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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1192 OF 2016

M/s Dharati Developers	]	
A partnership firm through its partners	]	
1. Shri. Digambar Sadashiv Govardhane	]	
age: 49 years,Occn. Business and agriculture	]	
	]	Petitioners
2. Shri. Prakash Punaji Tidke	]	Original
age: 49 years, Occn. Business a`nd agriculture	]	Plaintiffs.
	]	
both residing at Madhura Society	]	
Sambhaji Chowk, Untawadi Road	]	
Nashik 2	]	

V/s.

1. Madhukar Atmaram Patil	]	
age:; 68 years, Occn. Doctor,	]	
residing at: 103/6, Navdurga Apartment	]	
Opp. Lakme Compound, Deonar	]	
Mumbai 400 088	]	
	]	
2. Shri. Rajendra Keshavchand Bora	]	Respondents
age: 55 years, Occn. Business,	]	Original
residing at: Samrat House 39-D 1/6	]	Defendants.
Shankarsheth Road,	]	
Pune 37.	]	
	]	
3. Shri. Balasaheb Barku Kolhe	]	
age: 46 years, Occn. Business and agriculture	]	
residing at Stadium complex, Mahatma Gandhi	]	
Road, Nashik	]	

Mr. Sachin Gite for the Petitioners.
Mr. R. D. Soni a/w V.R. Kasale i/by Ram &

Co. for Respondent No.2.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 13th DECEMBER, 2017.

ORAL JUDGMENT :

1] Heard learned counsel for the petitioner and learned counsel for respondent No.2.

2] Rule.

3] By consent of learned counsel for both the parties, rule made returnable forthwith.

4] By this writ petition filed under Articles 226 and 227 of the Constitution of India, the petitioners are challenging the order dated 27th February 2015, passed by the 6th Joint Civil Judge Senior Division, Nashik, in Special Civil Suit No.360 of 2013, thereby allowing application filed at Exh.53 by respondent No.2 and directing the petitioners-plaintiffs to pay deficit Stamp on the Memorandum of Understanding executed on 24th January, 2011, on the basis of which the suit for specific performance of the said agreement is filed.

5] The submission of learned counsel for the petitioners is that perusal of the said Memorandum of Understanding (for short referred to as, "MOU") makes it clear that, on the basis of the same or in pursuance of the same neither the entire consideration amount was paid nor the possession of the suit property was delivered. Conversely, the averments in the said MOU are clear that the agreement to sale was to be executed subsequently and thereafter sale deed was to be executed. The possession of the suit property was also agreed to be given at the time of agreement to sale. In such situation according to learned counsel for petitioners, the trial Court has committed an error in impounding the said document and directing the petitioners to pay deficit stamp holding that it is an agreement to sale and the possession was agreed to be given thereunder.

6] Per contra, learned counsel for respondent No.2 submits that the Explanation 1 to Article 25 of the Maharashtra Stamp Act, 1958 makes it clear that even when the possession is <u>agreed to be given</u> by virtue of execution of any document, then such document is required to be construed as "*Deemed Conveyance*" and the stamp duty thereon will be payable accordingly. Here in the case, according to learned counsel for the respondent No.2, the recitals in the MOU are clear to the effect that the possession was agreed to be given at the time of execution of agreement to sale and therefore the recitals in the MOU satisfy necessary condition as laid down in Explanation-I to Article 25 of the Maharashtra Stamp Act. Hence according to him, the trial Court has rightly directed the petitioners to pay the deficit Stamp thereon. In his opinion, therefore, the impugned order passed by the trial Court being just, legal and correct, no interference is warranted therein.

7] In order to substantiate their respective contentions, learned counsel for both parties have relied upon judgments of Division Bench of this Court. However, before adverting to those judgments, it would be useful and advantageous to refer the provisions of Explanation 1 to Article 25 of the Maharashtra Stamp Act and those provisions can be reproduced as follows :-

> "[Explanation-I} – For the purpose of this article, where in the case of agreement to sell an immovable property, the possession of any immovable property is transferred or agreed to be transferred to the purchaser before the execution, or at the time of execution, or after the execution of, such agreement, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly.
>
> Provided that, the provisions of section 32A shall apply mutatis mutandis to such agreement which is deemed to be a

conveyance as aforesaid, as they apply to a conveyance under that section:

Provided further that, where subsequently a conveyance is executed in pursuance of such agreement of sale, the stamp duty, if any, 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.

Provided also that where proper stamp duty is paid on a registered agreement to sell an immovable property, treating it as a deemed conveyance and subsequently a conveyance deed is executed without any modification then such a conveyance shall be treated as other instrument under Section 4 and the duty of one hundred rupees shall be charged"

8] Thus, these provisions are clear to the effect that where in a document pertaining to sale of an immovable property, the possession of immovable is transferred or agreed to be transferred to the purchaser before the execution or at the time of execution or after execution of such agreement, then such agreement is deemed to be conveyance and stamp duty thereon shall be leviable accordingly.

9] Here in the case, if one goes through the MOU, then clause (1) of the terms and conditions thereof lays down that the total consideration price of the suit property was fixed as Rs.4,31,00,008/-. Out of that amount an amount of Rs.41 lacs was paid on the date of execution of MOU; whereas the remaining of the 50% of the total consideration was to be paid on the date of agreement of sale, 25% of the remaining was to be paid within three months from the date of agreement of sale and balance 25% was to be paid on the date of execution of the sale deed.

10] Clause (7) of the MOU further provides that the possession of the property was to be handed over on the date of agreement of sale. Even clause No.(2) also provides that the agreement of sale was to be executed after the sale deed was executed in favour of the vendor by the bank.

11] In the considered opinion of this Court, these recitals in the MOU are more than sufficient to show that on the execution of the MOU or by virtue of MOU, the possession was not to be handed over, but it was to be handed over at the time of agreement of sale. The entire consideration amount was also not paid on the date of MOU, but only part of the consideration was paid and balance was to be paid subsequently. 50% of the remaining consideration amount was to be paid at the time of agreement of sale, when possession was to be delivered.

12] The real issue for consideration is the clause No.7 which states that the possession of the property was agreed to be given on the date of agreement of sale. According to learned counsel for respondent, this term in clause No.(7) of the MOU clearly attracts Explanation-I to Article 25 of the Maharashtra Stamps Act and therefore, stamp duty is required to be paid as leviable on the conveyance deed.

13] This very term, "*possession was agreed to be given*" as used in the MOU, came for consideration before the Division Bench of this Court in the case of ***Balwantgir Ganpatgir Giri through his Lrs Nanibai wd/o Balwant Giri and ors -vs- Manasi Construction and Developers, 2006 (5) Mh. L. J. 306,*** relied upon by the learned counsel for the petitioner. In that case also the argument advanced was that the document of MOU clearly discloses an agreement for delivery of possession in terms of said agreement for sale of the property and therefore it was required to be stamped in accordance with the provisions of law comprised under Explanation-I to Article 25 of the Schedule I of the Maharashtra Stamps Act. This argument was upheld by the trial Court, on the ground that there was clear mention in the agreement that the possession was to be delivered on the date of agreement to sale of property. The point, therefore, raised for consideration before the Division bench was, whether the document in question discloses agreement for delivery of possession in terms of agreement of sale and, therefore, it was a conveyance within the meaning of Explanation-I to Article 25.

14] While deciding this point, it was held in paragraph 9 of the judgment that,

> "*the fact that, agreement in question clearly contemplates delivery of possession only on execution of the sale deed being not in dispute, in fact, that itself is sufficient to reject all the contentions sought to raise on behalf of appellant*".

It was further held that,

> *"Under the Explanation-I to Article 25, the delivery of possession which transposes the agreement to conveyance in terms of said Explanation-Is only in case of agreement to deliver the possession in terms of the agreement and not in terms of the sale deed agreed to be executed consequent to such agreement. Indeed in case of execution of the sale deed it would carry the stamp duty which is required to be paid on a conveyance in accordance with the Article 25 of Schedule I. Being so, once the sale deed is executed by paying required stamp duty in terms of Article 25, the occasion to deprive the Government revenue cannot arise. For the said reason, once the agreement discloses that delivery would be on execution of the sale deed, it is needless to say that there could be no opportunity for the parties to defraud the Government. Being so, an agreement which restricts delivery of possession or execution of sale*

> *deed cannot by any stretch of imagination construed to be a conveyance within the meaning of the said expression under Explanation-I to Article 25 of Schedule I of the said Act".*

15] In the facts of the present case, clause (7) of the MOU clearly discloses that the possession was to be given at the time of execution of agreement of sale, therefore possession was not given or agreed to be given on the date when the MOU was executed. In such situation, if the expression, *"possession agreed to be given"* as explained in the decision of Division Bench is considered, then it follows that the requisite stamp fee would be definitely payable at the time of execution of the agreement to sale when possession was to be delivered and not at the stage when MOU was executed. If the possession was to be given by virtue of agreement of sale and not by virtue of MOU, then it follows, as held in the above said judgment that, at this stage Explanation-I of Article 25 cannot be made applicable.

16] In this respect it is pertinent to note that the entire consideration is also not paid. MOU clearly goes to show that it is not an agreement, but this is just an understanding arrived at between the parties by virtue of which no possession or title is delivered and the possession is agreed to be delivered and is to be delivered only at the time of agreement of sale. Therefore, when MOU is purely an agreement or understanding arrived at between the parties; wherein there is no recital for delivery of possession, it cannot be considered as conveyance within the meaning of the said Explanation-I to Article 25 of schedule I of the Act.

17] As regards the judgment relied upon by learned counsel for respondent No.1, it can be seen that in this case of **Bhupendrabhai Rambhai Patel -vs- Sau. Lilabai Mahadeorao Labde and anr, CDJ 2010 BHC 1653,** agreement of sale contained stipulation for delivery of possession, but there was refusal to hand over possession and hence it was held that the fact that possession was not handed over cannot be relevant for the purpose of deciding whether it can be treated as conveyance within the meaning of Explanation-I to Article 25 of the Stamps. Act. Hence this judgment cannot be of any assistance.

18] Learned counsel for respondent also submits that if the petitioner is seeking specific performance for execution of the sale deed on the basis of this document, which is styled as MOU, then it follows that he has to pay court fee stamp on the MOU as if it is an agreement to deliver the possession. In his opinion, therefore, if the

MOU, is being treated as an agreement by the petitioner himself, the petitioner cannot escape from the liability of paying stamp duty thereon. According to him, the averments made in the plaint are required to be considered while deciding the nature of the document styled as MOU.

19] However, if one considers the recitals in the MOU, it is clear that it is merely an understanding arrived at between the parties. As agreement of sale was agreed to be executed subsequently by which possession of the property was to be given. Now even if despite that the petitioner is asking for execution of MOU, he is doing so at his own risk. Now merely because he is asking for execution of the sale deed on the basis of MOU and that too without paying requisite stamp duty, then he is doing so at his own peril.

20] From the facts of present case, suffice it to say the possession was agreed to be given in pursuance of the agreement of sale to be executed subsequently as a follow up of this MOU. Therefore MOU does not come within the purview of Explanation-I of Article 25 of the Maharashtra Stamps Act.

21] As a result, this writ petition is allowed.

22] The impugned order passed by the trial Court below Exh.53 in Special Civil Suit No.360 of 2013 stands quashed and set aside.

23] Rule made absolute in above terms.

[DR.SHALINI PHANSALKAR-JOSHI, J.]