IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.23067 of 2013

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1. Bipin Bihari S/O Mr. Bishwanath Tiwary (Membership No. 305) Resident Of Flat No. 405A, Hope, Narayani Apartment, Vijay Nagar, Rukunpura, Patna-800014

2. Asha Agrawal (Membership No. 304) W/O Late P.N. Agrawal At Present Residing At 202A, Hope Narayani Apartment, Vijay Nagar, Rukunpura, Patna-800014

3. Priti Priya (Membership No. 328) W/O Alok Kumar Flat O. 203A, Hope Narayani Apartment, Vijay Nagar, Rukunpura, Patna- 800014

.... Petitioners

Versus

1. The State of Bihar Through Its Chief Secretary, Govt. of Bihar, Patna.
2. The Inspector General, Registration Department, Government of Bihar, Patna.
3. The District Registrar Cum District Magistrate, District- Patna.
4. The District Sub Registrar, Registration Office, Patna, District- Patna.
5. The Municipal Commissioner, Patna, District- Patna.
6. Sri Rakesh Kumar, Director, M/S Hope Co- Operative Housing Society Limited, Patna Registered Office at 49 Ashiyana Gaalxy, Exhibition Road, Patna.

.... Respondents

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Appearance :

For the Petitioners : Mr. Md. Helal Ahmad, Advocate

For the State : Mr. Rajiv Kumar Singh, GP 2

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CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

ORAL JUDGMENT

Date: 21-06-2016

I have heard the parties and perused the records of this case.

Petitioners seek quashing of the order dated 20.9.2013 issued under the memo no. 4850 by the District Registrar –cum – District Magistrate, Patna (respondent no. 3) by which he has rejected the application of the petitioners for exemption of stamp duty and registration fee in order to register Flat Nos. 405A, 202A and 203A of Hope Narayani Apartment situated at Vijay Nagar, Rukunpura, Patna.

Petitioners claim to be members of M/s Hope Cooperative Housing Society Limited, Patna, which is registered under the Bihar and Orissa Cooperative Society Act and had entered into an agreement with the owner of the land for development, construction of building/apartment dated 24.11.2004 which was duly registered and a copy of which has been appended as Annexure 6 with the supplementary affidavit filed by the petitioners. As per the agreement, the developer cooperative society was given 67% of the constructed area, whereas, the owners got remaining 33%. Respondent no. 6 launched a scheme, namely, Hope Narayani Apartment to achieve the aforementioned object stated in the deed of agreement. Petitioners, being the members of the society, applied for allotment and were allotted flat nos. 405A, 202A and 203A in the Hope Narayani Apartment. Subsequently, the possessions of the flats were also given to them and accordingly, they got their names recorded in the records of Patna Municipal Corporation and started paying Holding Tax etc. However, petitioners approached respondent no. 6 several times for registration of the apartment in their name but the effort went in vain. Eventually, when the developer did not respond, they approached the Municipal Commissioner – cum – Chief Executive Officer (respondent no. 5) under section 21 of the Bihar Apartment Ownership Act, 2006 for unilateral registration and order was passed in their favour. Thereafter, they submitted their absolute sale deed along with permission letter dated 31.7.2007 before the District Sub-Registrar, Patna, however, he returned the same with an endorsement that the stamp duty and the registration fee are payable on the respective deed of absolute sale. The petitioners again approached the District Registrar – cum – District Magistrate, Patna for exemption / remission of the stamp duty as well as the registration fee but Annexure 1 was passed refusing the same.

It is urged on behalf of the petitioners that they have been discriminated as registration of one of the members of the Hope Naryani Apartment has been done after granting exemption from praying stamp duty. Xerox copy of such sale deed has been appended as Annexure 4.

A counter affidavit has been filed and it has been urged on behalf of the State that the Hope Cooperative Society did not purchase the land for development after payment of registration fee in accordance with the provisions contained in Section 9A of the Indian Stamp Act, 1899 which was payable under Clause 5 Schedule 1A. Thereafter, the petitioners would be liable to pay stamp duty.

For better appreciation, Section 9A which has been inserted by Bihar Amendment Act, 1988, is quoted as under.

> "9-A. Notwithstanding anything contained in any rule or orders under clause (a) of section 9 reducing or remitting the duty on an instrument or class of instruments inforce immediately before the date of commencement of this section, any instrument, so far as it relates to premises of a Co-operative Society registered or deemed to be registered under any law operative Society registered or deemed to be registered under any law relating to the Co-operative Society for the time being in force, executed by or on behalf of or in favour of such society or by an officer or member in favour of another and relating to business of such society shall be chargeable with duty under this section read with articles indicated in Schedule 1-A:
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> Provided that an instrument relating to mortgage of property by a Housing Co-operative or a member thereof to be registered in favour of the Bihar State Housing Co-operative Federation Limited or the Bihar

State Rural Housing Co-operative Federation Ltd. or any financing institution for the loan to be taken from the said Federation or institution shall not be chargeable with duty:

Provided further that an instrument relating to transfer of premises by a Co-operative Society to be registered in favour of its members shall not be chargeable with duty:

Provided also that an instrument to be registered by the Bihar State Housing Co-operative Federation Ltd. or the Bihar State Rural Housing co-operative Federation Ltd. for the loan to be taken by it from a financing institution including the Life Insurance Corporation of India and a Commercial Bank shall not be chargeable with duty:

Provided further also that an instrument to be registered in favour of a registered Co-operative Society by any of its members or by another registered Co-operative Society or any of its members for loan up to Rs. 50,000 (Rupees fifty thousand) to be taken for any purpose other than purchase of land shall not be chargeable with duty.

Explanation.- For the purpose of this section, the word ‘premises’ means any land or building or part of a building including any flat, apartment, tenement, shop or warehouse therein and includes,

(i) gardens, grounds and outhouses, if any, appertaining to such building or part of a

> building and
> (ii) any fitting affixed to such building or part of a building for the more beneficial enjoyment thereof."

As per Section 9A, whenever any instrument, so far as it relates to the premises of a Co-operative Society registered or deemed to be registered under any law relating to the Co-operative Society for the time being in force, is executed by or on behalf of or in favour of such society or by an officer or member in favour of another and relating to business of such society, shall be chargeable with duty under this Section read with articles indicated in Schedule 1-A.

It appears from the order impugned that the co-operative Society, since did not purchase the land from the owner and. as such, has not paid stamp duty and registration fee as payable if a sale deed would have been executed, the exemption granted under proviso of Section 9A would not be available to the petitioners in a sale deed executed by the society in their favour.

The question would whether the aforesaid view can be held to be correct?

The society has entered into a written agreement for development of the land which was duly registered by the competent authority charging the registration fee which was payable at that point of time. The deed of agreement indicates in clear term that 67% of the total area would come into the ownership of the developer society which would have liberty to transfer, mortgage, sale the same as it became the owner of the same. If more stamp duty was chargeable on such agreement then that ought to have been charged by the registering authority at that point of time itself. That apart, subsequently to the agreement which was executed in the year 2004, the **Bihar Apartment Ownership Act, 2006** came into force in the year 2006. Section (2) of the Bihar Apartment Ownership Act, 2006 provides that it would apply to every Apartment in a multi-storied building which was constructed for residential or commercial or such other purposes such as office, practice of any profession, occupation, trade or business etc.

For better appreciation the relevant provisions under Section 2 of the Bihar Apartment Ownership Act, 2006 are quoted below:-

> 2. **Application of the Act.-** The provisions of this act shall apply to every Apartment in a multi-storied building which was constructed for residential or commercial or such other purposes such as office, practice of any profession, occupation, trade or business for any other type of independent uses before or after the commencement of this Act and on a free hold land, or a lease hold land, if the lease for such land is for a period of thirty years or more:
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> Provided that, where a building

constructed, whether before or after the commencement of this Act, on any land contains only two or three Apartments, the owner of such building may, by a declaration duly executed and registered under the provisions of the Registration Act, 1908 (16 of 1908) and as amended from time to time, indicate his intention to make the provisions of this Act applicable to such building, and on such declaration being made, such owner shall execute and register a Deed of Apartment in accordance with the provisions of this Act, as if such owner were the promoter in relation to such building:

Provided further, that the sole owner or all the owners of the land may submit such land to the provisions of this Act with the condition that he or they shall grant a lease of such land to the Apartment owners, terms and conditions of the lease being disclosed in the declaration to be made in this regard either by annexing a copy of the instrument of lease to be executed to the declaration or otherwise:

Provided that the state government may exempt by general or special order any such owner from submitting such building to the provisions of this Act."

It would be evident from the language of the aforesaid provision that the enactment has been given a retrospective effect as the same is applicable on the building constructed even before commencement of the Act. Therefore, the agreement, as contained in Annexure 6, would also come within the ambit of the Bihar Apartment Ownership Act, 2006. Section 5 of the aforesaid Act provides that there can be development of the project even without executing a sale deed of land in faovur of the developer by the owner by virtue of required agreement between them. The relevant provision is extracted as under:-

> "5. **The Developer/ Promoter and Owner to execute and get Registered document of transfer-**
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> (1) Where the Developer/ Promoter is not the owner of the land over which the Apartment is to be built, the Developer/ Promoter and the Owner shall execute and register an agreement stating all the terms and conditions of the agreement including the portion of the building and land to be shared by the Developer/ Promoter and the Owner.
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> The agreement document shall also include that after the completion of construction of the building project the respective share owner i.e.; developer/ promoter and the land owner, shall be absolute owner of their respective shares and they will be entitle to sell/ transfer their shares separately.
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> (2) The final sale/ lease of the Apartment along with the Common areas and facilities shall be executed and registered by the Developer/ Promoter or the Owner, as the case may be, as per sub-section 5.1. in favour of the prospective Apartment Owner."

It is apparent from the aforesaid provision that the developed area shared by the Developer / Promoter and the land owner shall be under their absolute ownership and they would be subsequently entitled to sell / transfer their shares separately after competition of the project. However, an explanation has been inserted by S.O 1.M.1-255/2006, 364 dated 8.2.2007 dated

8.2.2007 in Clause 5 of Schedule 1 A of the Stamp Act, 1899. For better appreciation, the same is being quoted hereinunder:

> "[Explanation- For subsequent agreements, relating to construction of a house or building including a multiunit house or building or unit of apartment / flat/portion of a multistoried building or for developments/sale of any other immovable property, the stamp duty, if not paid earlier, on such agreements relating to construction of a house or building including a multistoried building or for development/sale of any other immovable property shall be chargeable at the rate as prescribed above in clause (b) subject to a maximum of Rs. 10,000-(Rupees Ten Thousand)."

As would be evident from the above, this provision has been introduced for agreements relating to sale, construction or development which executed in part, and provides that in case the ownership is to be transferred under such agreement then duty required to be paid on a sale deed would be payable on it.

At the strength of such explanation read with Section 9A of the Stamp Act, the impugned order has been passed holding that the society, since did not pay stamp duty on earlier occasion when development agreement was executed, the subsequent transfer of units, even to its members, would require payment of stamp duty and no exception can be granted in such case.

However, in my view such stand is erroneous as it cannot have an overriding effect upon the second proviso introduced specially for the purpose of granting exemption of duty upon the instrument of transfer by a co-operative society in favour of its members. The proviso has to be understood to be exception to the Section 9A of the Stamp Act. This is further apparent that the explanation to the Clause 5 of Schedule 1A was introduced on 8.2.2007, i.e., much after the date of development registered agreement between the co-operative society and owner of land executed on 24.11.2004 and the same talks about subsequent agreement. At the same time it cannot override the second proviso to the Section 9A which the legislature in its wisdom has introduced for the relevant purpose.

Since the developer, even after several request, did not come up for registration of the document, it had to be unilaterally got registered under the provisions of Bihar Apartment Ownership Act, 2006 but it has to be deemed that it was the registration by the Co-operative Society in favour of one of its members and as such neither the provisions of Section 9A or amended Schedule 1-A would have overriding effect upon override the second proviso which grants exemption from stamp duty if a registered premises of Co-operative Society is registered by the society in favour of its members.

Accordingly, it has to be held that the respondent District Registrar – cum – District Magistrate has erred in holding that, since the premises was not originally purchased by the Co-operative Society and as such stamp duty chargeable in case of purchaser was not paid, the exception under second proviso to Section 9A would not be available to the petitioners. As a result, the questioned framed is answered in negative and the impugned order is quashed and set aside. The respondent District Registrar is directed to proceed with the registration of the documents concerned assuming that it is covered under second proviso to Section 9A of the Indian Stamp Act, 1899. It is expected that the whole exercise would be completed within a period of two months from the date of receipt / production of a copy of this order.

This disposes of the writ petition.

(Dr. Ravi Ranjan, J)

Spd/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	12.09.2016
Transmission Date	NA