# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CIVIL APPELLATE JURISDICTION

## WRIT PETITION NO.4174 OF 2015

Audio Visual Centre ...Petitioner

*Versus*

State of Maharashtra & Ors. ...Respondents

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Mr. K. T. Kukreja a/w. Ms. Chandni Sabnani i/by Mr. Arvind Manghirmalani for the Petitioner.

Ms. M. S. Bane, AGP for the Respondent (State).

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**CORAM : JITENDRA JAIN, J.**

**RESERVED ON : 7th OCTOBER, 2023.**
**PRONOUNCED ON : 12th OCTOBER, 2023**

**Judgment:-**

. By this petition under Article 226 of the Constitution of India, the Petitioner is seeking an appropriate writ against the Respondents for refund of Rs.20,50,000/- being stamp duty on sale agreement which was subsequently cancelled.

2. **Narrative of the relevant events:-**

(i) On 17th April 2006, Petitioner purchased stamp of Rs.22,50,000/- from ICICI Bank for the purpose of executing sale deed with Orbit Finance Pvt. Ltd.

(ii) On 18th April 2006, a sale deed was executed between the Petitioner and Orbit Finance Pvt. Ltd. for the purchase of premises being Unit Nos.303 and 304 in the building "Orbit Plaza" at Prabhadevi, Mumbai for a consideration specified in the said deed. As per clause 12 of the sale deed, Orbit Finance agreed to handover to the Petitioner vacant physical possession of the premises. However, Orbit Finance could not handover the possession of the premises and, therefore, a cancellation deed was executed on 19th October 2006 between the Petitioner and Orbit Finance.

(iii) On 13th April 2007, a refund application was made to the Respondents for refund of stamp duty paid on sale deed dated 18th April 2006.

(iv) Thereafter, series of correspondences were exchanged between the Petitioner and the Respondents under the Right to Information Act, 2005 as well as under the Stamp Act for refund of the stamp duty. However, inspite of various internal communications received by the Petitioner pursuant to the R.T.I. applications which approved the refund, the Respondents did not grant the refund on the ground that the cancellation is not of agreement to sale, but it is of sale deed and, therefore, provision of Sections 47 and 48 dealing with refund of stamp duty is not applicable.

(v) It is on this backdrop that the writ petition is filed for refund of the stamp duty along with the interest.

3. The Petitioner submitted that the issue is squarely covered by the decision of this Court in the case of **Sanman Trade Impex Pvt. Ltd. Vs. State of Maharashtra**[1], wherein on a very identical situation, the contentions raised by the Respondents herein have been rejected. The Petitioner, therefore, submitted that the relief as prayed for be granted.

4. Per contra, on the other hand, the Respondents justified the denial of the refund on the ground that sale deed is not covered by Sections 47 and 48 of the Stamp Act and, therefore, the application made for refund is rightly rejected. However, the Respondents did not contest the applicability of the decision relied upon by the Petitioner in the case of **Sanman Trade Impex Pvt. Ltd. (supra)**.

5. Heard learned counsel for the Petitioner and the Respondents and with their assistance have perused the documents annexed to the petition.

6. In my view, the issue stands squarely covered by the decision of this Court in the case of **Sanman Trade Impex Pvt. Ltd.**

1 AIR 2005 Bombay 94

**(supra)**, wherein on an identical fact situation, the refund application was rejected on the ground that sale deed is not covered by the provision of Sections 47 and 48 of the Act. The Coordinate Bench of this Court after analysing the scheme of the Act and more particularly Sections 47 and 48 of the Stamp Act by a detailed order rejected the contention of the Respondents and allowed the refund application. The relevant paragraph of the said decision are as under:-

> *"7. Section 48 deals with the subject of applications for reliefs under Section 47 of the said Act. Sub-section (1) thereof provides that application for relief under Section 47 shall be made within a period of six months from the date of the instrument, when a case falls under clause (c)(5) of Section 47. Proviso to the said sub-section provides that in case of an agreement to sale of immovable property on which stamp duty is paid under Art. 25 of Schedule I, is presented for registration under the provisions of Registration Act, 1908 and if the seller refuses to deliver possession of the immovable property which is the subject matter of such agreement the application may be made within two years of the date of the instrument. In other words in cases where the instrument is covered by Art. 25 of the Schedule I of the said Act, the period of limitation prescribed for refund is of two years from the date of the instrument whereas when the instrument happens to be the one referred to under clause (c)(5) of Section 47, and other than the agreement covered by the provisions of the proviso to Art. 25 of Schedule I of the said Act the period prescribed is of six months.*
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> *8. ....*
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> *9. ....*
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> *10. ....*
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> *11. Similarly, even in case where an instrument in relation to such an agreement is provides with the nomenclature of deed of sale and purchase of property but after execution thereof the transferor thereunder is rendered helpless in the matter of giving effect to the sale of the property agreed upon in the sense that he fails to deliver actual possession of the property to the purchaser, certainly in such cases, also it would amount to total failure of intended purpose within the meaning of the said expression under*

*clause (c)(5) of Section 47 unless, the evidence produced before the Collector discloses that the claim for refund is either bogus or is made with sole intention to defraud the Government in relation to revenue or for any other purposes.*

*12. The expressions "the stamp used for an instrument executed" and "totally fails of the intended purpose" disclose that the "purpose" spoken of in sub-clause (5) of clause (c) of Section 47 of the said Act relates to the utility of the stamps for the matter for which the same was required to be used. Once the transferor fails to comply with the conditions in the agreement for sale and to deliver the possession of the property, obviously the instrument is rendered ineffective and useless, unless of course, the transferee seeks for specific performance of such agreement. Otherwise, the purpose having failed, the party investing the money for purchase of the stamp in relation to the spoiled stamp papers, would be entitled to claim refund of the stamp duty, albeit, subject to other conditions specified in the said Act and the said Rules.*

*13. Undoubtedly, explanation (1) to Art. 25 of the Schedule I of the said Act provides that when an agreement to sale an immovable property is accompanied with the delivery of possession of the immovable pro-perty, which is the subject matter of the agreement, would be deemed to be a conveyance of the property and, therefore, would require the payment of the stamp duty accordingly. In other words, even if an instrument is drawn with the nomenclature as agreement for sale but once it discloses delivery of possession of immovable property to the purchaser thereunder, the transaction would partake the nature of covenance and would be deemed to be a deed of sale and, therefore, would warrant stamp duty payable on a deed of sale in relation to such property.*

*14. Considering the provisions of law referred to above, the contention on behalf of the respondent that payment of entire consideration price under the deed dated $27^{th}$ 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. It applies to all instruments irrespective of the fact whether it is deed of sale or a mere agreement for sale. 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 Art. 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 Art. 25 of Schedule I of the said Act.*

*15. In any case, as already observed above, it is immaterial whether it is an agreement or deed of sale. It may be relevant only for the purpose of considering period of limitation to claim refund in case of agreement of the notice covered by proviso to Art. 25 of Schedule I of the said Act, the period of limitation would be of two years as per the proviso to Section 48. However, it would restrict to period of six months in other cases. Undisputedly in the case in hand claim for refund was made on 19th July 2003 whereas the instrument in question was drawn and was presented for registration on 27th March, 2003. In other words, claim was made within a period of six months as provided under Section 1 of Section 48.*

*16. It is pertinent to note that order dated 4th Dec. 2003 as well as the order dated 28th May 2004 speak of claim for refund being outside the scope of the said Act. Neither the order passed by respondent No. 2 nor the one passed by respondent No. 3 discloses as to how the claim for refund is outside the scope of the said Act. It is to be noted that in case of spoiled instrument within the meaning of the said expression under Section 47 of the said Act, it is the matter of right for the parties to claim refund of the stamp duty. Being so, the authorities empowered to deal with such claims and to pass order in relation to such claim, are also necessarily required to pass a reasoned order. The order on the face of it should disclose reason for the rejection of the claim. Merely stating that a claim is outside the scope of the said Act, cannot, under any circumstances be said to be disclosing the reason for rejection of the claim. It was necessary for the authorities to disclose as to how the claim for refund happens to be beyond the scope of the said Act. Learned A.G.P. tried to explain the same by contending that the instrument was a conveyance and not an agreement and, therefore, it did not fall within the provisions of Section 48(1) of the said Act. However, as already seen above, arguments in that regard are totally devoid of any substance. No other explanation was sought to be given as to how the authorities found the claim beyond the scope of the said Act. It is really surprising that while collecting stamp duty it was collected under the said Act and when the party approached for refund of the same, the claim was sought to be rejected on the ground that it falls beyond the scope of the said Act. The lower authority having committed such mistake by order dated 4th Dec. 2003, at least the appellate authority was expected to give proper reason if at all there is any, for rejecting the claim and not to just endorse the totally unsustainable order* *passed by the lower authority.*

*17. In the case in hand undoubtedly the instrument dated 27th March, 2003 disclosed the condition relating to delivery of possession of the flat after expiry of one month from the date of execution of instrument. The instrument also disclosed the purpose of purchase of the flat being in the occupation of the customer of the petitioner company. Undoubtedly, the occupant of the flat refused to vacate the same and the transferor company, therefore, could not deliver the possession of the flat to the petitioner company. It is not the case of the respondent that the claim for refund is bogus or false or there has been any misrepresentation of facts by the petitioner in relation to the claim for refund. Under these circumstances, the application having been made within the prescribed time, the petitioners are entitled for refund of the stamp duty in accordance with the provisions of law.*

*18. As regards the decisions sought to be relied upon by the learned Advocate for the petitioner, it is to be noted that the decision of the Division Bench in the case of Kotak Mahindra Finance (supra) the same was on the point of liability to pay stamp duty and it was not in relation to the refund claim. Undoubtedly, it was held that the transfer of shares in cooperative society does not amount to transfer of merely movable property but amounts to conveyance of immovable property as the same amounts to agreement for sale of immovable property along with the transfer of shares in the society. The decision of the Apex Court in the case of Veena Jain (supra) was also on the point that whether there is specific time for handing over the possession without executing conveyance and in such event, the document would fall within the scope of explanation 1 of Art. 25 of Schedule I to the said Act and, therefore, would attract then duty as if it is a conveyance.*

*19. For the reasons stated above, the petition succeeds. The impugned orders are hereby quashed and set aside and the respondents are directed to refund the stamp duty in accordance with the provisions of law, also bearing in mind Rule 22A of the said Rules within a period of four weeks. Rule is made absolute in the aforesaid terms with no order as to costs."*

7. It is also important to note that various information obtained by the Petitioner under the Right to Information Act, 2005 also supports the case of the Petitioner that the officers of the Respondents themselves have accepted that the Petitioner is entitled to the refund of the stamp duty.

8. It is also relevant to note Explanation-I to Article 25 of the Schedule to the Stamp Act, which provides that where in the case of agreement to sell an immoveable property, the possession of any immoveable property is transferred or agreed to be transferred to the purchaser before or after or at the time of execution of such agreement, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly. If that be so, then the Respondents are not justified to contend that when it comes to provision of Sections 47 and 48 of the Stamp Act, what is covered is only agreement to sell and not the sale deed. The Respondents cannot blow hot and cold by contending that when it comes to payment of stamp duty, they would treat the document as sale deed/conveyance but when it comes to the refund of the stamp duty on that very document they would deny the refund by contending that sale deed is not covered by Sections 47 and 48 of the Stamp Act, but what is covered is agreement to sell. In my view, for the purpose of Sections 47 and 48 read with Explanation-I to Article 25, the agreement to sell for all the three provisions should be read harmoniously and document treated as conveyance under Article 25 Explanation-I would for the purpose of refund should be read as agreement to sell.

9. In view of above, the issue being squarely covered by the decision of Coordinate Bench of this Court, the petition is allowed in terms of following order:-

**<u>O R D E R</u>**

(i) Respondents are directed to refund a sum of Rs.20,50,000/- (22,50,000 – 10%) being the amount of stamp duty refundable under sections 47 and 48 of the Bombay Stamp Act, 1958 along with interest at 6% per annum from 19th October 2006 till the date of payment.

(ii) Petition is allowed. No order as to costs.

**[JITENDRA JAIN, J.]**