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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 6234 OF 2018

Vikrant Vikas Raikar,)
Proprietor of M/s. Elegant)
Constructions, having office at)
Hotel Pearl, D. K. Sandu Marg,)
Chembur, Mumbai 400 071 ... Petitioner

Vs.

1. State of Maharashtra, through)
Government Pleader, having his)
office at P.W.D. Building, High Court)
Mumbai - 400 032.)
2. Assistant District Registrar,)
Class-I (US) & Stamp Dist. Officer,)
Thane City, Thane.)
3. The Chief Controlling Revenue)
Authority, Maharashtra State, Pune)
having office at Office of Inspector)
General of Registration & Controller)
of Stamps, Maharashtra State, Pune,)
Ground Floor, New Administrative)
Building, Opp. Council Hall,)
Pune – 411 001.)
4. Basant Realty Pvt. Limited,)
A company incorporated under)
Companies Act, having its address)
at 1305, Mayuresh Chambers,)
Sector 1, CBD Belapur, Navi Mumbai ... Respondents

Mr. Atul Damle, Sr. Counsel a/w Keshav Borhade i/b Shelke & Co.,
for the Petitioner.

Mr. Y. D. Patil, AGP for Respondent Nos. 1 to 3.

Mr. Vivek Sharma a/w Rajeev Ravi, for Respondent No. 4.

CORAM : C. V. BHADANG, J.

RESERVED FOR JUDGMENT : FEBRUARY 24, 2020

JUDGMENT PRONOUNCED ON : MARCH 5, 2020

JUDGMENT :

1. Rule. Rule made returnable forthwith. Learned AGP waives notice for Respondent Nos. 1 to 3; the learned advocate Mr. Vivek Sharma waives notice for Respondent No. 4. Heard finally by consent of parties.

2. The challenge in this petition is to the order 16th March, 2018 passed by the third respondent in Appeal No. 130 of 2016. By the impugned order, the third respondent, while dismissing the appeal filed by the Petitioner, has confirmed the order dated 18th May, 2016 passed by the second respondent, thereby levying deficit stamp duty of Rs.23,92,000/- alongwith penalty of Rs. 57,88,700/- on an agreement dated 16th March, 2006, executed between the Petitioner and the fourth respondent. That agreement has been subsequently cancelled on 27th February, 2008.

3. The brief facts, necessary for the disposal of the petition,

may be stated thus:

. That one Ms. Maya Venkatrao Kaikini (since deceased) was allotted a plot of land, admeasuring 3680 sq. mt. being Plot No. 14, Sector 50, Nerul Node, Navi Mumbai by City and Industrial Development Corporation, Maharashtra Ltd. (for short "CIDCO"), as per the allotment letter dated 11th May, 2004 and the Corrigendum dated 25th May, 2004. That land was allotted under the Gavthan expansion scheme, popularly known as "12.5% scheme" in lieu of lands acquired by CIDCO.

4. It appears that prior to the allotment, one Mr. Jagdish Laxmidas Thakkar had entered into an agreement with Ms. Maya Kaikini on 26th July, 2000 for acquiring all rights, title and interest, including the development rights in respect of the said plot. Mr. Jagdish Thakkar subsequently on account of his inability could not abide by the terms and conditions of the said agreement, and therefore, he entered into another agreement dated 9th April, 2001 with one Madan Kolambekar, by which the rights, under the erstwhile agreement were transferred in favour of said Madan. Even Madan was unable to complete and perform the obligations under the said agreement. Ms. Maya Kaikini expired on 11th August, 2005 and after her demise, her heirs applied for heirship certificate vide Misc.

Application No. 460 of 2005. It appears that during pendency of the said proceedings, Jagdish Thakkar and Madan agreed to transfer, surrender and assign their right, title and interest in the said plot under the two agreements dated 26th July, 2000 and 9th April, 2001 in favour of the fourth respondent Basant Reality Pvt. Ltd. vide agreement dated 4th March, 2006 finally.

5. By agreement dated 16th March, 2006, the fourth respondent has agreed and undertaken to transfer, assign the right, title and interest of the said land in favour of the Petitioner on terms and condition, as set out in the said agreement. Even this agreement did not materialise and the fourth respondent issued a letter dated 27th February, 2008 to the Petitioner, expressing willingness to repay the amount Rs. 3,50,00,000/- which comprise of the refund of the consideration and compensation. The letter dated 27th February, 2008 also stipulates that Rs. 25 lakh is also paid being part of the settlement amount, as agreed.

6. Be that as it may, the Petitioner has filed Commercial Suit No. 38 of 2010 (old Summary Suit No. 139 of 2010) against the fourth respondent for recovery of Rs. 3,15,00,000/-, which is pending on the original side of this Court. In that suit, this Court by an order dated

16th March, 2016 has found that the document of cancellation dated 27th February, 2008 is required to be impounded and sent for adjudication, in view of the objection raised by the fourth respondent (the defendant in the suit) in its written-statement. This Court forwarded the said document to the Collector / Adjudicating Authority under S. 33 of the Bombay Stamp Act, 1958 for impounding / stamping, in accordance with the decision in the case of ***Santosh Raut Vs. Pukharaj Rathod & Anr.***¹.

7. The Collector by an order dated 18th May, 2016 has valued the said land at Rs. 4,78,40,000/- and has levied the stamp duty of Rs.23,92,000/- alongwith penalty Rs. 57,88,700/-, in so far as the original agreement for sale dated 16th March, 2006 is concerned. As regards the letter of cancellation, the Collector under Article 15 of Schedule I has levied the stamp duty of Rs. 100/- alongwith penalty of Rs.100/-.

8. The Petitioner is principally aggrieved by the levy of the deficit stamp duty and the penalty on the original agreement. The Petitioner approached the third respondent in Appeal No. 130 of 2016, which has been rejected by the impugned order dated 16th March, 2018. Hence, this petition.

1 2010 All MR (Supp.) 529

9. I have heard Mr. Damale, the learned senior counsel for the Petitioner and Mr. Vivek Sharma, the learned counsel for the fourth respondent. I have also heard the learned AGP for Respondent Nos. 1 to 3. Perused record.

10. Mr. Damle, the learned senior counsel for the Petitioner has principally raised three grounds. Firstly, that this Court having referred receipt / communication dated 27th February, 2008 to the adjudicating authority, it was not open for the Collector / Adjudicating Authority to impound or to levy deficit stamp duty and penalty on the original agreement dated 16th March, 2006. It is submitted that the adjudicating authority ought to have confined itself to the adjudication of the deficit stamp duty and penalty, if any, insofar as receipt / communication dated 27th February, 2008 is concerned.

11. Secondly, it is submitted that the agreement dated 16th March, 2006 has already been cancelled on 27th February, 2008 and has not been acted upon by the parties, and therefore, it was not open for the adjudicating authority to have adjudicated on the original agreement or have levied any deficit stamp duty and penalty on the same. In the submission of the learned senior counsel, the cancellation of the original agreement, would wipe out any liability to pay the deficit stamp duty and the penalty, even assuming that the document

was insufficiently stamped.

12. Thirdly, it is submitted that even on merits and having regard to Art. 25 of the Schedule I of the said Act, the agreement dated 16th March, 2006 cannot be said to be a conveyance. For this purpose, the learned senior counsel has taken me through the recitals of the said agreement in order to submit that it contemplates a further agreement being executed between the parties after transferor / assignee's obtaining possession from CIDCO and heirs of Ms. Maya Kaikini having obtained a heirship certificate. It is submitted that the said agreement contemplates execution of a tripartite agreement between the owners i.e. heirs of Maya, CIDCO and the transferees /assignees or their nominees, as the case may be. It is thus, submitted that the recitals in para 5 of the said agreement cannot be read in isolation to hold that the agreement is a conveyance within the meaning of Art. 25 for the purposes of levying of the stamp duty. On behalf of the Petitioner, reliance is placed on the following decisions:

- (i) ***Balasaheb Jadhav Vs. Hanumant Deshmukh***²;
- (ii) ***Padma Nair Vs. The Dy. Collector***³;
- (iii) ***Crest Hotel Ltd. Vs. The Asistant Superintendent of Stamps***⁴;
- (iv) ***Balawanigir Giri Vs. Mansi Construction***⁵;

2 MANU / MH / 0590/1995

3 AIR 1996 BOM 160

4 MANU/MH/0038/1994

5 2006(6) ALL MR 109

- (v) *Sheshrao B Kale Vs. Damodhar Pandhare*⁶;
- (vi) *Kishor Sahani Vs. State of Maharashtra*⁷;
- (vii) *Dharati Developers Vs. Madhukar Patil*⁸;
- (viii) *Narendra Pathak Vs. Collector of Stamps*⁹.

13. On the contrary, the learned counsel for the Respondent No. 4 has supported the impugned order. It is submitted that there are three amendments to Art. 25 of the Schedule I of the said Act, i.e. in the year 1988, 1993 and 1994, which are relevant for the purpose. It is submitted that the agreement if read as a whole would clearly indicate that there was an agreement to deliver possession, and therefore, by virtue of the explanation, annexed to Art. 25, the document would be a 'conveyance' for the purpose of levying of stamp duty. It is submitted that under S. 33 of the said Act, the adjudicating authority can impound the document and levy the stamp duty and penalty, even when any such document, which in the opinion of the adjudicating authority is insufficiently stamped, is produced before such authority or the authority comes across any such document. It is thus, submitted that the adjudicating authority had independent powers to impound the agreement of the year 2006 and to levy deficit stamp duty and penalty de hors of the order dated 16th March, 2006 in the summary suit. It is

6 2004 (2) ALL MR 880

7 2001 (4) Bom. C. R. 469

8 2018 (2) MhLJ 525

9 2019 BCR (6) 451

submitted that mere cancellation of the document is inconsequential and cannot wipe out the liability to pay the deficit stamp duty and penalty, as has been held by this Court in the case of ***Nanik Daryani Vs. Dy. Inspector General of Registration***¹⁰. It is submitted that the most of the authorities, cited on behalf of the Petitioner, are prior to the relevant amendment to Art. 25 of the Act. It is submitted that those authorities are distinguishable on facts.

14. On behalf of the Respondent Nos. 4 reliance is placed on the decision of the Supreme Court in the case of ***Veena Jain Vs. State of Maharashtra***¹¹, and the decision of this Court in the case of *Nanik Daryani (supra)*.

15. The learned AGP has also supported the impugned order on similar grounds. It is submitted that the adjudicating authority has wide powers under S. 33 of the said Act and adjudication cannot be limited to the order passed in the summary suit for impounding of the receipt / letter of cancellation of the year 2008.

16. I have carefully considered the rival circumstances and the submissions made.

17. Insofar as the first ground is concerned, S. 33 of the

¹⁰ 2008 SCCOnline Bom 310

¹¹ AIR 1999 SC 807

Maharashtra Stamp Act, would make it clear that, the adjudicating authority can impound any document, which it comes across. Section 33(1) of the Maharashtra Stamp Act, which is relevant for the purpose, reads thus:

“33(1) Subject to the provisions of section 32A, 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.”

18. It can thus clearly be seen that the adjudicating authority can impound any document, which it comes across in the performance of its function and which appears to it not duly stamped. Thus, the contention that because document of cancellation dated 27th February, 2008 was referred to the adjudicating authority, the authority could not have impounded the original agreement, to my mind cannot be accepted.

19. This takes me to the second contention that on account of the agreement dated 16th March, 2006 having been cancelled, there was no liability to pay deficit stamp duty or penalty, if any. This issue

may not detain me long as it is covered by a decision of this Court in the case of ***Nanik Daryanani*** (*supra*). In para 23 of the judgment, this Court has held that subsequently the parties have entered into a deed of cancellation, will not absolve the petitioner from payment of the stamp duty leviable on such a document, which otherwise is deemed to be a conveyance. Thus, the second contention, as raised on behalf of the Petitioner, has also to fail.

20. This takes me to the third contention as to the document dated 16th March, 2006, otherwise, not being a ‘conveyance’ within the meaning of explanation to Article 25 of Schedule I to the Stamp Act. Article 25 provides that in respect of a conveyance, stamp duty is leviable on the “true market value” of the property, which is subject matter of conveyance. In order to appreciate the rival contentions, it is necessary to reproduce Explanation I to Article 25, which is relevant for the purpose, which reads thus:

Explanation I – For the purposes 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 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.”

21. It can thus be seen that for the purposes of Article 25, where in the case of agreement to sell, 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 an agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly.

22. The question, whether a particular agreement to sell any immovable property amounts to a conveyance or not, would depend on facts and circumstances of each case. The Court would be required to read the document as a whole, in order to gather the intention of the

parties, and then decide whether the agreement to sell would amount to conveyance within the meaning of Explanation I to Article 25 of the Stamp Act.

23. Coming to the present case, the appellate authority has relied upon clause (5) and (8) of the said agreement, in order to find that the said agreement ‘fulfills the condition’, contemplated under Explanation I, below Article 25 of Schedule I of the said Act to treat the agreement, as a deemed conveyance. In order to appreciate the contention, as raised, it is necessary to reproduce clauses (4), (5), (6) and (8) of the agreement, which read as under:

“(4) (i) The Transferors / Assignor both hereby agree and undertake to obtain the Heirship Certificate of late Miss Maya Venkatrao Kaikini in favour of her heirs latest by end of April 2006.

(ii) The Transferor / Assignor both hereby further agree and undertake to get the lease agreement executed from the Cidco Maharashtra Limited and to get the possession from Cidco Maharashtra Limited at their own cost and expenses, immediately after getting Heirship Certificate obtain from the Court.

(5) The Transferor / Assignors both hereby agrees and undertake to hand over the possession of the said plot of the land to the Transferees / Assignees and / or its nominee / s or assignee / s as the case may be immediately on obtaining the possession from Cidco Maharashtra Limited and further agrees to simultaneously execute necessary agreement with the legal heirs of Miss Maya Kaikini and the

Transferee / Assignee herein within one month from obtaining Heirship Certificate from the Court.

- (6) The Transferors / Assignor both hereby agrees and undertake to get executed the tripartite agreement between the Owners, CIDCO Maharashtra Limited, and the transferee / Assignee or its nominee / s or assignee / s as the case may be for the transfer of the said plot of the land in favour of Transferee / Assignees or its nominee/s or assignee/s immediately on the execution of the lease agreement and obtaining and handing over possession of the said land as stated above.
- (8) The Transferees / Assignees shall on getting the possession of the said land be fully entitled to develop the said land by constructing the buildings thereon as per the plans which may be approved by N.M.M.C. and by other concerned authorities at its own cost, and expenses and shall be entitled to sell the constructed premises to the prospective purchasers for the consideration and on the terms and conditions as the transferee / Assignee any deem it fit and proper.”

24. A bare perusal of the aforesaid clauses would make it clear that there were several formalities and conditions to be satisfied for the entire transaction to materialise. For instance, the heirs of Ms. Maya Kaikini were to obtain an heirship certificate, followed by the lease agreement being executed by CIDCO and to get possession from CIDCO at their own costs. Thereafter clause (5) envisages that the transferors or assignees had agreed to hand over possession of the said plot of land to the transferees or assignees or its nominees, immediately after obtaining possession from CIDCO. It is significant

to note that clause (5) envisages further simultaneous execution of necessary agreements with the legal heirs of Maya Kaikini and the transferee / assignee within one month of obtaining heirship certificate. Thereafter clause (6), which is significant, provides the execution of a tripartite agreement between the owners i.e. the legal representatives of Maya Kaikini, CIDCO and the transferee / assignee in favour of the transferee / assignee / or its nominees, “immediately on the execution of the lease agreement” and obtaining and handing over of possession.

25. It can thus, clearly be seen that at the time when agreement of the year 2006 was executed the transferor / assignor and the legal representatives of Maya Kaikini had not even obtained heirship certificate, nor had obtained the possession from CIDCO, inasmuch as clause (4) of the agreement contemplated obtaining of possession from CIDCO by execution of a lease agreement after getting heirship certificate. Not only that, the said agreement also contemplates execution of further tripartite agreement, in which CIDCO was one of the parties. In the aforesaid circumstances, in my considered view, the document cannot be said to be a conveyance within the meaning of Explanation I to Article 25 of the said Act. It is not necessary to refer to all the cases, cited on behalf of the Petitioner, as some of them are rendered prior to amendment to Explanation to

Article 25 and would otherwise be distinguishable on facts. I have already noted that the question whether a particular document is a conveyance, for the purposes of levy of the stamp duty within the meaning of Explanation I to Article 25 of the said Act, would depend upon facts and circumstances of each case and examination of the recitals of the documents as a whole. However, I propose to make a brief reference to the decision in the case of *Dharati Developers (supra)* and *Narendra Pathak (supra)*.

26. In the case of *Dharati Developers (supra)*, there was a Memorandum of Understanding (for short “MOU”) executed between the parties and the question was whether the MOU could be considered as a conveyance. This Court found that the MOU provides that possession was to be handed over on the date of agreement of sale and the said agreement of sale was to be executed after execution of a sale-deed by the bank in favour of the vendor. This Court in such circumstances, found that recitals in the MOU are sufficient to show that on the execution of MOU or by virtue of MOU the possession was not to be handed over. This Court found that the MOU was purely an agreement or understanding without any recitals for delivery of possession.

27. In the case of *Narendra Pathak (supra)* again it was found that possession of the property was not handed over or agreed to be handed over to the petitioner.

28. The learned counsel for Respondent No. 4 submitted that the decision in the case of *Narendra Pathak* is distinguishable and in the submission of the learned counsel for Respondent No. 4, the said decision is of no avail to the Petitioner, in view of observations in the decision in the case of *Veena Jain (supra)*. It is not possible to accept the said contention. In the case of *Veena Jain (supra)*, the question before the Hon'ble Supreme Court was as to the duty payable under the Bombay Stamp Act, 1958 on an agreement for sale of flats covered by the Maharashtra Ownership Flats (Regulation and Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short "MOFA") and the Maharashtra Apartment Ownership Act, 1970.

29. In that case, the agreement entered clearly provided for sale of an immovable property and there was specific time agreed within which possession was to be delivered. In para 10 of the judgment, the Supreme Court has observed that if the agreement provides that possession will be handed over on execution of a conveyance as contemplated under S. 11 of the MOFA, then the Explanation shall not be attracted at all.

30. In the present case, as noticed earlier, the relevant clauses of the agreement make it amply clear that it contemplates the obtaining of heirship certificate by the legal representatives of Maya Kaikini, and the possession from CIDCO under a lease-deed, and thereafter clause (6) also contemplates execution of a tripartite agreement. In that view of the matter, in my considered view, the document dated 16th March, 2006 cannot be said to be a conveyance for the purpose of levy of stamp duty, in accordance with Explanation I to Article 25 of Schedule I of the said Act. Before parting with the final order, it is made clear that the observations and the findings herein are only for the limited purpose of examining the impugned order as regards adjudication of the stamp duty and penalty on the said agreement dated 26th March, 2006.

. In that view of the matter, following order is passed.

ORDER

- (i) The petition is allowed.
- (ii) The impugned order dated 18th May, 2016 to the extent it relates to levy of deficit stamp duty and penalty on the agreement dated 16th March, 2006 is hereby set aside.
- (iii) Rule is made absolute in the aforesaid terms, with no order as to costs.

Vinayak
P.
Halemath

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by Vinayak P.
Halemath
Date: 2020.03.07
14:28:10 +0530

Sd/-
C. V. BHADANG, J.