submission is concerned, which is that the market value of the property for the purposes of levy of stamp duty has to be calculated on the date when the sale deed was executed, as indicated above, is an exercise, which would follow, logically only upon respondent no.3 coming to a conclusion that provisions of Section 47A of the Act can be triggered, in the present case.

11.1 In so far as the judgement in the case of *State of Rajasthan vs Khandaka Jain Jewellers* is concerned, it would be of some value to note, in this case, that it is a judgement, which was delivered prior to the decision of the Supreme Court in the case of *Resident Welfare Association, Noida*.

The Division Bench of the Supreme Court in ***Resident Welfare Association, Noida***, clearly indicates in paragraph 54 and 55 at page 732, that there can be no straight jacket formula devised for determining the applicable date for evaluating the market value of the subject property for the purposes of levy of stamp duty. The court goes on to state that, much would depend whether the delay in execution of the sale deed after entering into an agreement to sell, was intentional. If it was so, then market value of the subject property will have to be determined, as on the date when the sale deed was executed. On the other hand, if the contrary was proved, then of course, the inverse would follow. The two judgements can thus easily be harmonized.

11.2 In the present case, the facts, as they have emerged from the record, would show that, DDA did not convert the property to freehold for five (5) long years. Whether this factor would go in favour of the petitioner is an aspect which respondent no.3 will have to address. The judgement in the case of ***State of Rajasthan vs Khandaka Jain Jewellers*** did not deal with such like facts. I do not wish to comment any further as these are aspects which the respondent no.3 would have to deal with.

12. In so far as reliance on the judgement of the Supreme Court in the case of ***Addl. Distt. Sub Registrar, Siliguri vs Pawan Kumar Varma*** is concerned, that judgement, in my view, can also be harmonized with the observation made by another Division Bench of the Supreme Court in ***Resident Welfare Association, Noida***. In ***Addl. Distt. Sub Registrar, Siliguri vs Pawan Kumar Varma*** case, the Supreme Court was required to ascertain the legal tenability of the order passed by the Calcutta High Court, whereby the view of Civil Judge, Siliguri had been sustained, which, *inter alia* required the Sub-Registrar, Siliguri to assess the stamp duty payable, as per the valuation adverted to in the suit as against the market value of the

subject property.

12.1 In this context, the Supreme Court observed, based on the provisions of Stamp Act and the Rules framed thereunder, by the State of West Bengal, that the provisions of the Suit Valuation Act, 1887 cannot be employed for the purposes of assessment of stamp duty, and that the registering authority cannot be compelled to follow “invariably”, the value fixed by the court for the purposes of suit valuation. It is in this context, that the court observed that for the purposes of registration the instrument in issue has to be valued in terms of the market value at the time of execution of the document.

12.2 As indicated above, these observations were made by the Supreme Court in given set facts. The said observations, in my view, can easily be reconciled with the observation made by another Division Bench in the case of *Residents Welfare Association, NOIDA*.

12.3 Therefore, for the reasons articulated above, the impugned order dated 11.02.2013, is set aside. The respondent no.3 will accord full opportunity to the petitioner to present her case, and in that behalf, will follow scrupulously the mandate of Section 47A of the Act and the provisions of 2007 Rules. Respondent no.3, will also make, the relevant inquiry, if found necessary, as provided under Section 47A of the Act. Needless to say, the relevant exercise in this behalf will be completed as expeditiously as possible, though not later than twelve (12) weeks from today

13. The writ petition is disposed of with the aforementioned terms leaving parties to bear their own cost.

RAJIV SHAKDHER, J

JANUARY 05, 2015

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