IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION 6118 OF 2022

Pravin Manilal Sanghvi and Ors.	…	Petitioners
Versus		
M/s. Arihant Developers through its Partners	…	Respondent

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Mr. Siddharth C. Wakankar for the Petitioners.
Mr. Chaitanya Nikte for the Respondent.

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CORAM: ROHIT B. DEO, J.
DATE : 6th JULY, 2022

P.C. :-

. Rule.

2. With consent, the petition is heard finally.

3. Petitioners are the plaintiffs in Special Civil Suit 1730 of 2011 brought for specific performance and enforcement of the right of preferential purchase, possession and injunction.

4. The suit property is described in paragraph 1 of the plaint and it is situated in Ganesh Peth within the limits of Pune Municipal Corporation.

5. The challenge in the petition is to the order dated 23rd December, 2021 rendered by the learned Trial Judge below exhibit 71 whereby the

agreement dated 4th December, 2002 which is placed on record by the plaintiffs vide list of documents exhibit 62, is impounded. The learned Trial Judge invoked the provisions of Article 5 (g-a) and Article 25 of the Maharashtra Stamp Act, 1958 (for short 'Stamp Act') and held that agreement dated 4th December, 2002 is insufficiently stamped.

6. Considering that the issue involved will have to be addressed primarily on the basis of the recitals in the agreement dated 4th December, 2002, it would suffice only to broadly note the case of the plaintiffs.

7. According to the plaintiffs, the suit property is purchased by the defendant M/s. Arihant Developers which is a partnership firm, by registered sale deed dated 18th July, 1996. The father of the plaintiffs 1 to 4 and husband of plaintiff 5 Mr. Manilal Chunilal Sanghvi had extended substantial cooperation to the firm is in dealing with occupants and tenants and had also paid an amount of Rs.10,00,000/- (Rupees Ten Lakhs Only) to the firm. It was agreed that the defendant firm would develop the suit property and 25% of the gross sale proceeds would be paid to Mr. Manilal Sanghvi. The agreement was reduced into writing vide document dated 4th December, 2002. The plaintiffs contended that the defendant firm neither developed the suit

property nor returned the amount of Rs.10,00,000/- (Rupees Ten Lakhs Only) to Mr. Manilal Sanghvi and it was in this view of the matter that the agreement dated 4th December, 2002 recites that four rooms along with the attic which is part of the suit property shall be in possession of Mr. Manilal Sanghvi who would be entitled to exploit the rental potential thereof. The agreement dated 4th December, 2002 further recites that if within the period of two years from the date of the agreement, the development activity is not commenced by the defendant firm, Mr. Manilal Sanghvi would have the right of preferential purchase. The arrangement envisages that as and when it is decided that the suit property be sold, the defendant firm shall decide the valuation and if Mr. Manilal Sanghvi finds the valuation fair, he would have preferential right to purchase the suit property by making payment of 75% of the amount of the valuation arrived at by the defendant. A further condition is incorporated in the agreement that in the event Mr. Munilal Sanghvi opts to enforce the right of preferential purchase, he shall not be entitled to claim of amount of Rs.10,00,000/- (Rupees Ten Lakhs Only) or any other or further amount from the defendant firm. The rest of the averments in the plaint are not relevant in the sense that the attempt is to demonstrate that the defendant firm is resiling from the terms and conditions of the agreement dated 4th December, 2002.

8. The defendant preferred an application exhibit 71 invoking the provisions of Section 33 of the Stamp Act. The defendant contended that in view of the recitals in the agreement dated 4th December, 2002, Article 5(g-a) and Article 25 are attracted. It is contended in application exhibit 71 that the plaintiff is attempting to secure rights of ownership and the plaintiff has further asserted that the defendant has the right to develop the property and therefore the provisions of Stamp Act supra are clearly attracted.

9. The learned Trial Judge accepted the submission of the defendant that the agreement dated 4th December, 2002 is insufficiently stamped. The learned Trial Judge held that from plain reading of the agreement dated 4th December, 2002, it appears that the agreement is deed of conveyance and further empowers the defendant to construct and develop the suit property. It is on such premise, that the learned Trial Judge invoked the provisions of Article 5 (g-a) and Article 25. The consideration by the learned Trial Judge of the issue reads thus :

> *"16. Considering the above provision, I would like to state here that by way of agreement dtd. 04.12.2002, the rights of Plaintiffs have been secured and it is agreement of conveyance of suit property*

> *and as well as giving authority to defendants to raise construction and develop the suit property. Therefore, though agreement dtd. 04.12.2002 is contingent in nature and as partial premises of suit property in the form of four rooms have been given to plaintiffs, I am of opinion that in view of provision of the Article 5(g a) and under the Article 25 of the Maharashtra Stamp Act, the instrument dtd. 04.12.2002 is needs to be impounded because it has been reduced into writing on the stamp paper of only Rs.50/- and considering the market value of the suit property, it appears that it is insufficiently stamped and the said instrument is deed of conveyance. Therefore, I am of opinion that the instrument dtd.04.12.2002 is required to be impounded as per the provision of the Section 33 of the Maharashtra Stamp Act. Hence, I proceed to pass following order:-*
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> ***ORDER***
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> 1. *Application Exh. 71 is hereby allowed.*
> 2. *The agreement dtd. 04.12.2002 which is at serial no. 1 of list of documents Exh. 62 is hereby impounded.*
> 3. *The plaintiffs shall obtain the certified copy of the agreement dtd. 04.12.2002 and furnish in the Court so as to, it shall send to the District Stamp Collector, Pune for calculation of exact stamp duty with penalty.*
> 4. *After furnishing the certified copy by plaintiff on record, it shall be sent to the District Stamp Collector, Pune.*
> 5. *The District Stamp Collector, Pune shall calculate the required stamp duty on the agreement dtd. 04.12.2002 and shall recover the same from plaintiffs and make endorsement to that effect on the said certified copy and be sent it to the Court."*

10. I have heard the learned counsel for the parties and with their able assistance the material on record *inter-alia* the recitals in the agreement dated 4th December, 2002 are scrutinized.

11. In my considered view, the learned Trial Judge clearly erred in impounding the agreement dated 4th December, 2002 by invoking the provisions of Article 5 (g-a) and Article 25 of the Stamp Act and the

order impugned is clearly unsustainable in law for the reasons spelt out herein after.

12. Article 5(g-a) which is brought on the statute book by Maharashtra Act 9 of 1997 w.e.f. 7th February, 1990, reads thus :-

> *"Article 5(g-a) : (i) if relating to giving authority or power to a promoter or a developer, by whatever name called, for construction on, development of or, sale or transfer (in any manner whatsoever) of, any immovable property.*
>
> *(ii) if relating to the purchase of one or more units in any scheme or project by a person from a developer :*
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> *Provided that, on conveyance of property by the person, under an agreement under this sub-clause, to the subsequent purchaser, the duty chargeable for each unit under this sub- clause shall be adjusted against the duty chargeable under article 25 (conveyance) after keeping the balance of one hundred rupees, if such transfer or assignment is made [within a period of one year] from the date of the agreement. If on adjustment, no duty is required to be paid, then the minimum duty for the conveyance shall be rupees one hundred.*
>
> *Explanation.—For the purposes of* this sub-clause, the unit shall include a flat, apartment, tenement, block or any other unit by whatever name called, as approved by the Competent *Authority in the building plan."*

12. The legislative intent is clearly to protect the State revenue and of eliminating the possibility of the property owner circumventing the provisions of the Stamp Act. Plain reading of the said provision indicates that the person giving the authority or power must be the owner of the property or a person claiming through or under him and the person to whom the power is given must be the promoter or developer by whatever name called. In the factual matrix, the question

of Mr. Manilal Sanghvi authorizing or empowering the defendant to develop the property just does not arise. Indeed, it is not in a dispute that the owner of the property is the defendant firm. What is discernible from the recitals of the agreement dated 4th December, 2002 is that the intent of the parties was to secure the investment, in terms of finance and other contribution, of Mr. Manilal Sanghvi and it was to the said end that the parties arriaved at certain arrangement. The defendant firm as the owner required no authority or power from any person, much less Mr. Manilal Sanghvi, to develop its own property. The learned Trial Judge has clearly failed to appreciate the true import of the agreement dated 4th December, 2002 and misdirected himself by assuming that Article 5(g-a) would apply since the agreement dated 4th December, 2002 speaks of the firm developing the property.

13. The finding of the learned Trial Judge that the agreement dated 4th December, 2002 is deemed conveyance attracting the provisions of Article 25 of the Stamp Act, is equally flawed. Article 25 of the Stamp Act reads thus :-

> *"Article 25 : CONVEYANCE (not being a transfer charged or exempted under Article 59) —*
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> *On the [true market value] of the property, which is the subject matter of Conveyance, —*
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> *(a) if relating to movable property*

(b) if relating to immovable property situated, —

(i) within the limits of any Municipal Corporation or any Cantonment area annexed to it or any urban area not mentioned in sub-clause (ii).

(ii) within the limits of any Municipal Council or Nagar Panchayat or Cantonment area annexed to it, or any rural area within the limits of the Mumbai Metropolitan Region Development Authority, or the Influence Areas as per the annual statement of rates published under the Bombay Stamp (Determination of True Market Value of Property) Rules, 1995.

(iii) within the limits of any Grampanchayat area or any such area not mentioned in sub-clause (ii).

(c) if relating to both movable and immovable property.

*(d) * * * **

(da) if relating to the order of High Court in respect of the amalgamation or reconstruction of companies under section 394 of the Companies Act, 1956 or the order of the National Company Law Tribunal under sections 230 to 234 of the Companies Act, 2013 or confirmation issued by the Central Government under sub-section (3) of section 233 of the Companies Act, 2013 in respect of the amalgamation, merger, demerger, arrangement or reconstruction of companies (including subsidiaries of parent company) or order of the Reserve Bank of India under section 44A of the Banking Regulation Act, 1949 in respect of amalgamation or reconstruction of Banking Companies.]

*(e) * * * **

Exemption

Assignment of copyright under the Copyright Act, 1957.

[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 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.]

[Explanation II.— * * * *]*

[Explanation III.—[(i)] For the purposes of clause (da), the market value of shares,—

(a) in relation to the transferee company, whose shares are listed and quoted for trading on a stock exchange, means the market value of shares as on the appointed day mentioned in the Scheme of Amalgamation or when appointed day is not so fixed, the date of order of the High Court ; and

(b) in relation to the transferee company, whose shares are not listed/ or listed but not quoted for trading on a stock exchange, means the market value of the shares issued or allotted with reference to the market value of the shares of the transferor company or as determined by the Collector after giving the transferee company an opportunity of being heard.]

[(ii) for the purposes of clause (da), the number of shares issued or allotted in exchange or otherwise shall mean, the number of shares of the transferor company accounted as per exchange ratio as on appointed date.]"

14. The learned Trial Judge presumably relied on explanation I which provides that where in the case of agreement to sell an immovable property, the possession of any immovable property is transferred or agreed to transfer 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 Act thereon shall be leviable accordingly.

15. The *sine qua non* condition for attracting the explanation is that the document must be an agreement to sell and that the possession of the subject matter of the agreement is transferred or agreed to transfer to the purchaser before the execution or at the time of execution or after the execution of such agreement. In my considered view, the recitals of the agreement dated 4th December, 2002, if understood in proper perspective, do not attract the provisions of explanation.

16. The document dated 4th December, 2002 cannot be construed as an agreement to sell for the purpose of Article 25 of the Stamp Act. The agreement in essence seeks to protect and secure the financial interest of Mr. Manilal Sanghvi. In consideration of the financial and other support extended by Mr. Manilal Sanghvi to the defendant firm in acquiring the suit property, Mr. Manilal Sanghvi was assured 25% of the gross sale proceeds from the development and sale of the constructed units. The agreement then contemplates that in the event the defendant is not in a position to pay Mr. Manilal Sanghvi his dues and decides to sell the suit property, Mr. Manilal Sanghvi would have a preferential right to purchase the suit property at 75% of the valuation to be determined by the defendant firm, provided such valuation is

acceptable to Mr. Manilal Sanghvi. The preferential right of purchase of which enforcement is sought in this suit would come into play only if the defendant firm is not in a position to settle the financial dues of Mr.Manilal Sanghvi. It is in this view of the matter, that the agreement dated 4th December, 2002 cannot be construed as an agreement to sell immovable property within the meaning of Article 25 of the Stamp Act. The other aspect of the matter, is that the possession of the four rooms which Mr. Manilal Sanghvi was permitted to retain was not pursuant to an agreement to sell. The agreement dated 4th December, 2002 squarely explains and clarifies the backdrop and context in which Mr. Manilal Sanghvi is permitted to retain the possession of the structure comprising of four rooms and attic standing on the suit property. The said possession was retained by Mr. Manilal Sanghvi as security for due compliance of the terms and conditions of the agreement dated 4th December, 2002, as is the recital in Clause 7 of the said agreement.

17. In view of the discussion supra, the order impugned is set aside. Exhibit 71 in said suit stand rejected.

18. The petition is allowed in the aforestated terms, no cost.

[ROHIT B. DEO, J.]