IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION 3521 OF 2018

Mr. Kimtilal Kaashmirilal Gupta and Anr. … Petitioners
Versus
Mrs. Reena Narendra Mehta and Anr. … Respondents

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Mr. R. D. Suryawanshi a/w Suraj Naik for the Petitioners.
Ms. Sandesh D. Patil a/w Divya A. Pawar-Patil for the Respondents.

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CORAM: ROHIT B. DEO, J.
DATE : 14th JUNE, 2022

P.C. :-

. Petitioners are the plaintiffs in Special Civil Suit 333 of 2009 which seeks decree for declaration and injunction against the respondents herein.

2. Petitioners are aggrieved by the order dated 10th January, 2018 rendered by 7th Jt. Civil Judge Senior Division, Thane (for short 'Trial Court') below exhibit 21 whereby document dated 8th June, 2007 styled as 'Memorandum of Understanding' (for short 'MOU') which was produced during the cross-examination of the plaintiff is impounded invoking the power under Section 33 of the Maharashtra Stamp Act, 1958 (for short 'Stamp Act').

3. The learned counsel for the plaintiffs Mr.R. D. Suryawanshi, would submit that the learned Trial Judge committed serious error in observing that the MOU is an agreement of sale and that in view of the explanation - (I) to Article 25 of the Stamp Act, the stamp duty shall be

leviable treating the MOU as deed of conveyance.

4. Relying on the decision in ***Balawanigir Ganpatgir Giri (Deceased through L.Rs) v/s. Mansi Construction and Developers and Ors., 2006 (6) ALL MR 109***, Mr. R. D. Suryawanshi would submit that the possession was to be delivered on execution of the sale deed and the learned Trial Judge committed an error in holding that the terms and conditions of Clause-5 of the MOU are rendered unworkable unless the possession is delivered.

5. Mr. Sandesh Patil who represents the defendants, would argue that reading MOU holistically, it is manifest that the possession is delivered and at any rate was to be delivered pursuant to the MOU and not postponed till the execution of the sale deed. Mr. Sandesh Patil would submit that the question which arises is required to be determined only on the basis of recitals of the documents and dehors the pleadings of the parties.

6. Before considering the submissions of the learned counsel, it would be necessary to note the provisions of Section 25 (Explanation I) of the Stamp Act, which reads thus :-

> *"25. How transfers in consideration of debt or subject to future payments, etc. to be charged*
>
> *Where any property is transferred to any person -*
>
> *(a) in consideration, wholly or in part, of any debt due to him; or*
>
> *(b) subject either certainly or contingently to the payment or transfer (to him or any other person) of any money or stock, whether being or constituting a charge or encumbrance upon the property or not;*
>
> *such debt, money or stock, shall be deemed to be the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with ad valorem duty:*

> ***Provided*** *that, nothing in this section shall apply to any such certificate of sale as is mentioned in Article 16 of Schedule I.*
>
> *Explanation. - Where property is sold and sale is subject to a mortgage or other incumbrance, any unpaid mortgage money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale, whether or not the purchaser expressly undertakes with the seller to pay the same or indemnify the seller if the seller has to pay the same:*
>
> ***Provided*** *that, where any property subject to a mortgage is transferred to the mortgage, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage."*

7. The language of Explanation I to Article 25 is unambiguous. The agreement shall be deemed to be a conveyance for the purpose of stamp duty, if 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. It is well settled, that the issue will have to be addressed and determined on the basis of the recitals, notwithstanding that the party to the litigation may contend that as a fact the physical possession of the property was not delivered.

8. In the context of the issue involved, it would be necessary to scrutinize the terms and conditions of the MOU dated 8th July, 2007 of which impounding the order. Mrs. Reena Narendra Mehta is described as owner/vendor and the party of the first part and Mr. Kimtilal K. Gupta and Mr. Vishnu M. Mehta are collectively described as purchasers of the second part. The subject matter of the property is described as land survey 276 admeasuring 1780 sq. meters situated in village Bhayander, Dist. Thane along with the building constructed thereon with built-up area of 22,000 sq. ft. The MOU describes that the party of the first part is desires of selling of her rights title and

interest in the said property and has agreed to deliver vacant and freehold possession of the said property to the party of the second part, the party of the first part made a request that the Reena Mehta College which is occupying the building, be permitted to continue the user till an alternate building is constructed.

(i) Clause 4 of the MOU reads thus :-

"4. On delivering the possession of the said property by the party of the first part to the party of the second part, the part of the second part shall have every right to deal with the said property in any manner as they may deem it fit and proper. It is further agreed by the party of the first part that the party of the second part has every right to deal with the said property i.e. to demolish the existing construction and to re-construct the buildings thereupon as the party of the second part deem it fit and proper and also have every right to sell the flats, shops, which are going to be constructed in the new buildings."

(ii) Clause 5 of the MOU authorizes and empowers the party of the second part to do the following :-

"a. To develop the said land for the commercial and or residential purpose as they may deem it fit, proper and profitable.
b. To demolish the existing construction.
c. To obtain project loan for the construction of the buildings upon the said property.
d. If necessary to mortgage the said property.
e. To enter into partnership firm.
f. To use T.D.R./F.S.I. in respect of the said property.
g. To sanction/revised the plan from the M.B.M.C.
h. To amalgamate the adjourning property."

(iii) Clause 6 is of substantial significance in the context of the controversy and reads thus :-

"6. It is further agreed and undertaken by the party of the first part that she shall handover the quite, actual and physical possession of the said property to the party of the second part. It is also undertaken by the party of the first part that it will be absolute sole responsibility of the party of the first part to shift the College which is at present running in the premises under the name & style as "Reena Mehta College", without any excuses. (Such as students and or teachers

> *problems and or any reason.). And incase any litigations will be arises in respect of the said college, same shall be remove by the party of the first part without any excuses and causing any delay."*

9. In the context of the specific recitals of the MOU, which are culled out supra, it is crystal clear that the possession of the property is as a fact delivered to the party of the second part. The learned Trial Judge is not wrong in observing that in the absence of de-facto possession, Clause 5 of the MOU is rendered unworkable. Even *dehors* the said aspect, the Explanation II to Section 25 comes into place, no sooner it is agreed that the possession shall be delivered to the purchaser and such delivery may not necessarily be simultaneous with the execution of the agreement. Suffice it, if the delivery of possession is pursuant to the agreement and is not postponed till the execution of the sale deed.

10. The decision in ***Balwantgir Ganpatgir Giri through his Lrs Nanibai wd/o Balwant Giri and Ors. v/s. Manasi Construction and Developers, 2006 (5) Mh.L.J. 306*** is clearly distinguishable. The decision turns on the finding that the agreement in question clearly contemplated delivery of possession only on the execution of the sale deed. It would be apposite to note the following observations in the said decision :-

> *"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."

11. The decision in ***Balwantgir Ganpatgir Giri*** (supra) is considered in ***M/s. Dharati Developers and Ors. v/s. Madhukar Atmaram Patil and Ors.,*** which is pressed in service by the learned counsel for the petitioners. However, the factual matrix in ***M/s. Dharati Developers and Ors.*** (supra) was that the possession was to be given at the time of execution of an agreement which was to be executed subsequent to the MOU and it was in that view of the matter, that it is held that since the possession was not to be delivered pursuant to the MOU, the MOU cannot be treated as deemed conveyance. ***M/s. Dharati Developers and Ors.*** (supra) does not take the case of the petitioners any further.

12. I am satisfied that the view taken by the learned Trial Judge does not suffer from any infirmity, which warrants the interference and would be impel me to exercise writ jurisdiction. The petition is dismissed.

[ROHIT B. DEO, J.]

BIPIN DHARMENDER PRITHIANI

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