IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2665 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

MOHNALAL SAGARMAL KOTHARI

Versus

STATE OF GUJARAT

Appearance:

MR AJAY R MEHTA for Petitioner

MR PS PATEL for Respondents

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 31/07/97

ORAL JUDGEMENT

1. The petitioner challenges by this special civil application under Articles 226 and 227 of the Constitution of India the validity, legality and correctness of the order Annexure `F' dated 18/25-3-1991 under which the petitioner was directed to pay the stamp duty of Rs.7800/- and penalty of Rs.78000/-.

2. The facts of the case are as under:

The petitioner purchased certain movable properties from one Company viz. Mangsalts Private Limited by an agreement dated 17th September, 1980 for a total consideration of Rs.62,500/=. As per the case of the petitioner that movable properties included cupboards, tables, chairs etc. . The agreement to purchase the movable properties have been filed by the petitioner on the record of this special civil application as annexure `A'. The petitioner stated that for abundant caution the aforesaid agreement was lodged for registration with the Sub Registrar of Documents, Valsad in September, 1980 though no such registration was required of the said document as it pertains to sale of movable properties. The petitioner stated that the said document was registered in the year 1980 and after registration, the same was given to the petitioner.

3. When the respondent No.2 had called upon for the said document the petitioner handed over the same out of good faith and the respondent No.2 has illegally taken the possession of the said document as per the case of the petitioner.

4. Vide letter dated 22-12-1987, annexure `B' on the record of this case, the Sub Registrar Officer, Valsad, called upon the petitioner to pay the deficit of the stamp duty of the document mentioned in the subject. That letter was followed by subsequent letters of the Sub Registrar, Valsad to the petitioner to pay the deficit of the stamp duty of the document. The petitioner replied on 18th July, 1988 and he agreed to pay the deficit stamp duty as directed under the notice annexure `B' by the Sub Registrar. However, the petitioner stated in the special civil application that the said letter was written on improper advise and without any application of mind. Thereafter, the petitioner stated that the entire matter stood at rest and only on 5th December, 1989 i.e. after a lapse of nearly 9 years from the lodging of registration of the document, the petitioner received a show cause notice stating inter-alia that the document was insufficiently stamped and further asked the petitioner to show cause as to why ten times penalty should not be levied upon the petitioner. This notice was issued by the respondent No.2 to the petitioner. The petitioner replied to the show cause notice vide his letter dated 31st January, 1990. After ten months another show cause notice dated 15th October, 1990 came to be received by the petitioner from the respondent No.2. Thereafter, as per the averments of the petitioner, the respondent No.2 time and again have been

issuing notices. On 4th February, 1991, the petitioner had approached to the respondent No.2 and handed over the original duly registered document as demanded and applied for time. The grievance of the petitioner is that the respondent No.2 without considering the reply of the petitioner dated 31st January, 1990 and violating the principles of natural justice, under its order annexure `F' dated 25th March, 1991 ordered for the payment of deficit of stamp duty of Rs.7800/- and penalty thereupon of Rs.78000/=. The petitioner sent a letter on 4th March, 1991 through his advocate, but that too has not been considered by the respondent before passing of the order annexure `F'. Hence, this special civil application before this Court.

5. The petitioner filed an additional affidavit in this case on 7th July, 1997 and a zerox copy of the sale deed No.2127 has been filed on record of this special civil application. From this zerox copy of the sale deed as well as from annexure `F' it comes out that both the parties have not correctly stated the facts and agreement annexure `A' which has been filed by the petitioner was not registered but the registered document in respect of which the order impugned in this special civil application has been passed is of the sale deed which is registered at No.2127 on 30th May, 1981. In this sale deed there is a reference to the movable properties which are purchased by the petitioner for Rs.62500/=. So the dispute pertains to this document, zerox copy of which has been filed by the petitioner before this Court on 7th July, 1997.

6. This petition has been contested by the respondent by filing reply to the same. It is admitted by the respondent that the document was registered by Sub Registrar, Valsad on 30th May, 1981 at Sr. No.2127. It is also an admitted fact that this document was presented for registration before Sub Registrar, Valsad on 27th October, 1980. The respondent No.2 further admits in the reply to the special civil application that the copy of document at Sr. No.2127 as sent to him by the Sub Registrar vide his letter dated 2-6-1989 for appropriate proceedings and the notice was issued to the petitioner on 5th December, 1989 and despite of granting many opportunities, the petitioner has not contested the same. The power under sec.68 of the Bombay Stamp Act, 1958 (hereinafter referred to as "the Act, 1958") has also been exercised and on 4th February, 1991 unregistered document on stamp papers of Rs.10/= for the sale of movable properties has been produced. So from the reply it is clear that the document annexure `A' was not

presented for registration nor it was registered. Registered document, which is now produced by the petitioner before this Court, is annexure `I' and impugned order is also in respect of the said document. The order dated 7th March, 1991 has been passed under sec.33 read with sec.39 of the Act, 1958 and this order is appealable under sec.53 of the Act, 1958.

7. The learned counsel for the petitioner contended that the sale of movable properties under the document made is not compulsorily registerable under sec.17 of the Registration Act. The document annexure `I' though mentions of movable properties which were also sold to the petitioner by the company but merely because of that recital no stamp duty could have been charged on the said amount. It has next been contended that the power under sec.33 and sec.39 could have been exercised within a reasonable time. The alleged deficit stamp duty was demanded from the petitioner first time after more than six years and six months by the Sub Registrar, Valsad. So far as the respondent No.2 is concerned, he has given the notice to the petitioner only on 5th December, 1989 i.e. after about eight years and six months from the date of registration of the document. The delay of six years and six months in the case of Sub Registrar, Valsad for demanding the deficit stamp duty and in the case of respondent No.2 of eight years and six months is itself sufficient for setting aside of the order annexure `F'. It has next been contended that how far the respondents are justified to impose the penalty of Rs.78000/= in such a matter.

8. On the other hand, the counsel for the respondents contended that it is a case where at one point of time in the year 1987 the petitioner has given voluntarily to pay the deficit stamp duty, but subsequently he has backed out and then the action has been taken under sec.37 of the Act, 1958. It has next been contended that delay is there, but merely on this ground the petitioner should not be allowed to retain the amount of stamp duty more so when the order impugned in this special civil application is appealable. It has next been contended that no limitation is prescribed under the Act, 1958 for initiation of action for recovery of deficit stamp duty and for the imposition of penalty.

9. During the course of arguments in this matter earlier it transpires that the audit party had raised the objection in respect of deficit stamp duty paid on the document in question in the year 1981 itself. The learned counsel for the respondent was directed to give

out further details including the names of those Officers who were posted as Sub Registrar and Inspector General of Registration at the relevant time. The counsel for the respondents filed a purshis today in the Court and from which it transpires that the audit party has raised objection in respect of the document regarding deficit of stamp duty in the year 1981 and the said objection was accepted by the Inspector General of Registration on 23rd December, 1983 and the said authority informed the Sub Registrar for the recovery of the deficit amount. The Sub Registrar, Valsad vide his letters dated 13-2-1985, 22-12-1987, 23-5-1988, 30-12-1988, 1-6-1989, 28-8-1989 and 27-9-1989 informed the petitioner about the production of the original document and payment of deficit stamp duty, but what they stated that the petitioner has not complied with the above request and so the Sub Registrar vide his letter dated 2-6-1989 sent the document to the Dy. Collector and the Dy. Collector has given the notice to the petitioner under sec.39 of the Act on which there is not dispute only on 5th December, 1989.

10. I have given my thoughtful consideration to the submissions made by the learned counsel for the parties.

11. The counsel for the petitioner very fairly admitted that at one point of time his client had given a writing to the respondent to pay the deficit stamp duty in respect of the document in question. However, the counsel for the petitioner contended that it was a ill advise given to him, and as such, he ultimately has not paid the amount. The learned counsel for the petitioner further submits that though legally this deficit amount of stamp duty could not have been recovered by the respondent from the petitioner but still the petitioner has no objection to pay this amount as ex-gratia donation to the Chief Minister's Flood Relief Fund as a token to help the persons affected by such calamities in the State of Gujarat.

12. The contention of the counsel for the petitioner that the action initiated in the present case after more than six years and six months certainly suffers from the vice of delay and laches, and as such, no recovery could have been ordered, deserves acceptance. The counsel for the respondents is correct to contend that no limitation has been prescribed under the Act, 1958 for initiation of proceedings for recovery of the deficit stamp duty as well as for the levy of penalty under sec.39 of the Act, 1958, but such powers should have been exercised within reasonable time. There is no quarrel with the

proposition also that what should be the reasonable time in a given case depends solely and wholly on the facts of the case and it is difficult to lay down any limitation within which such action has to be taken.

13. In the light of this settled proposition now I proceed to examine the facts of this case to see whether the delay in initiation of action for the recovery of deficit amount be said to be reasonable. The respondents have not produced any proof on record of this special civil application that the Sub Registrar, Valsad sent a letter dated 13th February, 1985 to the petitioner and the said letter has been receive by the petitioner. In reply to the special civil application even this fact has not been mentioned. This fact has been mentioned in the purshis filed by the respondent today in this Court. So in the absence of any evidence to prove that the letter dated 13th February, 1985 has been sent to the petitioner and the same has been received by him, it cannot be accepted that the Sub Registrar had sent a letter aforesaid to the petitioner demanding from him the deficit stamp duty.

14. The audit party raised objection in respect of this document in the year 1981 though the date and month has not been given but whatever date and month may be taken, it is a fact that the Inspector General of Registration has taken two years time to accept that objection. This delay of two years on the part of the Inspector General of Registration to accept the objection of the audit party absolutely remains unexplained on the record. The respondent has not produced on record any evidence whatsoever on which date first the Inspector General of Registration has informed to the Sub Registrar of Valsad to start the proceedings for recovery of the deficit amount of stamp duty from the petitioner. In reply to the special civil application even no such averments have been made. Now there are two aspects of the matter at this juncture. First aspect is to accept that immediately after 23rd December, 1983 the Inspector General of Registration has informed the Sub Registrar, Valsad to recover the deficit amount of stamp duty from the petitioner. In that case there is a delay of about more than four years to give the notice to the petitioner from the side of Sub Registrar, Valsad. Second aspect is that there is delay of sending of this information to the Sub Registrar, Valsad by the Inspector General of Registration. However, irrespective of the aforesaid facts, the fact remains that after 23rd December, 1983 first notice came to be issued to the petitioner for the demand of deficit stamp duty on 22nd December, 1987 i.e.

four years thereafter. This long delay of four years in second spell remains unexplained. Then comes the next delay of sending of the copy of document to the respondent No.2. The Sub Registrar, Valsad sent a copy of this document on 2nd June, 1989 and the notice has been issued to the petitioner by the respondent No.2 only on 5th December, 1989. So the delay in taking action under sec.39 of the Act, 1958 is of more than eight years in the present case and that has also remained unexplained from the side of the respondents. The respondents have leisurely moved in the matter and this delay in taking of the action in the matter is a culpable delay and they cannot be allowed to take the benefit of their own inaction or omission. It is a case where at one point of time I thought to direct the State Government to take action against the erring Officers in the matter, but as per the purshis of the respondent dated 31st July, 1997, almost all the Officers who were there at the relevant time on the post of Sub Registrar, Valsad have retired from the services. The counsel for the respondents also informed to the Court that the Inspector General of Registration at the relevant time has expired. So this course was not taken, but the delay in initiation of action is certainly fatal to the action taken by the respondent and the same cannot be allowed to stand. It is a case where despite of the fact that this deficit amount in stamp duty has been found by the audit party in the year 1981, all the three authorities have leisurely moved in the matter for the reasons best known to them, but this Court will not permit the respondents to take the action at such a belated stage.

15. The counsel for the petitioner submits that in compliance of the order of this Court dated 29th March, 1993, the petitioner has deposited an amount of Rs.7800/= X 3 = Rs.23400/= in the office of the respondents-authorities and that amount should be ordered to be refunded back to him. However, the counsel for the petitioner undertakes that out of this amount, Rs.7800/= will be deposited by the petitioner in the Chief Minister's Flood Relief Fund. The counsel for the petitioner further contended that the respondents have deprived of the petitioner for use of this amount. The petitioner is a businessman and this amount would have been used in the business by the petitioner and he would have earned profit, and as such, direction may be issued to the respondents to refund this amount together with the interest at the rate of 18%. In support of this contention, the counsel for the petitioner relied on the decision of the Hon'ble Supreme Court in the case of Agricultural and Processed Food Products vs. Oswal Agro

Furane reported in 1996 (4) SCC 297. The counsel for the petitioner further contended that where the businessman if retained the amount payable to the Government then the Hon'ble Supreme Court in the aforesaid case has given direction for the refund of the said amount with interest at the rate of 18% on the analogy that the businessmen get the amount from the financial institution for their business on the rate of interest not less than 18%, and as such, the same principle has to be applied where the petitioner businessman has been ordered to pay the amount and ultimately he was not found liable for the same.

16. I have given my thoughtful consideration to the aforesaid submissions of the counsel for the petitioner.

17. In the case of Agricultural and Processed Food Products vs. Oswal Agro Furane (supra) the Hon'ble Supreme Court held that the company respondent therein gained undue advantage by obtaining an order which it was not entitled to get in accordance with law. It is, therefore, not only liable to pay the amount of excise duty which was due and payable but it also has to pay interest thereon. The company which was a commercial organisation had approached the High Court in exercise of its discretionary jurisdiction under Article 226 purportedly to get justice. In actual fact it sought and obtained interim orders which resulted in its not becoming liable to pay excise duty which, under no circumstances, could have been a matter of dispute. A litigant who obtains an incorrect order and does not pay the statutory dues should not be allowed to make any profit or gain from the infraction of law. The money which was legitimately due to the Government has been utilised by the Company in its business. Dealing with such cases which have financial implications involving business houses or companies it is the commercial principles which must be applied by the court while ordering payment of interest. Had the Company instead of using the government money, obtained the said amount of loan from a bank, it would have had to pay interest thereon at the bank rate then prevailing. A lending institution like a bank would normally have advanced money for the purposes of business at the bank rate which is fixed with periodical rest. In addition thereto, a bank would normally also obtain a collateral security so as to safeguard the loan advanced by it. The Company on the other hand, had not paid the excise dues to the Government and the government money has presumably been used in its business. No collateral security has been furnished by them because none was ordered by the court. Under these circumstances, there is no reason as to why

the Company should not be required to pay at least that rate of interest, and on such terms, as it would have to pay to a bank if that amount of money had been obtained by it on loan. Keeping this principle in mind, it would be just and proper that the Company be directed to pay, in addition to the excise duty payable, interest at the rate of 18% per annum.

18. In this case, the recovery of the amount is ordered and annexure `F' has been stayed by this Court on condition of depositing by the petitioner an amount of Rs.23400/= with respondent authorities. So this amount has been parted with by the petitioner in compliance of the order of this Court i.e. the Court has granted the interim relief on a condition. However, the facts of the case in hand and that which were before the Hon'ble Supreme Court in the case of Agricultural and Processed Food Products vs. Oswal Agro Furane (supra) are not identical, but the fact remains that ultimately this Court has found in this case that the demand of the amount under Annexure `F' from the petitioner was wholly unjustified and this demand has been quashed. For all these years, the petitioner has been deprived of the use of this amount of Rs.23500/= and being a businessman he could have utilised this amount in his business for profit earning. There may be possibility that the petitioner would have paid this amount from borrowing amount from the market and on which he might be paying the interest. In such case, at the final stage of the matter, this Court can certainly pass appropriate order for compensation of the loss suffered by the petitioner under the interim order granted by this Court in his favour. One thing is definite that this amount of Rs.23500/= has been paid by the petitioner to the respondents and he could have utilised this amount for business purpose. So I find sufficient justification in the prayer made by the counsel for grant of interest on the amount of Rs.23400/=.

19. The counsel for the petitioner lastly submitted that it is a fit case in which the petitioner should be awarded the costs. The counsel for the petitioner submitted that the order annexure `F' was wholly arbitrary and unjustified as no action could have been taken after such a long time by the respondents though they were knowing of the deficit of the stamp duty paid in the year 1981 itself. The petitioner was constrained to approach this Court and about Rs.5000/= have been spent by him for this litigation. The petitioner is a businessman but amount spent by him in the litigation certainly is a tax to him and in the eventuality of

success of the petitioner in the matter the respondents have to reimburse for the expenses. This contention of the counsel for the petitioner also deserves acceptance. A litigant who has come to this Court challenging illegal and arbitrary orders of the authorities and in case ultimately he succeeds in the litigation then certainly the opposite party should be burdened with the expenses of the litigation incurred by the party. It is a case where I find sufficient justification to exercise my discretion of awarding the costs in favour of the petitioner. The Court should not award only token costs for the sake of costs, but where it has discretion to award costs then whatever actual cost incurred by the petitioner should have been ordered to be reimbursed by other side.

20. In the result, this special civil application succeeds and the same is allowed. The order annexure `F' dated 18/25-3-1991 of the respondent No.2 is quashed and set aside. The respondent authorities are directed to refund the amount of Rs.23400/= to the petitioner together with the interest at the rate of 18% p.a. from the date of deposit of the said amount till the date of payment of the amount. The respondent-authorities are directed to refund the amount of Rs.23500/= together with the interest at the rate of 18% p.a., as ordered aforesaid, within a period of two months from the date of receipt of certified copy of this order. The respondents are further directed to pay Rs.5000/= by way of costs of this petition. The counsel for the petitioner very fairly submitted that the petitioner has no objection in case this amount of costs of Rs.5000/= is ordered to be deposited by the respondent-authorities in the Chief Minister's Flood Relief Fund. Order accordingly. The respondent-authorities are directed to deposit the amount of costs of Rs.5000/= in the Chief Minister's Flood Relief Fund and receipt of the deposit of the amount should be placed on the file of this case. The petitioner, as agreed by the counsel for the petitioner, is directed to deposit Rs.7800/= and interest thereon as received at the rate of 18% from the respondent in the Chief Minister's Flood Relief Fund within a period of 15 days from the date of receipt of the said amount from the respondents and shall produce on record of this case the receipt of the deposit of the amount. Rule is made absolute accordingly.

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