

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.7968 OF 2017

Kasthmandup Developers Pvt. Ltd.

.. Petitioner

Versus

The State of Maharashtra and Ors.

.. Respondents

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- Mr. Naresh Jain a/w. Ms. Neha Anchlia i./by Agrud Partners for the Petitioner.
- Mr. C. D. Mali, AGP for Respondent Nos.1 to 4 – State.

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CORAM : MILIND N. JADHAV, J.

RESERVED ON : FEBRUARY 28, 2023

PRONOUNCED ON : JUNE 05, 2023

JUDGMENT:

1. By the present Writ Petition, Petitioner has prayed for the following reliefs :-

“a) that this Hon’ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari under Article 226 of the Constitution of India, calling for the records pertaining to the Impugned Judgement dated 01st September, 2016 passed by the Respondent No.2 in Case No. 61/2012, inter alia, rejecting the Petitioner’s claim of refund of stamp duty of Rs.3,23,75,615/-, and after going into the validity and legality thereof to quash and set aside the same;

b) that this Honorable Court be pleased to issue writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India, directing the Respondents to refund to the Petitioner, stamp duty of Rs.3,23,75,615/- along with interest at the rate of 15% p.a. thereon from 27th April, 2011 till payment and/or realization.”

2. Petition takes exception to the order dated 01.09.2016 passed by Respondent No.2 – Chief Controlling Revenue Authority and

Registrar General of Stamps, Maharashtra rejecting Petitioner's case for refund of stamp duty amount of Rs.3,23,75,615/-.

3. In anticipation of executing a Deed of Assignment for Development rights, Petitioner paid an amount of Rs.3,23,75,615/- to the Collector of stamps as an advance payment against stamp duty that would be liable to be paid for the said Deed of Assignment which was to be executed on 27.04.2011. Admittedly, the aforesaid amount was paid on the unexecuted Deed of Assignment as an advance. Further, admittedly the Deed of Assignment for development rights was not executed. Instead the Deed of Assignment was substituted with two separate documents viz; Development Agreement dated 02.05.2011 and Tripartite Deed of Cancellation of Development rights dated 10.09.2011. Once again admittedly Petitioner paid the appropriate ad-valorem stamp duty amount on the Development Agreement and the Tripartite Deed of Cancellation.

4. I have perused both the above documents. Development Agreement with the original owner in respect of the same property which was the subject matter of the unexecuted Deed of Assignment for Development rights was executed on 02.05.2011. The same is appended at page No.93 to 128 of the Writ Petition. The Tripartite Deed of Cancellation between the original owner of the same land / property and holder of Development rights with whom original Deed

of Assignment was proposed to be executed is at Page No.139 to 153 of the Writ Petition. It is seen that appropriate stamp duty has also been paid on this document / transaction.

5. Considering the above transactions, Petitioner filed Application dated 14.03.2012 seeking refund of the amount of Rs.3,23,75,615/- which was paid in respect of the unexecuted Deed of Assignment for Development rights. The Application seeking refund was rejected by Respondent No.2 vide order dated 01.09.2016 on the ground that the refund Application was time barred as the same was made beyond the prescribed period of limitation as contemplated under Section 48(3) of the Maharashtra Stamp Act, 1958 (for short 'the said Act').

6. In the interregnum pursuant to the filing of the refund Application in 2012, by order dated 07.09.2012, Respondent No.2 rejected the Application without giving an opportunity of hearing to the Petitioner under the provisions of Section 48(3) of the said Act. Petitioner filed Writ Petition No.2566 of 2013 in this Court wherein vide order dated 08.03.2016, this Court set aside the order dated 07.09.2012 and directed the Competent Authority to give hearing to the Petitioner and pass a fresh speaking order.

7. After hearing the Petitioner, the impugned order dated 01.09.2016 is passed by the Respondent No.2 – Competent Authority.

By the impugned order the Competent Authority has held that Applicant has failed to prove beyond doubt that any Development Agreement entered into by and between the same parties with regard to the subject property was neither filed on record of the lower Authority while filing the claim for refund nor submitted in the proceedings before the competent authority. It was further held that Petitioner had not proved that the existing document had any nexus with the subject document. It was held that the Petitioner's Application was not filed within the prescribed time limit as contemplated under Section 48(3) of the said Act and hence Petitioner was found ineligible for grant of refund of stamp duty which was paid by the Petitioner.

8. Mr. Jain learned Advocate appearing for the Petitioner has made the following submissions:-

- (i) That amount paid to Stamp Duty Authority for unexecuted deed of Assignment of Development Rights is not a levy as per Section 3 of the said Act:-

In this regard, he would rely on the decision of this Court in the case of *Crisil Limited v. Inspector General of Registration and Controller of stamps and Ors.*¹ wherein it is held that 'The stamp duty had not

¹ Writ Petition No.2439 of 2018

become payable. It would become payable only upon execution of such document which parties never did.'

He would submit that therefore, as per section 3 of the said Act and the aforesaid decision of this Court, the amount paid to the tune of Rs.3,23,75,615/- is never levied or payable under the said Act. It is submitted that something which is not at all levied or payable as stamp duty cannot be retained by the State by invoking the restricted time limit provided under Section 48(3) of the said Act. That in such a case, the general time limitation of 3 years must be applicable. That the State cannot retain the money by invoking artificially restricted time limit provided under Section 48(3) of the said Act. It is submitted that such retention of payment made would be violative of Article 265 of the Constitution of India which prohibits levy and collection of taxes without authority of law. If the payment does not come under the ambit of stamp duty, the time limitation provided under the said Act cannot be made applicable and the period prescribed under the Limitation Act should apply.

Therefore, the payment paid as an advance on

account of stamp duty payable needs to be refunded if the transaction did not go through. That it is an undisputed fact that the same could not be executed. Therefore, the Petitioner is entitled to claim this advance money under the general law of limitation and its claim cannot be obstructed by imposing the restricted time limit provided by Section 48(3) of the said Act.

- (ii) That the State cannot enrich itself at the cost of its citizen:-

That the principle of unjust enrichment is well recognised and the State i.e Respondent herein cannot enrich itself by retaining Petitioner's money which is lawfully not leviable. Hence there is no doubt that refusal to refund the stamp duty amount, which is not payable, will result in unjust enrichment of the State.

- (iii) That without prejudice, Period of limitation has to commence from the date of the substituted Agreement.:-

That period of limitation should commence from the date of the substituted Agreement as provided under Section 48(2) of the said Act. As stated in the facts,

unexecuted document dated 27.04.2011 has been substituted by the two documents being the Development Agreement dated 02.05.2011 and the Cancellation Deed dated 10.09.2011. So time as per Section 48(2) of the said Act was extendable upto 10.03.2012. The refund Application was filed on 14.03.2012, therefore, there was delay of four days. The Petitioner notarized the Application for refund on 06.03.2012 and presented the same before Authority, however, the same could not be filed on 06.03.2012 itself due to technical and administrative difficulties pointed out by the Authority itself, which were beyond the control of the Petitioner and the Application eventually got filed on 14.03.2012. Hence, the delay of four days in filing Application is condonable under Section 5 of Limitation Act. Even if it presumed that the Deed was not substituted, there is delay of six months in filing refund claim if counted from the date of the unexecuted document i.e. 27.04.2011. It is submitted that the same is also condonable because the alternate arrangement in the form of the two instruments had taken a lot of time and energy of the Petitioner and this needs to be considered.

(iv) That without prejudice to the above, Section 5 of the Limitation Act is applicable in the absence of any specific exclusion of the provisions of the Limitation Act in the Maharashtra Stamp Act:-

That in the abovementioned situation if the delay of 4 days is presumed or if it is presumed that the Deed was not substituted, the delay of six months in filing the refund claim if counted from the date of the unexecuted document i.e. 27.04.2011 also is condonable under Section 5 of Limitation Act.

8.1. In addition to the above, he would further submit that the amount to the Collector of Stamps was paid on account of unexecuted Deed of Assignment of Development rights. This payment was made based on a mistaken understanding that the assignee i.e. Chheda Housing Development Corporation will grant Development rights directly to the Petitioner. The Petitioner realised the mistake and came to know that the land owner was not on good terms with Chheda Housing Development Corporation and was not going to permit the assignment directly without entering into a transaction with the Petitioner directly. Therefore, the proposed Deed of Assignment of Development Rights was found to be unexecutable. Instead two substituted instruments were therefore executed i.e.

(Development Agreement with the original owner for the same property and Tripartite Deed of Cancellation of Development Rights between original owner of the land and Holder of Development Rights i.e. Chheda Housing Development Corporation) and the Petitioner has paid *ad volarem* stamp duty on the two executed documents separately in accordance with law. As a result, payment of stamp duty was made twice with respect to the same transaction i.e. one with respect to the unexecuted Deed of Assignment and another with respect to the two substituted executed documents. That this is clearly a mistaken payment made with respect to Deed of Assignment, which was never executed.

8.2. In support of the above submissions the Petitioner has placed reliance on the following decisions:-

- (i) *Crisil Limited V/s. Inspector General of Registration and Controller of Stamps and Ors. (Supra).*
- (ii) *Binani Cement Ltd. V/s. Union of India*² decided on 25.07.2012.
- (iii) *Shamjibhai Ranchhodbhai Dabhi V/s. Chief Controlling Revenue Authority and Ors.*³ decided on 18.03.2009.
- (iv) *The Committee – GFIL V/s. Libra Buildtech Private Ltd. and Ors.*⁴ decided on 30.09.2015.
- (v) *Smt. Pallishree Mohanty V/s. State of Odisha and two*

² 2013 (6) TMI 417 Gujarat High Court

³ [(2009) GLH (2) 191]

⁴ [(2015) 16 SCC 31]

*others*⁵ decided on 18.06.2021.

(vi) *Sikha Debnath V/s. The Assistant Commissioner of State Tax, Cooch Behar Charge and Ors.*⁶ decided on 10.02.2023.

(vii) *Parimal Ray and Another V/s. The Commissioner of Customs (Port), Customs House and Others*⁷ decided on 17.02.2015.

(viii) *Vodafone Mobile Services.*⁸ decided by Hon'ble Andhra Pradesh High Court on 09.12.2022.

9. He would therefore submit that the impugned order be set aside and the Petitioner be granted refund of the stamp duty amount alongwith interest.

10. *PER CONTRA*, Mr. Mali, learned AGP appearing for Respondents Nos.1 and 2 has drawn my attention to the Affidavit-in-Reply dated 09.02.2023 filed by Respondents to oppose the Writ Petition and contended that the Petitioner has no cause of action whatsoever to invoke the writ jurisdiction of this Court for the wrong committed by the Petitioner for non-observance of the limitation period as contemplated under Section 48(3) of the said Act and for not lodging the Application seeking refund within the prescribed time limit. He would submit that the Application of the Petitioner was rejected by the Competent Authority as it was not filed within six

⁵ [W.P.(C) No.22426 of 2016]

⁶ [2023 (2) TMI 724 – Calcutta High Court]

⁷ [(2015) 318 E.L.T. 379 (Cal.)]

⁸ Writ Petition 10637 of 2021

months which is the prescribed time limit under the provisions of Section 48(3) of the said Act. He would submit that once the Petitioner has failed to execute the Deed of Assignment for grant of Development right it was incumbent upon the Petitioner to file an Application seeking refund within six months from the date of purchase of stamps.

11. I have heard Mr. Jain, learned Advocate appearing for the Petitioner and Mr. Mali, learned AGP appearing for the Respondents and with their able assistance perused the pleadings in the present case. Submissions made by Advocates has received due consideration of the Court.

12. In the present case, it is seen that the Petitioner approached the Competent Authority along with the draft of the Deed of Assignment in order to know the exact amount of chargeable stamp duty on the same. The Authority determined the market value of the property involved in the document to be Rs. 65.74 Crores and called upon the Petitioner to deposit an amount of Rs. 3.23 Crores under Article 5(g-a) read with Article 11 of Schedule I to the said Act towards the stamp duty. Petitioner deposited the said amount on 27.04.2011. It is Petitioner's case that thereafter the document could not be executed as the deal was cancelled for unavoidable circumstances and personal reasons. In view thereof, the stamps so

purchased through adjudication from the Competent Authority became useless and spoiled and were not required by the Petitioner. Hence, an Application seeking refund was filed on 16.03.2012 under Section 48 (3) of the said Act. On receiving the refund Application, the same was forwarded to the Office of the Additional Controller of Stamps, Mumbai by the Competent Authority. However, the Authority on considering the Application and documents appended thereto, came to the conclusion that the subject document under consideration for grant of refund was not executed by the parties. However, it was further observed that the Application seeking refund was not filed within six months from the date of purchase of stamps by the Petitioner and therefore, the Application was found ineligible for grant of refund.

13. Petitioner would further submit that from the date of Deed of Cancellation dated 10.09.2011, the Application seeking refund was filed within six months five days by the Applicant and there was a delay of five days which could be explained by the Petitioner. According to the Petitioner, the Application seeking refund was notarized on 06.03.2012 i.e. well within six months from the date of cancellation of the document and on approaching the officer of the Competent Authority, the Petitioner was directed to exhibit additional documents before accepting the refund application due to which there

was a delay of five days. According to Petitioner, admittedly the Application was filed on 09.03.2012 with the office of the Competent Authority i.e Collector of Stamps, Borivali but considering that additional documents were required and 10th and 11th March being Saturday and Sunday, the delay of four days was inevitable. Before I advert to my observations and findings, it would be apposite to consider the statutory provisions.

14. Admittedly in the present case, the subject document has not been executed between the parties. Therefore, it is clear that the subject document has not come into existence though it was stamped. This position is undisputed. Under Section 43(3) of the said Act, Application for seeking relief of refund / allowance for spoiled / unrequired stamps is required to be made within six months from the date of purchase of the stamps. However, in the present case, the provisions of Section 48(2) of the said Act are also relevant for consideration. For the sake of convenience, Section 48 of the said Act is reproduced herein below:-

“48. Application for relief under Section 47 when to be made

The Application for relief under Section 47 shall be made within the following period, that is to say, -

- (1) In the case as mentioned in clause (C)(5), within six months of the date of the instrument : provided that where an agreement to sale 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.”*

14.1. Perusal of sub-section (2) would clearly show that the Application for seeking refund / allowance shall be made 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 be made within six months after the date of execution of the substituted instrument. In the present case, it is seen that the Petitioner intended in taking over Development rights of certain lands situated at Kandivali, Mumai from one Chheda Housing Development Corporation who had themselves taken the said rights from the original land owners namely one Bibija Shaikh & Ors. under the Development Agreement dated 24.03.2005. Therefore, the Deed of Assignment for the purpose of taking over the rights assigned in its favour from Chheda Housing Development Corporation was prepared and was adjudicated for payment of the chargeable stamp duty. Admittedly, this document was an unsigned document and was not executed. Thereafter due to unavoidable circumstances and personal grievance, the transaction did not go through and remained unexecuted and was abandoned by the parties. Petitioner has thereafter pleaded that in order to acquire the Development rights in respect of the aforementioned property, Petitioner had to acquire the said rights in the property independently from the original owners of

the said property i.e. Bibijan Farid Shaikh & Ors and therefore a Development Agreement dated 02.05.2011 was executed between the parties along with another third party viz. Star Habitat Pvt Ltd and rights in the said property were assigned to the Petitioner. Admittedly, on this document Petitioner paid stamp duty of Rs. 1,87,50,100/-. Copy of this Development Agreement has been annexed at Exh. "C" to the Petition. As a consequence of this execution, Petitioner was put in possession of the said property by the original owners on 02.05.2011 along with the possession letter. Copy of this letter is also annexed to the Petition as Exh. "D". Considering the above transaction and in order to give effect to the Development Agreement dated 02.05.2011, the said Chheda Housing Development Corporation executed a Power of Attorney dated 09.09.2011 in favour of the Petitioner. That apart, a fresh Deed of Cancellation was executed on 16.09.2011 between the parties namely Petitioner in its capacity as the confirming party and the original owners i.e. Bibijan Farid Shaikh & Ors. on the one hand and Chheda Housing Development Corporation on the other hand. Under the said Deed of Cancellation, Petitioner agreed to pay Rs. 20 Lacs to Chheda Housing Development Corporation for cancellation of their development rights and on the said document / transaction, Petitioner paid the requisite stamp duty of Rs. 1 Crore. Registered Deed of Cancellation dated 10.09.2011 has been annexed as Exh. "F" to the Petition.

15. In view of the above facts and subsequent events which transpired, Petitioner sought refund of stamp duty which was paid on the draft Deed of Assignment between and Chheda Housing Development Corporation which was admittedly paid on an unexecuted Deed of Assignment dated 27.04.2011. In view of the above and read in consonance with the provisions of Section 48(2) alluded to herein above, it is clear that the Petitioner due to unavoidable circumstances which have been noted above could not execute the Deed of Assignment dated 27.04.2011, but in substitution thereof executed two fresh transactions in respect of the same subject property for acquiring development rights in the said subject property and freshly paid the ad-valorem stamp duty on the said two transactions. In that view of the matter, case of the Petitioner is clearly governed by the provisions of Section 48(2) of the said Act. It is seen that there is a delay of four days in filing the refund Application from the date of execution of the two substituted instruments. The last substituted instrument in respect of the subject property was executed on 10.09.2011 which is the Deed of Cancellation between the parties. This Deed of Cancellation between the original owner and Chheda Housing Development Corporation has the Petitioner as a confirming party thereto. If the period of limitation of six months is calculated from the said date, then the date of acceptance of the Application seeking refund is delayed by four - five

days. However, it is seen that the Application for refund has been notarized on 06.03.2012 but the same was presented / filed only on 14.03.2012. Petitioner has pleaded that when the Petitioner approached the office of the Competent Authority for filing the same before 10.03.2012, the office of the Competent Authority directed the Petitioner to furnish additional documents along with the said Application due to which the delay of four - five days has occurred. The fact that the Petitioner had approached the Competent Authority before six months is proved when the Petitioner would submit that the Competent Authority was seized of the Application and had given its endorsement on the said Application. I have perused the two documents which have been executed between the parties in lieu of cancellation of the first transaction which was abandoned by the parties. Considering that the Petitioner had admittedly paid the stamp duty on the said two transactions and the Competent Authority has however rejected the said Application on the ground of limitation, in the facts and circumstances of the present case, I am inclined to allow the Petitioner's case.

16. In view of the above, it is concluded that in the present case, once the Petitioner has proven that the original document has been abandoned by the parties and in lieu thereof, parties have subsequently entered into another substituted transaction in respect of

the same property under which ad-valorem stamp duty has been fully paid, Petitioner is certainly entitled to the refund. The only objection that would remain for consideration is whether the Application seeking refund from the date of the substituted Agreement / transaction is within limitation or otherwise and whether in the facts and circumstances of the case, the delay of five days as pleaded deserves to be condoned or otherwise.

17. Perusal of the impugned order dated 01.09.2016 clearly shows that the Competent Authority on the basis of the documentary evidence produced by the Petitioner has found that the subject document under consideration for grant of refund was not executed between the parties. In view thereof, on the pretext of adherence to the strict period of limitation, Government cannot unjustly enriched itself by forfeiting a huge amount deposited by the Petitioner towards stamp duty in respect of the document which the parties subsequently abandoned and had never intended to bring it into existence. In that view of the matter, the refund of stamp duty amount would become refundable to the Petitioner when the Petitioner has clearly proven the two substituted agreements. It is clear from the documentary evidence produced by the Petitioner that the parties abandoned the document and decided to govern themselves by a fresh set of transaction / document in respect of the same subject property. Therefore, in this

case reason of refusal of both sides to act under the agreement is made out and the parties have decided not to execute the transaction, the delay of five days for the reasons mentioned herein above stands condoned as it is clear that the intention of the Petitioner to make the Application for refund was genuine and also considering that the said Application has been notarized on 06.03.2013. In so far as the issue of grant of interest is concerned on the amount that shall be refunded, it is directed that the amount that shall be refunded back to the Petitioner shall be returned back along with simple interest at the rate of 6% per annum till payment and / or realization.

18. In view of the above, the impugned order dated 01.02.2016 passed by Respondent No. 2 deserves to be interfered with. The impugned order dated 01.02.2016 stands quashed and set aside. Petitioner is entitled to refund of the stamp duty amount of Rs. 3.23 Crores in the present case. Said amount shall be returned back to the Petitioner within a period of eight weeks from today alongwith interest as directed.

19. With the above directions, Writ Petition is allowed and disposed of.

[MILIND N. JADHAV, J.]

20. After the Judgment / Order is pronounced, Mr. Mali, learned AGP appearing for Respondent Nos. 1 to 4 – State seeks stay to the Judgment / Order.

21. Considering the observations and findings recorded by this Court, I am not inclined to accede to the request made by the learned AGP. Hence, request for stay stands rejected.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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