IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.2244 OF 2012

Rashilaben @ Rashilabai
Harishchandra Sonar & ors. … PETITIONERS

VERSUS

Ratilal Babu Patil & ors. … RESPONDENTS

....

Shri R.R. Sancheti, Advocate holding for
Shri R.R. Mantri, Advocate for petitioners

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CORAM : R. G. AVACHAT, J.

DATE : 24th FEBRUARY, 2021

O R D E R :

Heard learned counsel for the parties. This writ petition has been filed for the following two main reliefs :-

(B) Issue writ of certiorari or any other appropriate writ and call for the record and proceedings of the special Civil Suit No.43/2009, and on perusal of the same or otherwise, quash and set aside the order dated 17/10/2011 passed below Exh.3 by the said Court and be further pleased to hold that the Agreement dated 19/5/2006 cannot be read in evidence under Section 34 of the Bombay Stamp Act.

(C) In the alternative and without prejudice to above, quash and set aside the order dated 17/10/2011 passed below Exh.3 by Civil Judge, Senior Division, Nandurbar in Special Civil Suit No.43/2009 and direct the agreement dated 19/5/2006 is a conveyance and liable to be dealt with for stamp duty and penalty as a conveyance under Article 25 of the Bombay Stamp Act.

2. Mr. R.R. Sancheti, learned counsel appearing for the petitioners would submit that, the respondents No.1 to 8 filed Special Civil Suit, No.43/2009, contending that the predecessor-in-title of the petitioners and the formal parties agreed to sell the suit land to them and executed agreement for sale dated 19/5/2006. Since the executants avoided to execute the sale deed, the suit for specific performance has been filed. Respondent No.8 filed the affidavit of his examination-in-chief and sought to prove the alleged agreement for sale. The petitioners objected to admit the said document in evidence, interalia on the ground that it has not been executed on stamp paper purchased by any of the parties to the agreement. Moreover, under the agreement for

sale, the possession which was with the predecessor-in-title of the respondents No.1 to 8 in a capacity as tenant, has been confirmed as possession under the agreement for sale. Thus, the document became the conveyance within the meaning of Article 25 of the Maharashtra Stamp Act (for short Stamp Act). Since it has not been executed on the requisite stamp paper, the same is inadmissible in evidence.

3. After hearing the parties to the suit, the learned Judge was pleased to hold that since the agreement has been executed on a stamp paper purchased by the person not a party to the agreement, it has to be treated to have been executed on a blank paper. The possession has not been delivered under the agreement for sale and, therefore, Article 25 of the Stamp Act would have no application. In view of the learned Judge, as per Schedule I, Article 5-H, an agreement is required to be executed on stamp paper of Rs.20/-. On payment of the requisite amount of the value of the stamp paper with penalty thereon, the agreement could be admitted in evidence. The learned Judge, therefore, directed the respondents No.1 to 8/ plaintiffs to deposit Rs.46/- on or before the next date. In case of failure to deposit the amount, the document was directed to be impounded.

4. I have perused the impugned order and considered the submissions made on behalf of the petitioners. In my view, no interference is called for with the impugned order.

Section 34 of the Maharashtra Stamp Act reads :-

> “34. Instruments not duly stamped inadmissible in evidence, etc.
>
> No instrument chargeable with duty* * * * shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped or if the instrument is written on sheet of paper with impressed stamp such stamp paper is purchased in the name of one of the parties to the instrument:
>
> Provided that,—
>
> (a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of-----
>
> (i) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make up such duty, and
>
> (ii) a penalty at the rate of 2 per cent. of the deficient portion of the stamp duty for every month

> or part thereof, from the date of execution of such instrument:
>
> Provided that, in no case, the amount of the penalty shall exceed four times the deficient portion of the stamp duty;
>
> (b) . . . . ;
>
> (c) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter IX of Part D of Chapter X of the Code of Criminal Procedure, 1973;
>
> (d) . . . . ;
>
> (e) . . . ."

Admittedly, the alleged agreement has been executed on a stamp paper purchased a person unconcerned with the terms of the agreement. He is not a party/ privy to the agreement for sale. In view of provisions of Section 34 of the Stamp Act, the agreement is, therefore, not admissible in evidence. The proviso to Section 34 gives a way out. Such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable or in the case of an instrument insufficiently stamped, the amount required to make up such duty and penalty @ 2% of the deficient portion of the stamp duty for every month or part thereof from the date of execution of such instrument provided the amount of penalty shall not exceed four times the deficient portion of the stamp duty. Learned Judge has relied on the proviso to Section 34 and directed the respondents No.1 to 8 to pay the requisite amount as a condition precedent for admission of the document in evidence. The order has been duly complied with. Since the aforesaid proviso applied to entire text of Section 34, no fault could be found with the impugned order passed by the learned Judge.

5. So far as regards Article 25 of the Stamp Act is concerned, the relevant explanation thereto first needs to be adverted to.

Explanation I to Article 25 of the Stamp Act reads as under :

> "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 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 levialble 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."

6. In view of the aforesaid explanation, where in the case of agreement to sell an immovable property, the possession of immovable property is –

(a) transfer, or

(b) 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.

7. To find whether the aforesaid explanation is

attracted to the facts of the present case, one has to peruse the terms of the agreement. For better appreciation, the relevant clause in the agreement is reproduced :-

> "सदर शेताचा कब्जा पूर्वीपासून जवळजवळ १९५८ सालापासून तुमचेच कब्जात होते व आहे व पुढे भविष्यात वाद राहू नये म्हणून व आता आम्हाला सदर शेती करणे शक्य नसल्याने तुम्हाला कायम विक्री करण्याचे निश्चित केल्याने शेत विक्री करण्यापोटी ६०००० मात्र मिळालेले आहेत. तक्रार राहिलेली नाही. सदर शेताची खरेदीखताचे वेळी माझे मयत भावाचे वारसांनी संमती सबब आणून खरेदीखत तुमचे लाभात तुम्ही सांगाल त्यावेळी करून देऊ."

8. The aforesaid clause in the agreement for sale would undoubtedly indicate that the vendor has simply acknowledged that the purchaser has already been in possession of the subject land since 1958. I do not come across any of the terms in the agreement indicating that the possession of the land has either been stated to have been transferred while the agreement came to be executed or agreed to be transferred thereafter but before the sale deed is to be executed. At the cost of repetition, it is to be stated that the aforesaid clause regarding possession of the suit land simply indicates the vendor to have acknowledged the purchaser to have already been in possession of the subject land since 1958. None of the ingredients of the Explanation I to Article 25 of the Stamp act thus gets invoked in the present case. The learned Judge has, therefore, rightly observed that

Article 25 has no application.

9. For the reasons stated hereinabove, the Writ Petition fails. The same is, therefore, dismissed.

[R. G. AVACHAT, J.]

fmp/-