IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10017 OF 2018

Shri Ravindra Champalal Khivsara
Age 53 years, occ. Business
r/o Surana Nagar, Jalna Road,
Aurangabad. Petitioner

Versus

1. The State of Maharashtra
Through its Secretary
Revenue and Finance Department
Mantralaya, Mumbai.

2. The Inspector General of Stamps
New Administrative Building
Ground Floor,
Pune.

3. The Collector of Stamps
Aurangabad
Dist. Aurangabad. Respondents

Mr. Mukul Kulkarni, Advocate for the petitioner.
Mr. D.R. Kale, Government Pleader for respondents No. 1 to 3.

CORAM : M.G. Sewlikar, J.

RESERVED ON : 6th August, 2021
PRONOUNCED ON : 3rd January, 2022.

<u>JUDGMENT</u> :

1. Rule. Rule made returnable forthwith.

2. With the consent of the parties, petition is taken up for final hearing at the stage of admission.

3. By this petition, petitioner is challenging order dated 31st May, 2018, passed by respondent No. 2 – The Inspector General of Stamps, Pune, in proceedings bearing No. 39/2018, whereby application for refund of stamp duty has been rejected.

4. Facts in brief are that on 28th April, 2015, petitioner entered into Articles of Agreement with M/s Prem Constructions for utilizing resources for management of part of the property bearing Plot No. 1-A, situated at Jogeshwarwadi, N-6, CIDCO, Aurangabad. As per terms of the said agreement, petitioner was to perform given responsibilities for the property and to do things incidental thereto. The document was duly registered by the parties with the office of the Registrar, Aurangabad. Petitioner paid stamp duty of Rs. 56,50,000/-. It is further contended that although the agreement was executed, both the parties to the agreement noticed that the contract was not viable because of technical reasons and it had also become useless. Since the parties arrived at this conclusion, they executed a registered deed of cancellation on 26th

December, 2017. Accordingly, agreement dated 28th April, 2015, came to be cancelled.

5. It is further contended that the petitioner made online application on 6th February, 2018, for refund of stamp duty. On 31st May, 2018, petitioner was informed that application of petitioner for refund of stamp duty does not fall within the purview of proviso to Section 48 of the Maharashtra Stamp Act and hence, he is not entitled to refund of stamp duty. According to petitioner, hearing was required to be given to him before passing the impugned order. According to petitioner, since the document has been cancelled, it comes within the scope of Section 47(c)(5) of the Maharashtra Stamp Act. Petitioner submits that since the parties have mutually cancelled the agreement, petitioner is entitled to refund of stamp duty. Petitioner, therefore, prays for allowing the writ petition.

6. Affidavit-in-reply is filed by the Joint District Registrar, Aurangabad Shri Dipak S/o Prabhakar Sonawane on behalf of all the respondents. It is contended in the affidavit-in-reply that Articles of Agreement is in fact a Development Agreement which creates development rights in the property. According to respondents,

respondent No. 3-Collector of Stamps, forwarded the papers of petitioner for refund to the office of respondent No. 2 with remarks "not to grant refund to the petitioner". Respondent No. 2, after making scrutiny of the papers, sent back the papers to the office of respondent No. 3 with the opinion that the claim of the petitioner cannot be accepted and refund cannot be granted. It is contended in the reply that application of petitioner does not fall within the ambit of Section 47 of the Maharashtra Stamp Act. It is further contended that the agreement has been acted upon and, therefore, on this count also, petitioner is not entitled to refund of stamp duty. Development Agreement does not fall within the scope of Section 47 of the Maharashtra Stamp Act. Therefore, refund cannot be granted to the petitioner. On these counts, respondents have prayed for the dismissal of the writ petition.

7. Petitioner filed rejoider. In the rejoinder, it is contended that agreement was not acted upon. It is further contended that no right was created because of the Articles of Agreement. Articles of Agreement is not a Development Agreement.

8. I have heard Shri Mukul Kulkarni, learned counsel for

the petitioner and Shri D.R. Kale, learned Government Pleader for all the respondents.

9. Learned counsel Shri Kulkarni submitted that it is not a Development Agreement. It is only Articles of Agreement. He further submitted that when both the parties realised that the property could be developed, they decided to cancel the agreement. Accordingly, they executed deed of cancellation on 26th December, 2017. He submitted that even if the parties agree to mutually cancel the Articles of Agreement, it falls within the scope of Section 47(c)(5) of Maharashtra Stamp Act. He submitted that after cancellation of agreement on 26th December, 2017, petitioner filed application for refund of stamp duty on 6th February, 2018 i.e. within two months from the date of cancellation of agreement and, therefore, application is within limitation. He, therefore, submitted that petitioner is entitled to refund of stamp duty. He placed reliance on following cases :-

i) Sanman Trade Impex Pvt. Ltd. vs. State of Maharashtra and others, AIR 2005 Bom 94.

ii) M/s S.K. Realtors and another vs. The Inspector General of Stamp & Controller of Stamps, Maharashtra State, Pune

& others, 2016 SCC Online Bom 14536.

iii) Dr. Poornima Advani and another vs. Govt. of NCT of Delhi and another, 2018 SCC Online Del 10698.

10. Learned Government Pleader Shri Kale submitted that the application does not fall within any of the provisions of Section 47 of the Maharashtra Stamp Act. He argued that though the agreement is named and styled as Articles of Agreement, it is in fact a Development Agreement. Section 47 of the Maharashtra Stamp Act does not cover Development Agreement. He further submitted that petitioner has acted upon the agreement dated 28th April, 2015. When the agreement is acted upon, refund of stamp duty is impermissible. He, therefore, prayed for the dismissal of the petition. He placed reliance on the case of Mr. Nanik K. Daryanani vs. Deputy Inspector General of Registration & Deputy Controller of Stamps (Enforcement) Mumbai in Writ Petition No. 2229/2005 decided on 18th March, 2008.

11. Section 47 of the Maharashtra Stamp Act deals with the contingencies in which allowances for spoiled stamps is permitted. Section 47 of the Maharashtra Stamp Act reads thus :-

47. Allowance for spoiled stamps :

Subject to such rules as may be made by the State Government as to the evidence to be required, or the inquiry to be made, the Collector may on application, made within the period prescribed in section 48, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases hereinafter mentioned, namely:-

(a) the stamp on any paper inadvertently and undesignedly spoiled, obliterated or by error in writing or any other means rendered unfit for the purpose intended before any instrument written thereon is executed by any person;

(b) the stamp on any document which is written out wholly or in part, but which is not signed or executed by any party thereto;

(c) the stamp used for an instrument executed by any party thereto which -

(1) has been afterwards found [by the party] to be absolutely void in law from the beginning;

[(1A)] has been afterwards found by the Court, to be absolutely void from the beginning under section 31 of the Specific Relief Act, 1963;]

(2) has been afterwards found unfit, by reason of any error or mistake therein, for the purpose originally intended;

(3) by reason of the death of any person by whom it is necessary that it should be executed, without having executed the same, or of the refusal of any such person to execute the same, cannot be completed so as to effect the intended transaction in the form proposed;

(4) for want of the execution thereof by some material party, and his inability or refusal to sign the same, is in fact incomplete and insufficient for the purpose for which it was intended;

(5) by reason of the refusal of any person to act under the same, or to advance any money intended to be thereby secured, or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose;

(6) becomes useless in consequence of the transaction intended to be thereby effected by some other instrument between the same parties and bearing a stamp of not less value;

(7) is deficient in value and the transaction intended to be thereby effected had been effected by some other instrument between the same parties and bearing a stamp of not less value;

(8) is inadvertently and undesignedly spoiled, and in lieu whereof another instrument made between the same parties and for the same purpose is executed and duly stamped:

Provided that, in the case of an executed instrument, [except that failing under sub-clause (1A),] no legal proceeding has been commenced in which the instrument could or would have been given or offered in evidence and that the instrument is given up [to be cancelled, or has been already given up to the Court to be cancelled.]

Explanation – The certificate of the Collector under section 32 that the full duty with which an instrument is chargeable has been paid is an impressed stamp within the meaning of this section.

12. Section 47(c)(5) mandates that refund can be claimed by reason of the refusal of any person to act under the same or to advance any money intended to be thereby secured, or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose. It is not in dispute that Articles of Agreement came to be executed on 28th April, 2015. Even if it is named and styled as Articles of Agreement, it is a Development Agreement.

Nomenclature of the agreement is not material for deciding the nature of the agreement. The terms of the agreement determine the nature of the agreement. The tenor of the agreement clearly shows that it is a Development Agreement. Clauses 5 and 7 of the agreement clearly spell out that it is a Development Agreement. It reads thus :-

> 5) That, the party of second part at his own costs shall prepare the layout as well as building plan in respect of the said property under development on the open land as well as on the existing construction of shops standing thereon and the party of the first part will get it approved from the town planning authority in their name. The party of second part will incurs all the expenses for the same out of their own pocket and will pay deposit for obtaining such permission however, the party of second part will also be entitled to get the refund of deposit amount after completion of construction from the CIDCO authority/Municipal Corporation.
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> 7) That, the party of first part has already executed the declaration of apartment as per the provisions of Maharashtra Apartment Ownership Act in respect of the construction carried out on the western portion of the property plot No. 1-A on dated 07.05.2002 and deed of correction to the same on 07.07.2010 bearing

> registration no. 5475 as well as, deed of correction dated 01.12.2010 bearing registration no.9676. The party of first part shall execute the fresh deed of declaration as contemplated under Maharashtra Apartment Ownership Act and thereby insert all the details of the construction in the proposed building on the said property but however, it will be responsibility of the party of first part to comply with all requirements of apartment ownership act and that the party of the first part shall be responsible to execute deed of declaration.

Thus, these two clauses make it amply clear that the agreement is a Development Agreement.

13. It is contended in the petition and argued by learned counsel for the petitioner that the agreement was mutually cancelled as both the parties noticed that the contract is not viable because of practical reasons and it had outlived its utility. However, the deed of cancellation shows that the agreement had to be cancelled as petitioner did not actually commence any work on the said spot and intimated the owner that he was unable to carry on the development work of the said property. Therefore, it is clear that the agreement had to be cancelled because of refusal of petitioner to execute the

agreement. Even if it is assumed for the sake of argument that agreement was mutually cancelled, even then, the application for refund of stamp duty can be made.

14. In the case of M/s S.K. Realtors vs. The Inspector General of Stamps (supra), the facts were that agreement was mutually cancelled by the parties. The Division Bench of this Court has observed thus :-

> 10. The purpose behind incorporating section 48 of the Maharashtra Stamp Act is clearly to ensure that in cases where transaction is not executed, or cancelled before execution, then the State is not entitled to claim revenue for execution of the said document, and the State, therefore, is under an obligation to refund the said amount. The State, therefore, in our view, cannot resort to profiteering on the basis of a document which is not executed. The Dy. Inspector General of Stamps, Pune was not justified on relying on the circular issued by the Department, which stated that application has to be made online. It is not in dispute that the petitioners had no opportunity to make application online, since the server was not working, and therefore, he could not make application online. The Jt. District Registrar – I and Stamp Collector in his report has

accepted this position.

This decision of the Division Bench of this Court clearly lays down that application for refund can be made even if agreement is mutually cancelled.

15. Now the question is whether Development Agreement is covered by Section 47 of Maharashtra Stamp Act. In the case of Sanman Trade Impex Pvt. Ltd. Vs. State of Maharashtra (supra), it has been observed thus :-

> 14. Considering the provisions of law referred to above, the contentions on behalf of the respondent that payment of entire consideration price under the deed dated 27th March, 2003 would render the instrument to be a deed of conveyance and not an agreement and, therefore, would not be entitled to claim refund under section 48(1) read with 47(c)(5) is totally, devoid of substance. Clause (c)(5) of section 47 nowhere distinguishes between agreement of sale and the deed of sale. <u>It applies to all instruments irrespective of the fact whether it is a deed of sale or a mere agreement for sale.</u> What it provides is that the instruments should be rendered ineffective and unenforceable in the sense that the purpose for which it was executed should "totally fail". Once the party is

> able to establish that the purpose for which instrument was executed has totally failed, certainly the case would fall within the parameters of the provisions comprised under section 47(c)(5) of the said Act. Indeed, this is also clear from plain reading of section 48(1) along with proviso thereof. In fact clause (1) of section 48 does not distinguish between the sale deed and agreement for sale. Such a differentiation is to be found only under the proviso to the said clause. Explanation 1 to Article 25 of Schedule I of the said Act nowhere provides that the mere payment of entire consideration amount would transform the agreement for sale into deed of sale. On the contrary it specifically refers to delivery of possession and not the payment therefor. In other words, even under the agreement for sale with part payment of consideration, if the possession of property is delivered, it would warrant stamp duty which is payable in respect of conveyance of such property in view of provisions of law contained in explanation 1 of Article 25 of Schedule I of the said Act. (Underline is mine)

Thus, the decision of this Court makes it abundantly clear that Section 47(c)(5) applies to all instruments.

16, Section 2(l) of Maharashtra Stamp Act defines 'instrument' thus :

> "Instrument includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture, proxy and [receipt;]"

17. Thus, test for determining whether a document is an instrument is whether interest in the property is transferred. Agreement shows that petitioner was permitted to make charge on the property for taking loan. Charge is defined in Section 100 of Transfer of Property Act as :

> 100. Charges.—Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge]. Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge].

In view of this, Development Agreement is an instrument within the meaning of Section 2(l) of Maharashtra Stamp Act.

18. In view of this, petitioner seems to be entitled to refund of stamp duty paid by him. However, Section 48 of the Maharashtra Stamp Act disentitles the petitioner to claim stamp duty. Section 48 of the Maharashtra Stamp Act prescribes limitation within which refund can be claimed. Section 48 reads as under :-

> **48. Application for relief under section 47 when to be made**
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> The application for relief under section 47 shall be made within the following period, that is to say, -
>
> (1) in the cases mentioned in clause (c)(5), within [six months] of the date of the instruments:
>
> [Provided that where an agreement to sale of immovable property on which stamp duty is paid under Article 25 of the SCHEDULE I, is registered under the provisions of the Registration Act, 1908 and thereafter such agreement is cancelled by a registered cancellation deed for whatsoever reasons before taking the possession of the property which is the subject matter of such agreement, within a period of

> five years from the date of execution of the agreement to sale, then the application for relief may be made within a period of six months from the date of registration of cancellation deed];
>
> [(2) in the case when for unavoidable circumstances any instrument for which another instrument has been substituted cannot be given up to be cancelled, the application may be made within six months after the date of execution of the substituted instrument.
>
> (3) in any other case, within [six months] from the date of purchase of stamp.]

19. Thus, the period of limitation under Clause (c)(5) of Section 47 of the Maharashtra Stamp Act is six months from the date of the instrument. In the case at hand, petitioner is claiming refund of stamp duty on the Development Agreement styled as Articles of Agreement dated 28th April, 2015. Therefore, application for refund ought to have been made within six months from 28th April, 2015. Learned counsel Shri Kulkarni submitted that the period of limitation will have to be computed from the date on which the Deed of Cancellation was executed. I am afraid, this submission cannot be accepted. The instrument here refers to the instrument of which

refund is claimed. It does not say that refund can be claimed from the date of execution of Deed of Cancellation of the instrument.

20. Learned counsel Shri Kulkarni further submitted that his case also falls within the scope of Section 48(3) of the Maharashtra Stamp Act. In terms of Section 48(3), in any other case, refund can be claimed within six months from the date of purchase of stamp. In the case at hand, the date of purchase of stamp is 28th April, 2015, and refund is claimed on 6th February, 2018. This provision also does not come to the aid of the petitioner. In either case, claim of refund is barred by limitation. No provision is brought to the notice of this Court indicating that refund can be claimed even after prescribed period of limitation by condoning delay. In the case of Sanman Trade Impex Pvt.Ltd. vs.State of Maharashtra (supra) and M/s S.K. Realtors (supra), the claim was made within the prescribed period of limitation. Therefore, these authorities do not help the petitioner. In the case of Dr. Poornima Advani (supra) refund was claimed on account of loss of stamps. In this case also, claim was made within limitation. In the case at hand, since the claim is barred by limitation, I do not deem it appropriate to delve into the question as to whether before passing the impugned order, hearing

was required to be given to the petitioner or not.

21. For the aforesaid reasons, the petition cannot be allowed. Petition is devoid of any substance hence it stands dismissed. Rule is discharged.

(M. G. SEWLIKAR)
Judge

dyb