IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 4905 OF 2022

1. Asulkumar S/o. Deokinandan Narnoli, Aged about 36 years, Occ. Cultivation and business, R/o. Wardha, Tah. & Dist. Wardha.

2. Sau. Shakuntala W/o. Deokinandan Narnoli, Aged 61 years, Occu. Cultivation and Business, R/o. Wardha, Tah. & Dist. Wardha.

3. Aditya Anshulkumar Narnoli, Aged 28 years, Occu.: Business, R/o. Wardha, Tah. & Dist. Wardha.

4. Amartya Anshulkumar Narnoli, Aged 24 years, Occu.: Student, R/o. Wardha, Tah. & Dist.Wardha. Near Magan Wadi, Bachlar Road, Opp. Bajaj Bal Mandir, Wardha - 442 001.

…. **PETITIONERS.**
(Original Deft. No.1,2,5, 6)

// **VERSUS** //

1. Ganesh S/o. Vitthaldasji Chandak, Aged about 47 years, Occu. : Agriculturist, R/o. Arvi, Tah. Arvi, Distt. Wardha (Original Plaintiff)

2. Sau. Nita Arvind Patil, aged about 62 years, Occu. : Retired, R/o. Plot No.4, Azad Hind Society, Behind Radisson Hotel, Chhatrapati Nagar, Nagpur.

3. Sau. Sangita Naval Agrawal, aged about 59 years, Occu. : Housewife, R/o. Flat No.306, Sethia Link View, Road No.2, Motilal Nagar-II, Goregaon(W), Mumbai – 400 104.

4. Sau. Kavita W/o. Omprakash Goyal, aged 52 years, Occu. : Housewife, R/o. 204, Alokdham Nagar, Ujjain (M.P.) 456 010.
   (Respondent Nos. 2 to 4 are original defendant Nos. 3, 5 and 7)

…. RESPONDENTS.

Shri R.M.Bhangde, Advocate for Petitioners.
Shri A.L.Deshpande, Advocate for Respondent No.1.

CORAM : ANIL S. KILOR, J.
DATED : MARCH 27, 2023

ORAL JUDGMENT :

1. Heard learned counsel for the petitioners and respondent No.1. None for the respondent Nos. 2 to 4 though served.

2. **RULE**. Rule made returnable forthwith. Heard finally by consent of the learned counsel for the parties.

3. In the present writ petition a challenge to the correctness and legality of the common order dated 30/06/2022 passed below Exh.114 and Exh.130, by the Joint Civil Judge Senior Division, Wardha in Special Civil Suit No.15 of 2007, rejecting both the applications for impounding of the agreement filed by petitioners/ original defendant Nos. 1, 2, 5 and 6, is raised.

4. The respondent No.1 filed a suit for specific performance, damages and for declaration. The plaintiff claims that original defendant Nos. 1 to 3 had agreed to sale the suit land by executing agreement dated 08/02/2006. Accordingly, the plaintiff has paid earnest amount of Rs.5,00,000/- and remaining amount was agreed to be paid in installments. The date of execution of sale-deed was fixed as 30/10/2008. According to the plaintiff, the defendants committed breach of terms of the agreement and refused to perform their part of contract. Therefore, the plaintiff filed a suit for Specific Performance of Contract, damages and declaration.

5. The defendants appeared and resisted the suit by filing

common written statement. According to them, the agreement dated 08/02/2006 is not an agreement to sale in real sense. They have contended that said agreement was executed by them for the security of payment of hand loan obtained by them from the plaintiff. In fact, the agreement was not intended to be acted upon. They have tried to repay the loan amount by way of demand draft. However, the plaintiff has conspicuously avoided to accept the same.

6. On the basis of rival pleadings, the learned trial Court framed issues. P.W. No.1, Ganesh has filed his affidavit in lieu of examination-in-chief on 03/03/2015. He has also tendered in evidence the original agreement dated 08/02/2006.

7. Thereafter, on 14/07/2015 defendant Nos.1, 5 and 6 filed the application (Exh.114) contending therein that the plaintiff has specifically pleaded in the plaint that he was put in possession of the suit property at the time of execution of agreement dated 08/02/2006, such agreement is required to be compulsorily registered and sufficiently stamped as per the provisions of the Maharashtra Stamps Act, 1958 (hereinafter referred to as “the Act of 1958”).

8. The application (Exh.114) was resisted by the plaintiff vide a say filed by him to the application.

9. After hearing both the parties, the learned trial Court allowed the application (Exh.114) vide order dated 28/07/2015. The agreement dated 08/02/2006 was impounded and it was sent to the Collector for recovering deficit stamp and penalty.

10. Being aggrieved by the same, the plaintiff moved this Court by filing Writ Petition No. 808 of 2016.

11. At the same time, the plaintiff has moved the application (Exh.121) for amendment of the plaint, thereby seeking to delete the pleadings regarding possession, saying that the possession of the suit property was not handed over to him at the time of agreement.

12. The learned trial Court vide order dated 05/10/2017 allowed amendment to the plaint.

13. The trial Court has also granted liberty to the defendants to file fresh application raising fresh grounds to contend that the agreement to sale dated 08/02/2006 is required to be impounded. In view such liberty, the defendants moved another application (Exh.130), for impounding the agreement.

14. The learned trial Court, after hearing both the parties, was pleased to dismiss both the applications Exh.114 and Exh.130 vide impugned order dated 30/06/2022, which is the subject matter of the present writ petition.

15. Considering the prayers made in the applications Exh.114 and Exh.130, it is evident that the whole controversy revolves around a question, whether Explanation I to Article 25 of Schedule-I of the Act of 1958 would apply to the agreement in question ?

16. It is the case of the petitioners that if there is an Agreement to Sell of immovable property and possession of such property is transferred to the purchaser before the execution or at the time of execution or subsequently without executing any conveyance in respect

thereof, such an agreement to sell is deemed to be a conveyance. It is submitted that in the matter in hand, it was agreed between the parties that the possession would be handed over before execution of sale deed and therefore, the agreement is deemed to be a conveyance and therefore, the stamp duty thereon shall be leviable under Explanation I to Article 25 of Schedule-I of the Act of 1958.

17. In the backdrop of the said submission, at this juncture, it is necessary to refer to the Explanation I to Article 25 of Schedule I of the Bombay Stamp Act, 1958, which reads as follows:

> " *"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 to the purchaser before the execution, or at the time of execution, or after the execution of, such agreement without executing the conveyance in respect thereof, 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 32-A 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."*

18. In light of Explanation I to Article 25 of Schedule-I of the Act of 1958, it is further necessary to consider and refer to the relevant clauses of the agreement, for deciding the controversy involved in the present case.

Clause (1) of the agreement in question says that, it is agreed to pay Rs.25,00,000/- by plaintiff on 30/04/2006. As the plaintiff has taken the agricultural land for laying a layout, on payment of said amount, the agricultural land will be handed over for development of plots.

Clause (3) says that, it is agreed to pay Rs.50,00,000/- on 30/11/2006. After payment of the said amount, power of attorney will be executed, authorising the plaintiff to execute registered sale deeds in respect of land Survey No.260.

Clause (6) says that the plaintiff can accept the bookings of plots in the layout with his signature; and

Clause (7) stipulates that the last date for execution of the sale deed would be 30/10/2008 and prior to the said the balance amount of Rs.30,00,000/- shall be paid thereupon, the vendors will execute the sale deed.

19. It is the case of the respondent/plaintiff that no possession was handed over to him in view of the agreement and therefore, the stamp duty is not leviable as per explanation (I) to Article 25 of Schedule I of the Act of 1958. It is submitted that a bare perusal of the clauses of the agreement make it clear that there were several formalities and conditions to be satisfied for the entire transaction to be materialized and therefore, the possession was dependent on fulfillment of the agreed terms stated in the agreement.

20. It is further submitted that unless the conditions for handing over of possession are not fulfilled and possession is not handed over, Explanation-I to Article 25 of Schedule I of the Act of 1958 would not attract.

21. He, therefore, submits that the learned trial Court has rightly rejected both the applications Exh.114 and Exh.130, moved by the petitioners. In support of his submissions Shri Deshpande, learned counsel for the respondent No.1 has placed reliance on the judgment of the Hon'ble Supreme Court of India in the case of *M/s.Z.Engineers*

Construction Pvt.Ltd..vs..Bipin Bihari Behera, reported in **AIR 2020 SC1140** and the Judgments of this Court in the cases of *Dharati Developers ..vs.. Madhukar*, reported in **2018 (2) Mh.L.J. 525**, *Vikrant..vs.State of Mah.*, reported in **2020(3) Mh.L.J. 865** and *Sushila ..vs..Nirmala @ Mangal*, reported in **2020(5) Mh.L.J. 717**.

22. Shri Bhangde, learned counsel for the petitioners, however, submits that, mere having a clause of handing over of possession before execution of sale deed would make the purchaser liable to pay stamp duty leviable as per Explanation I to Article 25 of Schedule I of the Act of 1958. In support of his contention, he has relied upon the judgment of the Hon'ble Supreme Court of India in the case of *Veena Hasmukh Jain..vs.. State of Maharashtra*, reported in **(1999) 5 SCC 725** and the judgment of Co-ordinate Bench of this Court in the case of *Nanik..vs.. Deputy Inspector General*, reported in **2008(6) Mh.L.J.618**.

23. Shri Bhangde, learned counsel for the petitioners further submits that for construction of a contract, it must be read as a whole in order to ascertain the true meaning of several clauses and the words of each clause should be interpreted so as to bring them into harmony with

the other provisions. To buttress his submission, he has placed reliance upon a judgment of the Hon'ble Supreme Court of India in the case of *Bank of India..vs.. K.Mohandas*, reported in **(2009) 5 SCC 313**.

24. In the above referred backdrop, now I move to examine the pre-requisites for the applicability of Explanation I to Article 25 of Schedule I of the Act of 1958.

25. The Hon'ble Supreme Court of India had an occasion to consider and interpret the Explanation I to Article 25 of Schedule I of the Act of 1958, in the case of *Veena Hasmukh Jain* (supra), wherein the Apex Court has held thus :

> "8. *The duty in respect of an agreement covered by the Explanation is leviable as if it is a conveyance. The conditions to be fulfilled are if there is an agreement to sell immoveable property and possession of such property is transferred to the purchaser before the execution or at the time of execution or subsequently without executing any conveyance in respect thereof, such an agreement to sell is deemed to be a "conveyance". In the event a conveyance is executed in pursuance of such agreement subsequently, the stamp duty 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. Now, in the present case, the agreement entered into clearly provides for sale of an immoveable property and there is also a specific time within which*

> *possession has to be delivered. There-fore, the document in question clearly falls within the scope of the Explanation I. It is open to the Legislature to levy duty on different kinds of agreement at different rates. If the Legislature thought that it would be appropriate to collect duty at the stage of agreement itself if it fulfills certain conditions instead of postponing the collection of such duty till the completion of the transaction by execution of a conveyance deed inasmuch as all substantial conditions of a conveyance have already been fulfilled such as by passing of a consideration and delivery of possession of the property and what remained to be done is a mere formality of execution of a sale deed, it would be necessary to collect duty at a later (sic agreement) stage itself though right, title and interest may not have passed as such. Still, by reason of the fact that under the terms of the agreement, there is an intention of sale and possession of the property has also been delivered, it is certainly open to the State to charge such instruments at a particular rate which is akin to a conveyance and that is exactly what has been done in the present case. Therefore, it cannot be said that levy of duty is not upon the instrument but on the transaction. Therefore, we reject the contention raised on behalf of the appellants in that regard."*

26. The Coordinate Bench of this Court at Principal Seat in a case of *Nanik K. Daryanani* (supra), by relying upon the judgment of the Hon'ble Supreme Court of India in the case of *Veena Hasmukh Jain* (supra), has held thus:

> "*21. While construing different clauses of the subject document, I have already noted that the document makes clear provision regarding handing over of possession of the immovable property-that is agreed to be transferred to the Purchaser/Petitioner on payment of balance*

> *consideration amount of Rs.88,00,000/- (Rupees Eighty-eight Lakhs) out of Rs.2,88,00,000/- (Rupees Two Crores Eighty-eight Lakhs). This is the express provision made in the document. There is no stipulation that the possession of the immovable property will not be handed over to the Purchaser. If it is so, on account of the deeming provision in Explanation I, which applies to the case on hand, the Agreement will have to be treated as deemed to be Conveyance for the purpose of levy of stamp duty thereon. The fact that the possession has not been made over to the Petitioner or that the balance consideration amount has not been paid, so also, the fact that subsequently the parties have entered into Deed of Cancellation, will not absolve the Petitioner from payment of stamp duty leviable on such a document which is deemed to be a Conveyance*." (Emphasis supplied)

27. From the above referred observations and after considering the Explanation I to Article 25 of Schedule I to Act of 1958, it is evident that the aforesaid explanation creates a legal fiction that the Agreement to Sell shall be deemed to be a conveyance if possession is transferred to the possessor before the execution or at the time of execution or subsequently without executing any conveyance in respect thereof.

28. In the teeth of above referred law I would revert back to the facts of the present case, but before that it is necessary to examine the principles of construction of a contract, which has been dealt by the Hon'ble Supreme Court of India in *Bank of India* (supra) and has held

thus:

> "*28. The true construction of a contract must depend upon the import of the words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.*
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> *29. In Ottoman Bank of Nicosia vs. Ohanes Chakarian, Lord Wright made these weighty observations: (AIR p.29) "... that if the contract is clear and unambiguous, its true effect cannot be changed merely by the course of conduct adopted by the parties in acting under it."*
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> *30. In Ganga Saran vs. Firm Ram Charan Ram Gopal, a four Judge bench of this Court stated:(AIR p.11, para 6) "6. … Since the true construction of an agreement must depend upon the import of the words used and not upon what the parties choose to say afterwards, it is unnecessary to refer to what the parties have said about it."*
> *31. It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible. [(North Eastern Railway Co. vs. Lord Hastings)".*

29. From the above referred observations, it is evident that the

true construction of the contract must depend upon the import of the words used and not upon from the parties chose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of surrounding circumstances and the object of the contract.

30. In the light of the above referred exposition, if the agreement is read as a whole and if the object of the contract is considered, there is no doubt that, the object was to purchase the agricultural land for laying a layout and to sell the plots in the layout after converting the land from agriculture to non-agricultural purpose. The language of the agreement is not ambiguous and in clear terms it speaks about handing over of possession before execution of Sale Deed.

31. In the circumstances, I have no hesitation to hold that under the agreement in question the defendants to hand over the possession to the plaintiff before execution of sale deed, for the purposes of conversion of said land to the non-agricultural purpose and to accept the bookings of plots by laying a layout and to execute sale deed.

32. Though, certain conditions and formalities are stated to be fulfilled before taking possession by the purchaser, however, those conditions are not relevant for levying stamp duty under Explanation I to Article 25 of Schedule I to Act of 1958. The reason is that in the event a conveyance is executed in pursuance of such agreement subsequently, the stamp duty already paid and recovered on the agreement of sale which is deemed to be conveyance shall be adjusted towards the total duty leviable on the conveyance and if for non-fulfillment of conditions stipulated in the agreement, the agreement is later on cancelled by the parties, the purchaser can apply for refund of stamp duty as per the Rules.

33. In the circumstances, I have no hesitation to hold that the agreement to sell in question is a deemed conveyance and Explanation I to Article 25 of Schedule I to Act of 1958 would attract to it and hence, the plaintiff is liable to pay stamp duty as per Explanation I to Article 25 of Schedule I to Act of 1958.

34. The learned trial Court has given much emphasis on actual handing over of possession and it is the only ground for rejection of both the applications i.e. Exh.114 and Exh.130. The said finding is contrary to the law as laid down by the Hon'ble Supreme Court of India in the case of *Veena Hasmukh Jain* (supra).

35. So far as the authorities cited by the respondent no.1, in the case of *M/s. Z. Engineers* (supra), para 11 of the said judgment makes it clear that in that case the trial Court as well as High Court have not gone into the question as to whether in terms of the explanation inserted by the Orissa Act which is *pari materia* with Explanation I to Article 25 of Schedule I to Act of 1958, the power of attorney is liable to be stamped as a conveyance, on account of the delivery of possession at the time of execution of power of attorney. Moreover, the said judgment is distinguishable on facts.

36. In the case of *Dharati Developers* (supra) and Sushila (supra) the possession was to be delivered at the time of execution of the sale deed and therefore, again it is distinguishable on facts and thus, not applicable to the present case.

37. In the case of *Vikrant Vikas Raikar* (supra) the coordinate Bench of this Court has observed that each case has to be considered on the facts involved in the said case. Considering the facts of said case it can be said that the said case is distinguishable on facts and as such it will be no help to the petitioners.

38. In the circumstances, I am of the considered view that the impugned order needs to be quashed and set aside. Accordingly I pass the following order :

i) The writ petition is allowed.

ii) The order dated 30/06/2018 passed below Exh. 114 and Exh. 130 by Civil Judge Senior Division, Wardha is quashed and set aside and thereby applications Exh.114 and Exh.130 are allowed.

The Writ Petition is **disposed of** accordingly. No order as to costs.

(ANIL S. KILOR, J)

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