



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5650 OF 2005

1. Mr. Mukund Ganesh Barve,
age 48 years, Indian Inhabitant
 2. Mrs. Nilima Mukund Barve,
age 53 Years, Indian Inhabitant,
Both Nos. 1 & 2 residing at
A/20, Mandar Society, Gokuldharm,
Swami Vivekanand Road, Borivli (West),
Mumbai-400 092Petitioners
- vs.
1. The Chief Controlling Revenue
Authority, Maharashtra State, Pune
 2. The Joint District Registrar &
Collector of Stamps, Pune Dist. Pushpa
Heights, Bibwewadi, Pune-37.
 3. The State of Maharashtra
Respondents above named represented
Through the Additional Government
Pleader, High Court (A.S.), Bombay. ...Respondents
-
- Mr. Ketan A. Chothani, a/w. Ms. Gayatri S. Kapse and Ms. Aastha R. Desai, for the Petitioners.

Mrs. M.S. Bane, AGP, for State.

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CORAM : JITENDRA JAIN, J.

RESERVED ON : 7th OCTOBER, 2023

PRONOUNCED ON : 10th OCTOBER, 2023

JUDGMENT:

. This petition under Article 226/227 of the Constitution of India is filed challenging the order dated 6th May 2005 passed in Appeal No.52 of 1999 and order dated 13th August 1998 passed in Refund Case No.203A/99 whereby refund of Rs.19,725/- being the stamp duty under the Bombay Stamp Act, 1958 (the Stamp Act) paid by the Petitioners is denied.

2. Brief facts leading to the present petition are as under:-

(i) On 30th May 1996, the Petitioners entered into an agreement with M/s. Gandhi Kamat & Khivansara for purchase of flat no.7 in building “B” of the project to be constructed by the builder. As per the said agreement, the builder was obliged to handover possession on or before 30th November 1997. However, the possession was not given on the date as specified in the agreement and, therefore, on 15th May 1998, a cancellation deed was executed between the parties. In clause 2(B) of the cancellation deed, one of the reasons for cancellation is mentioned which is that the construction is yet to be completed and possession is yet to be handed over by the builder to the Petitioners. Further, it is also mentioned in clause (C) that due to financial problem, the Petitioners cannot pay the balance consideration and has decided to purchase a smaller accommodation and, therefore, intends to cancel

the agreement. On 21st July 1998, the promoter gave a certificate certifying that as they could not complete the construction of the building and the Petitioners being in financial difficulty, it was mutually agreed to execute the cancellation deed.

(ii) The Petitioners made an application on 29th July 1998 for refund of the stamp duty of Rs.19,725/- paid on the sale agreement. The said application came to be rejected on 13th August 1999 by Joint District Registrar on the ground that the application is not made within two years from the date of registration of document as required under Section 48(1) of the Bombay Stamp Act, 1958.

(iii) The Petitioners carried the said order of rejection in appeal. On 6th May 2005 in Appeal No.52/1999, the appellate authority confirmed the rejection on a totally different ground by observing that the case of the Petitioners does not fall under any of the provisions of Section 47 of the Bombay Stamp Act.

(iv) It is on this backdrop that the present petition is filed challenging the aforesaid rejection of the refund application and its confirmation by the appellate authority.

3. Heard learned Counsel for the Petitioners and the Respondents and with their assistance, perused the documents

annexed to the writ petition.

4. The issue which requires consideration is:

Issue (1) :

Whether the application dated 29th July 1998 for refund of the stamp duty is within the time specified in first proviso to Section 48 of the Bombay Stamp Act as it existed at the relevant time?

Issue (2) :

Whether the appellate authority is justified in confirming the rejection of refund application on the ground that the case of the Petitioners is not covered by any of the clauses of Section 47 of the Bombay Stamp Act?

5. **Issue No.1:**

Section 48 of the Bombay Stamp Act provides for time period within which the application for refund is to be made. The first proviso to Section 48 of the Bombay Stamp Act, 1998, as it existed at the relevant time, reads as under:-

“S.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 cases mentioned in clause (c)(5), within six months of the date of the instruments ;

Provided that where an Agreement to sell immovable property, on which stamp duty is paid under Article 25 of the Schedule I, is presented for registration under the provisions of the 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.”

6. As per the aforesaid proviso, the application has to be made within two years from the “date of the instrument”. The question which arises is whether the “date of the instrument” would be the date of execution of the agreement, which in the instant case is 30th May 1996, or the date on which the agreement is registered, that is, 26th August 1996. If the date of registration is taken as the “date of the instrument”, then the application made on 29th July 1998 would be within the period of two years as specified in the proviso and if the date of the agreement, i.e. 30th May 1996, is taken, then the refund application dated 29th July 1998 would be time barred.

7. There are two conditions specified in the proviso. Condition no.1 provides that the agreement to sell is the one on

which stamp duty is paid and presented for registration under the Registration Act and condition no.2 is that the seller refuses to deliver possession of the immovable property which is the subject matter of such agreement and if both conditions are satisfied then in such a case the application may be made within two years from the date of the instrument.

8. In my view, the “date of the instrument” referred to in the proviso would be the date on which instrument is presented for registration. Under Section 54 of the Transfer of Property Act, every agreement for transfer of immovable property whose value is more than Rs.100/- is required to be registered. Therefore, in my view, the “date of the instrument” when read harmoniously with the earlier part of the proviso to Section 48(1) of the Stamp Act and the provisions of the Transfer of Property Act would mean the date on which the sale agreement is presented for registration because it is only on the registration of such a document that there is a compliance of the provisions of the Transfer of Property Act. The interpretation of the proviso to Section 48(1) of the Stamp Act has to be in consonance with Section 54 of the Transfer of Property Act. Therefore, in my view, in the instant case, the “date of instrument” would be the date on which the agreement was lodged for registration which is 26th August 1996 and since the refund application is made on 29th July 1998, it is within the period of two years as required by the proviso to Section 48 of the Stamp Act.

9. The next issue which arises is whether the Petitioners' case is covered by any of the clauses of Section 47 so as to be eligible to claim refund. For the said purpose the relevant provision is Section 47(c)(5) which reads thus:

“S.47. Allowance for spoiled stamps.

Subject to such rules as may be made by the State Government as to the evidence to be required or the enquiry to be made, the Collector may on application, made within the period prescribed in section 48, and if he is satisfied as to the facts, make allowance for impressed stamps spoiled in the cases hereinafter mentioned, namely:-

- (a)
- (b)
- (c) the stamp used for an instrument executed by any party thereto which-
 - (1)
 - (2)
 - (3)
 - (4)
 - (5) by reason of the refusal of any person to act under the same, or to advance any money intended to be thereby secured, or by the refusal or non-acceptance of any office thereby granted, totally fails of the intended purpose;
 - (6) ...
 - (7) ...
 - (8) ...”

10. As per Section 48(1), relief under Section 47 can be given in the cases mentioned in clause (c)(5) if application is made within six months from the date of the instrument. However, proviso to sub-section (1) extends the period of six months to two years if the agreement is for sale of immovable property on which stamp duty is paid under Article 25 of the Schedule I and is registered under Registration Act, 1908 and if the seller refuses to

deliver possession of the immovable property which is the subject matter of such agreement. Section 47(c)(5) is a general provision with respect to all types of agreements. However, proviso to Section 48(1) carves out from such general provision, agreements with respect to sale of immovable property on which stamp duty is paid and document is registered. Therefore, with respect to refund on cancellation of a duly registered agreement for sale, the proviso to Section 48(1) is a special provision and same would apply and not the general provision of Section 48(1). In the present case of the Petitioners, the agreement is for sale of immovable property on which stamp duty is paid and the document is registered under the Registration Act and, therefore, the extended period of two years would be applicable.

11. Furthermore, the appellate authority is not justified in observing that none of the clauses of Section 47 are applicable to the case of the Petitioners.

12. In my view, admittedly, as per the agreement, the date of possession was 30th November 1997 and the builder confirmed in the cancellation deed as well as in the certificate that the possession could not be given as per the agreement since the construction was not complete. In addition to this reason, cancellation deed also provides for financial problem faced by the Petitioners to make the balance payment. Therefore, there was

refusal on the part of both the parties to act in accordance with the terms of the agreement to sell, which satisfies the provision of section 47(c)(5) of the Stamp Act.

13. In my view, the authorities were not justified in reading the clause relating to financial problem only for the purpose of denying the refund. It is a settled position that the agreement has to be read as a whole and if read so, the financial problem was not the only ground on which the cancellation deed was executed but non-delivery of possession as per the original agreement was also the ground for cancellation of the deed. Therefore, in my view, the case of the Petitioners is clearly covered by the provision of Section 47(c)(5) of the Stamp Act and, therefore, the Petitioners are eligible for the refund.

14. **Conclusion:**

In view of above, the application for refund has been made by the Petitioners within the time specified in Section 48 of the Bombay Stamp Act and the case of the Petitioners is covered by Section 47(c)(5) and, therefore, is eligible for refund of stamp duty of Rs.19,725/- along with interest of 6% from the date of application of refund, i.e. 29th July 1998, till the payment of refund by the Respondents. Respondents are directed to refund the stamp duty along with interest as specified above within a period of eight weeks.

15. Petition allowed in terms of above.

(JITENDRA JAIN, J.)