IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 13782 OF 2019

1. Dr. Shri Basavraj kashinath Natikar,
Age: 39 years, Occu.: Medical Practitioner,
R/o. Kabra Nagar, Nanded,
Taluka and District Nanded

2. Dr. Sow. Rupali D/o. Pralhadrao Sangamwar,
Age: 38 years, Occu: Medical Practitioner,
As above **.. Petitioners**
(Orig. Plaintiffs)

Versus

. Balaji S/o. Vithalrao Kasetwar,
Age: 53 years, Occu: Business,
R/o.: Jaibhavani Nagar, Toarda Kd.,
Nanded, Taluka and Dist Nanded **.. Respondent**
(Orig. Defendant)

...

Advocate for the Petitioners : Mr. Pavankumar S. Agrawal
Advocate for Respondent : Mr. Amit A. Mukhedkar

...

CORAM : ARUN R. PEDNEKER, J.

Reserved on : 05.04.2024
Pronounced on : 29.04.2024

JUDGMENT:

1. **Rule**. Rule returnable forthwith. With consent of the parties, the petition is heard finally.

2. Heard **Mr. Pavankumar S. Agrawal**, learned counsel for the petitioners and **Mr. Amit A. Mukhedkar**, learned counsel for the respondent.

3. By the present petition, the petitioners are challenging the order dated 07.09.2019, passed by the Civil Judge Senior Division, Nanded, allowing the application below Exhibit-69, in Special Civil Suit No.63 of 2013, whereby the civil court directed impounding of documents for non payment of stamp duty and to undertake further process under the Maharashtra Stamp Act for payment of stamp duty.

4. The facts giving rise to the petition can be summarised as under:-

A. The petitioners are the original plaintiffs who filed the suit no.63 of 2013 before the Civil Judge Senior Division, Nanded seeking relief of specific performance of contract against the defendant / respondent. It is contended that, on 05.03.2010, the petitioners entered into an agreement of sale with the respondent for plot bearing no.37, Gut No.133, situtated at Jaybhavani Nagar, Taroda (kd.), Nnaded admeasuring in length East West towards Southern side 70 feets. 6 inch (21.49 mts) and towards northern side 20 feets (6.10 mtrs) and in width South North 50 feets (15.24 mtrs) for total consideration of about

Rs.28,00,000/- The petitioners paid the earnest money of Rs.3,00,000/- by cheque no.062265 to the respondent at the time of agreement. The petitioners had paid earnest money of Rs.2,00,000/- by cheque no.062566. The petitioners had paid total earnest amount of Rs.5,00,000/- to the respondent.

B. As there was loan on the said property, the respondent could not clear the loan and, therefore, agreement was executed on 12.07.2010. The petitioners paid further amount of Rs.9,00,000/- by cheque no.306092 and the total amount of Rs.14,00,000/- was paid by the petitioners of which the respondent has acknowledged the receipt. It was further agreed that, in the event, the amount is not repaid, on or before 14.09.2010, the petitioners would be put in possession of the first floor on 15.09.2010. On 15.09.2010, the petitioners and the respondent entered into an agreement and the respondent agreed to refund the earnest money of Rs.12,00,000/- by few post dated cheques.

C. The prayer in the suit is as under:-

"a) Decree of specific performance of contract to execute registered sale-deed in favour of plaintiff No.1 & 2 on the basis of agreement of sale dt. 05.03.2010 of the immovable property bearing plot No.37, out of land Gut No.133 situated at Jaibhawani Nagar, Taroda (Kd), Nanded admeasuring in length east-west towards southern side 70 Ft. 6 inch (21.49 meter) and towards northern side 20 ft. (6.10 meter) and in width south-north 50 ft. (15.24 meter) which bounded by

> ***towards east – 20 ft. road, west – plot No.36, south – plot No.2 and north – 20 ft. road with constructed building of RCC structure on the first floor having 07 rooms out of which 3 rooms are uncompleted and on the ground floor with all construction having 07 rooms with possession of whole property by accepting remaining consideration amount of Rs.14,28,000/- from plaintiff No.1 & 2."***

D. In the suit filed by the petitioners, the application is filed at Exhibit-23, wherein the defendant contended that the plaintiffs have produced 3 agreements dated 05.03.2010, 12.07.2010 and 15.09.2010, before the court. The plaintiffs have referred the 3 documents in evidence. All the 3 documents are written on stamp paper of Rs.100/- and the agreements are not registered before the Sub-Registrar Office. The documents required compulsory registration. Since, the documents are not registered and not sufficiently stamped, as such, a prayer is made as under:-

> ***"2. The plaintiff may kindly be directed to impound the documents i.e. agreements of dated 5-3-2010, 12-7-2010 and 15-9-2010 produced and referred by plaintiff as inadmissible in evidence and oblige."***

E. The trial court on consideration of the nature of documents directed impounding of documents dated 12.07.2010 and 15.09.2010 by holding that the documents are insufficiently stamped and the same be forwarded for stamping of the documents under the Maharashtra Stamp Act. Against the order passed by the trial court below the Exhibit 69, the present writ petition is filed.

5. It is contended by the petitioners that the documents dated 12.07.2010 and 15.09.2010 are not exigible to the stamp duty under Article 25, Explanation 1, of the Maharashtra Stamp Act, 1958 and relied upon the judgment of this court in the case of **Balwantgir Ganpatgir Giri and Ors. Vs. Manasi Construction and Developers and Ors., 2007 (1) Bom. C. R. 2012**.

6. Per contra, the learned counsel for the respondent had submitted that the documents are liable to stamp duty under Article 25, Explanation 1 of the Maharashtra Stamp Act.

7. The learned counsel for the respondent relied upon the judgment of the Hon'ble Apex Court in the case of **Avinash Kumar Chauhan Vs. Vijay Krishna Mishra, 2009 (2) SCC 532**, so also, in the case of **SMS Tea Estate Private Limited Vs. Chandmari Tea Company Private Limited, 2011 (14) SCC 66**, to contend that if the document is not sufficiently stamped or insufficiently stamped, it cannot be taken in evidence.

8. The learned counsel for the respondent has also relied upon the judgment of the Nagpur Bench of this court in the case of **Sheshrao Bhikaji Kale Vs. Damodhar Kukaji Pandhare, 2004 (2) ALL MR 880**, to contend that in the event the possession is agreed to be transferred the

agreement of sale is deemed to be a conveyance and, as such, stamp duty therein is leviable in terms of Explanation-I to Article 25, Schedule-I read with Sections 34 and 32A of the Maharashtra Stamp Act.

9. On considered the rival submission, the issue that arises for consideration in the present petition is, whether document dated 12.07.2010 and 15.09.2010 are liable to the stamp duty under Article 25, Explanation 1, of the Maharashtra Stamp Act. The Article 25, Explanation 1, of the Maharashtra Stamp Act, reads as under:-

> ***"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 or agreed to be transferred to the purchaser before the execution, or at the time of execution, or after the execution of, such agreement 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 32A 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 :***
>
> ***Provided also that, where proper stamp duty is paid on a registered agreement to sell an immovable property, treating it as a deemed conveyance and subsequently a conveyance***

deed is executed without any modification then such a conveyance shall be treated as other instrument under section 4 and the duty of one hundred rupees shall be charged."

10. The relevant portion of document dated 12.07.2010, reads as under:-

"आज रोजी आम्हा दोघांमध्ये असे ठरले आहे कि, दि. १२.०९.२०१० पर्यंत लिहून देणार हे लिहून घेणार याना सदरील इमारतीची घेतलेली बायाना रक्कम रुपये १४,००,००० /- (चौदा लक्ष) परत करतील व सदर रक्कम लिहून घेणार यांना लिहून देणार यांचेकडून प्राप्त झालेनंतर सदर दिनांक ०५.०३.२०१० रोजी केलेली सौडचिठ्ठी रद्दबातल होईल. जर दि. १४.०९.२०१० पर्यंत लिहून देणार हे वरील बायाना रक्कम परत करू शकले नाहीत तर दि. १५.०९.२०१० रोजी सदरील इमारतीच्या पहिल्या मजल्याचा पूर्ण ताबा हे लिहून घेणार यांचे हक्कात करून देतील व त्यानंतर लिहून घेणार हे सदर इमारतीवर असलेले महाराष्ट्र राज्य वित्त मंडळाचे संपूणर्ण कर्ज बेबाक करतील. सदर कर्ज बेबाक झाल्यानंतर लिहून देणार हे लिहून घेणार यांचे हक्कात नोंदणीकृत विक्रीखत करून देतील व सदार विक्री झाले त्यानंतर वीस दिवसापर्यंत लिहून घेणार हे लिहून देणार याना उर्वरित रक्कम देऊन लिहून देणार यांचेकडे असलेला तळमजल्याला ताबा घेतील लिहून देणार हे पैसे प्राप्त झाल्यानंतर ताबा देण्यास कोणताही अडथळा आणणार नाहीत."

11. The relevant portion of agreement dated 15.09.2010, reads as under:-

"हे कि, आज रोजी खालील पंचासमक्ष शेवटी असे ठरले कि, लिहून देणार हे लिहून घेणार यांचे एकूण रक्कम १२,०००००/- (बारा लाख रुपये फक्त) युनियन बँक ऑफ इंडिया, शाखा अशोक नगरच्या बँकेच्या चेकद्वारे देण्याचे ठरले असून ते पुढील प्रमाणे आहे. १) चेक क्र. ०००३७५ दि. २८/१०/२०१०, ४,००००० /- (चार लाख रुपये फक्त) २) चेक क्र. ००६७६ दि.२९.१०.२०१० ४,०००००/- (चार लाख रुपये फक्त) ३) चेक क्र. ०००६७७ दि. ३०.१०.२०१० ४,०००००/- (चार लाख रुपये

फक्त) नमूद तिन्ही चेक आज रोजी खालील पंचासमक्ष लिहून घेणार याना दिले आहे व ते चेक मध्ये नमूद केलेल्या तारखेप्रमाणे बँकेत जाऊन पैसे वटवतील.

हे कि, वरील ठरल्याप्रमाणे दि. ३०.१०.२०१० पर्यंत लिहून घेणार याना रक्कम प्राप्त झाल्यानंतर यापूर्वी लिहून घेणार यांच्यासोबत झालेले सर्व व्यवहार संपुष्टात येतील.

हे कि, दि. ३०.१०.२०१० पर्यंत वरील नमूद तिन्ही चेकची रक्कम लिहून घेणार याना प्राप्त न झाल्यास उर्वरित रक्कम रु. १८,२८,०००/- (अठरा लाख अठ्ठावीस हजार फक्त) लिहून घेणार हे लिहून देणार याना देतील व दि. ०१ नोव्हे. २०१० रोजी लिहून घेणार हे प्रत्यक्ष जाय मोक्यावर जाऊन वरील नमूद मालमत्तेचे कबीजदार होतील. त्याबद्दल आज रोजी मी हमी देत असून त्यास ताबा पावती दिली असे ग्राह्य धरण्यात यावे.

हे कि वरील नमूद मालमत्तेवर कोणत्याही प्रकारचा शासकीय, निमशासकीय अथवा खाजगी कर्ज बोजा असेल तर बेबाकी करून देतील. तसेच इतर व्यवहार असेल तर ते सुद्धा दि. १/११/२०१० पर्यंत दूर करण्याची सर्व जबाबदारी लिहून देणार यांच्यावर राहील.

हे कि, दि. १/११/२०१० पर्यंत कर्ज बोजा वगैरे निल करून वरील मालमत्तेचे लिहून देणार यांच्या हक्कात रेजिट्री करून देण्यात येईल."

12. The perusal of the above said agreement dated 12.07.2010, it is clear that the agreement is of loan transaction and, in the event, by 14.09.2010, the owner of the property does not return the amount taken by him of Rs.14,00,000/-, he would hand over the first floor of the suit property to the petitioner and, in the event, the further amount is not paid then the other part of the suit property would be handed over to the petitioners and registered sale deed would be executed of the property.

13. In terms of Article 25, Explanation 1, of the Maharashtra Stamp Act, if an agreement is entered into for sale of immovable property and in pursuance of the said agreement if possession of the property is parted with or is agreed to be parted with and the transaction apparently is in the nature of the sale then ad velorem stamp duty is payable on such document. The stamp duty becomes payable on the document being executed.

14. Thus, the question that arises is whether in pursuance of the aforesaid documents the petitioners are either put in or agreed to put in possession of the suit property and the agreement is in the nature of "agreement to sale immovable property". The agreement has to be read as a whole and on reading the agreement, if it appears that the petitioners are put in possession or agreed to be put in possession of the property under the agreement to sell then the document would be exigible to the stamp duty. Perusal of the document dated 12.07.2010 would indicate that it is a loan transaction and, in the event, there is a failure of payment of money, the respondent would have become liable to part possession of the top floor of the suit property and the sale deed would be executed of that part of the suit property. Thus, the document dated 12.07.2010, is not an agreement of sale to the suit property, so also, neither the petitioners are put in possession or agreed

to be put in possession of the property in pursuance of the agreement to sale and, thus, Article 25, Explanation 1, of the Maharashtra Stamp Act is not applicable to the agreement dated 12.07.2010.

15. Coming to the agreement dated 15.09.2010, the same is also a monetary transaction i.e. failure to return the money would mean that the possession of the property would be handed over to the petitioners and on the same day the registered sale deed would be executed in favour of the petitioner. The possession of the suit property is not parted nor it agreed to be parted with in pursuance of the agreement dated 15.09.2010, whereas it is a document of loan transaction wherein failure to return the amount would entail liability of handing over the suit property to the petitioners by a registered document. As such, it cannot be said that the agreement dated 15.09.2010 is in the nature of agreement to sale.

16. Reference can be to the case of **Balwantgir Ganpatgir Giri and Ors. Vs. Manasi Construction and Developers and Ors., 2007 (1) Bom. C. R. 2012** of this court at para 6, 7 and 12 has held as under:-

> ***"6. The relevant clause of the agreement of sale dated 03/3/2000 reads thus: 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.

7. Explanation-I to article 25 of schedule-I of the said Act reads thus:
"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 or agreed to be transferred to the purchaser before the execution, or at the time of execution, or after the execution of such agreement then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly".

12. One more factor which is to be noted in the matter in hand is that the agreement for sale dated 03/3/2000 discloses that the conveyance of the property was agreed for the total consideration of Rs. 12,30,000/ and out of the said amount, sum of Rs. 1,00,000/ was paid on execution of the agreement, the sum of Rs. 2,00,000/ was agreed to be paid on or before 25/3/2000 and the balance of Rs. 9,30,000/ by 25/01/2001. The sale deed was agreed to be executed only after payment of the entire amount. And only thereafter possession was agreed to be delivered. These facts clearly disclose that the document was clearly an agreement for sale whereby even the entire consideration which is agreed to be paid was not paid on the date of the execution of the agreement. Though mere non payment of consideration by itself may not relieve the parties from their obligation to pay stamp duty, in terms of explanation-I to Article 25 when the delivery of possession of the property is made or agreed to

> ***be in terms of the agreement, yet when these facts disclose the intention of the parties as well as the conduct of the parties, both factors being relevant to ascertain the real nature of the transaction between the parties, and that the possession was to be delivered after conclusion of sale deed, the agreement cannot be said to be conveyance within the meaning of the said expression under the explanation-I to Article 25 of Schedule-I of the said Act."***

17. From the perusal of the above documents dated 12.07.2010 and 15.09.2010 it would reveal that the the documents are merely loan transactions and in the event if it is found that the petitioners fail to make repayment of the money then the petitioners will have to part with possession of the certain property, so also, will have to execute the sale deed qua the said properties. On the face of it, the document cannot be termed as an agreement to sell property and in any event no possession is parted under the agreement nor is agreed to be parted under the agreement. The possession would be parted in pursuance of the sale deed that would be executed in the event of non returning of the loan amount.

18. Thus, the documents mentioned dated 12.07.2010 and 15.09.2010 are not amenable to the stamp duty under Article 25, Explanation 1 of the Maharashtra Stamp Act, 1958 and the documents are wrongly directed to be impounded.

19. Rule is made absolute in above terms.

20. The writ petition is allowed and disposed of accordingly.

[ARUN R. PEDNEKER, J.]

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