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IN THE HIGH COURT OF JUDICATURE OF BOMBAY BENCH AT AURANGABAD

WRIT PETITION NO.2779 OF 2020

1. Ramnath Bhausaheb Katore PETITIONERS
Age – 40 years, Occ – Agriculture

2. Shamkant Bhausaheb Katore
Age – 37 years, Occ – Service
Both are R/o Nimgaon, Korahale,
Taluka – Rahata, District – Ahmednagar

VERSUS

1. Annasaheb Shivaji Moin RESPONDENTS
Age – 30 years, Occ – Agriculture
R/o Chorwaghalgaon, Taluka – Vaijapur
District – Aurangabad

2. Sunita Annasaheb Jadhav
Age – 38 years, Occ – Household
R/o Shirasgaon, Taluka – Kopargaon
District – Ahmednagar

3. Meena Ramesh Chavan
Age – 36 years, Occ – Household
R/o Kolamb, Taluka – Yewala
District – Nashik

4. Anita Sanjay Chavan
Age – 34 years, Occ – Business / Household
R/o Kate Pimpalgaon, Taluka – Gangapur
District – Aurangabad

5. Sangita Rajendra Bhad
Age – 32 years, Occ – Household
R/o Dhamod, Taluka – Yewala,
District – Nashik

6. Latabai Kachru Kothule
Age – 60 years, Occ – Agriculture
R/o Malharwadi, Taluka – Rahuri
District – Ahmednagar

7. Bhausaheb Nana Katore
Age – 73 years, Occc – Agriculture
R/o Nimgaon, Taluka – Rahata
District – Ahmednagar

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Mr. Sanket S. Kulkarni, Advocate for the petitioners

Mr. Rameshwar F. Totala h/f Mr. Swapnil V. Lohiya Advocate for respondents No.1 to 5

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[CORAM : NITIN B. SURYAWANSHI, J.]

RESERVED ON : 18th JULY, 2023
PRONOUNCED ON : 11th AUGUST, 2023

ORDER :

1. By this petition, filed under Article 227 of the Constitution of India, the petitioners challenge order dated 12th January, 2018 passed by learned Joint Civil Judge, Senior Division, Kopargaon, below Exhibit-72 in Special Civil Suit No.19 of 2016, thereby allowing the application filed by the respondent – defendants No.1 to 5 and impounding agreement to sell, dated 1st October, 2014 produced by the petitioners – plaintiffs at Exhibit-71/3 and sending the said document to the Collector, Ahmednagar for adjudication as per section 32 (A) (3) of the Bombay Stamp Act, 1958.

2. The petitioners filed the suit for specific performance of contract and for possession. Defendants No.6 and 7 resisted the suit by filing written statement and counter claim. Respondents

No.1 to 5 / defendants, filed application Exhibit-72 in the said suit, contending that the plaintiffs have filed the suit for specific performance of agreement dated 1st October, 2014, which is executed on bond paper of Rs.100/- and as per the recitals in the said agreement, the transaction is of Rs.14,00,000/-. Since the agreement is not registered, the plaintiffs are liable to pay stamp duty on Rs.14,00,000/- and, therefore, the agreement is liable to be impounded. No say was filed by the plaintiffs to the said application. By the impugned order, the document is impounded. Hence, the present petition.

3. Heard learned advocate for the petitioners and the learned advocate for respondents N.1 to 5. Perused the memo of writ petition, documents annexed with it, the impugned order and the citations relied on by both the parties.

4. Learned advocate for the petitioners submits that the suit is filed for specific performance of contract, claiming possession of the suit property. By pointing out averments in the written statement filed by defendants No.1 to 3 and 5, he submits that possession of defendant No.8, over the suit property is specifically denied by the said defendants. He further submits that since possession is claimed by the plaintiffs, pursuant to the specific performance of contract, the Trial Court erred in

impounding the document, by erroneously placing reliance on section 33 of the Bombay Stamp Act. In support of his submissions, he relied on decision of Division Bench of this Court in ***"″Balwantgir Ganpatgir Giri V/s Manasi Construction and Others" 2006 (44) Mh.L.J. 306*** and a decision of learned Single Judge of this Court in Writ Petition No. 7448 of 2015 (***Ramesh Shankarlal Sawaiwala and Another V/s Vijaya Late Laxminarayan and Others***).

5. Per contra, learned advocate for the respondents supported the impugned order. He submits that taking into consideration the recitals in the agreement to sell, it is clear that the suit property was in possession of General Power of Attorney holder Bhausaheb Nana Katore – defendant No.8 is in possession of the suit property. He, therefore, submits that it is clear from the said statement that the suit property is already in possession of the plaintiffs and, therefore, the said agreement can be termed as "*conveyance*" and the Trial Court is right in impounding the said document and directing inquiry by the Collector for adjudication as per section 32 (A) (3) of the Bombay Stamp Act.

6. Perusal of the agreement to sell dated 1st October, 2014 shows that the petitioners / plaintiffs have entered into an

agreement of sell with Bhimabai Shivaji Moin and Latabai Kacharu Kothule. Defendants No.1 to 5 are legal heirs of Bhimabai and Latabai is defendant No.6. Father of the plaintiffs – Bhausaheb is defendant No.8 in the suit. In the agreement it is stated that the suit property is not in actual possession of Bhimabai and Latabai, but the same is in cultivation and possession of General Power of Attorney Bhaushaeb Katore – defendant No.8.

7. Admittedly, the plaintiffs have claimed possession of the suit property by way of specific performance of the said agreement. In that view of the matter, it cannot be said that the agreement to sell is a conveyance and the same is liable to be impounded.

8. There is also a recital in the agreement that the suit property is jointly owned by Bhausaheb, Bhimabai and Latabai. Considering these recitals and the prayer of the plaintiffs in the suit, seeking possession of the suit property, the said agreement cannot be termed as conveyance.

9. In ***"Balwantgir Giri"*** (*supra*), the Division Bench of this Court has observed :

> *5. The point which arises for consideration is; whether the document in*

question discloses an agreement for delivery of possession in terms of agreement for sale and that, therefore, it is a conveyance within the meaning of said expression under Explanation-I to Article 25 of Schedule-I of the said Act?

6. The relevant clause of the agreement of sale dated 3-3-2000 reads thus:

तसेच खरेदी करते वेळेस आयकर प्रमाणपत्र प्राप्त करण्याची जबाबदारी पार्टी न. 2 वर राहील. पार्टी नं.1 ला शेत जमिनीत ताबा विक्रीचे दिवशी प्रत्यक्ष जावून देण्यात येईल

Plain reading of the above quoted clause would reveal that the parties had agreed that it would be the obligation of party No. 2 to obtain income tax clearance certificate at the time of completion of the sale. It was further agreed that party No. 1 would be delivered with the possession of the property on the day of the sale thereof by personally remaining present in loco. It is this later part of the agreement which has led to the dispute in question. As far as the term of the agreement which discloses that the delivery of possession was intended to be given on the day of the sale of the property, there is no dispute between the parties. It is also not in dispute that the expression: "the day of the sale" means the day on which the deed of sale was to be executed.

8. The Explanation clearly requires an agreement for sale to carry the stamp duty as payable on a conveyance, when such agreement contemplates for delivery of possession either before execution of the agreement or at the time of execution of agreement or any time after execution of the agreement. Referring to the last eventuality under which the agreement requires to carry stamp duty payable on a conveyance, it is sought to be contended that expression "after the execution of such agreement" would include any period or any day after the execution of the agreement irrespective of the fact whether such possession is to be delivered prior to or after the execution of the actual sale deed. The contention on behalf of the appellants is that bearing in mind the intention *of the legislature in incorporating the Explanation being with a view to avoid the opportunity to defraud the Government by representing the document to be a mere agreement and not a conveyance when in fact the conduct of the parties reveals from the terms of agreement that the same to be a transaction in the nature of conveyance; besides once the possession is delivered, the parties choose to neglect to execute a sale deed in spite of the fact that the property is actually transferred from one person to another. To avoid such eventuality the said Explanation having been incorporated in the statutory provision, according to the appellants the strict interpretation of the said Explanation would require that every agreement which contemplates delivery of possession at any time after the execution of such agreement should be construed as a conveyance and would require a stamp duty payable on conveyance. On the other hand it is the contention on behalf of the respondents that the Explanation having been introduced to safeguard the revenue interest of the Government and in cases where the agreement specifically contemplates the requirement of the execution of the sale deed and the delivery of possession being linked to the execution of the sale deed, there would be no occasion to defraud the Government of the revenue and such an agreement cannot be construed as a conveyance within the meaning of the said expression under the said Explanation. The learned advocate for the appellants has also sought to rely upon the decision of the learned Single Judge in Sheshrao Bhikaji Kale V Damodar Pandhare reported in 2004(3) Mh.L.J. 357.*

9. The fact that the 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 be raised on behalf of the appellants. Besides, as rightly submitted on behalf of the respondents, the Explanation to Article 25, the delivery of possession which transposes an agreement into a conveyance in terms of the 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 on execution of the sale deed cannot be 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.":*

10. In Writ Petition no. 7448 of 2015, learned Single Judge of this Court, in similar facts, has followed the decision in ***Balwantgir Giri"*** (*supra*) and by relying on decision of learned Single Judge of this Court at Nagapur in ***"Jugalkishore Jiwandas Arora V/s Sunil Vinayakrao Kokje and Another" 2006 (6) ALL M.R. 5761*** has held :

"5. A Single Judge Bench of this Court at Nagpur has taken a similar stand in <u>Jugalkishore Jiwandas Arora Vs Sunil Vinayakrao Kokje and Another [2006 (6) ALL M.R. 576]</u>, that where an agreement to sell does not stipulate delivery of possession at any point of time, prior to registration and execution of the sale deed, such an agreement to sell cannot be considered as a conveyance as contemplated by Article 25 of the said Act. Section 2 (l) of the said Act defines an 'instrument' to mean, every document, by which, any right or liability is created or it purports to create. However, such an instrument would be covered by explanation (1) to Article 25 of Schedule I of the said Act, if it creates a right by which the possession of the immovable property is transferred or agreed to be transferred before the execution or at the time of the execution of such an

agreement to sell which would then be deemed to be a conveyance. The issue of imposing stamp duty would then arise."

The above observations are squarely applicable to the facts of the present case.

11. While passing the impugned order, the Trial Court has failed to appreciate the ratio in ***Balwantgir Giri*** (*supra*) and has erred in relying on decisions in ***"Chilakuri Gangulappa Vs. Revenue Divisional Officer, AIR 2001 SC 1321*** and ***"Santosh Anant Raut Vs Pukhraj Chogmal Rathod 2010 ALL MR (Supp) 529*** and misread and misconstrued the provisions of sections 33 and 34 of the Bombay Stamp Act and has ignored the explanation I of Article 25 of Schedule I of the Bombay Stamp Act.

12. For the aforesaid reasons, the writ petition is allowed. The impugned order dated 12th January, 2018 passed by learned Joint Civil Judge, Senior Division, Kopargaon, below Exhibit-72 in Special Civil Suit No. 19 of 2016 is hereby quashed and set aside.

[NITIN B. SURYAWANSHI]
JUDGE