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VEENA HASMUKH JAIN AND ANR.

v

STATE OF MAHARASHTRA AND ORS.

JANUARY 28, 1999

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[S.P. BHARUCHA AND S. RAJENDRA BABU, JJ.]

- Bombay Stamp Act, 1958—Section 2(g)—Schedule I, Article 25, Explanation I—Conveyance—Agreement to sell with delivery of possession, in future, present or past amounts to conveyance and duty to be levied accordingly—Agreement for sale executed in terms of Section 4 of the Maharashtra Ownership Flat Act, 1963—Sale of immovable property and handing over the possession within specific time without executing conveyance—Held, document falls within scope of Explanation I of Article 25 and attracts duty as if conveyance and the levy of stamp duty is on instrument and not on any transaction.*

- E* The appellant executed agreement for sale of flat in terms of Section 4 of the Maharashtra Ownership Flats Act, 1963 and paid registration fee in addition to other charges. Thereafter, the Sub-Registrar through letter informed the appellants that the agreement had been impounded. The Assistant Director of Town Planning Stamp and Valuation also informed the appellants that he had received reference from Collector under S- 32A of Bombay Stamp Act for determination of true market value of the property.

- F* The appellants contended that, the document is only an agreement for sale since no right, title or interest passed on to the appellant so as to attract duty as a conveyance or instrument; therefore, Section 32A of the Bombay Stamp Act had no application and appellant was not liable for duty under Entry 25 of Schedule I of the Act. Even before the disposal of these objections, the appellant filed a Writ Petition. The High Court upholding the stand taken by the State in the matter of levy of duty dismissed the petition seeking the quashing of the provisions of the Bombay Stamp Act relating to determination of market value and took the view that the agreement in question could be construed to be a conveyance falling under Section 2(g) of the Act inasmuch as the right, title and interest in the flat stands transferred in favour of the purchaser on

payment of instalments.

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In these appeals, challenging the order of the High Court the appellant contended that the conclusion reached by the High Court was not correct because agreement in question was executed in terms of Section 4 of the Maharashtra Ownership Flats Act which cannot be construed to be a conveyance, Under the Act duty can be levied only on instrument and not on any transaction and here the levy of duty is on a transaction which is handing over possession and not on the instrument.

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Dismissing the appeals, this Court

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HELD : 1. The duty in respect of an agreement covered by Explanation I to Article 25 of Section I is leviable as if it is a conveyance. Under the Act duty can be levied only on instrument and not on any transaction. It there is an agreement to sell 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". 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. The agreement entered into clearly provides for sale of an immovable property and there is also a specific time within which possession has to be delivered. Therefore, the document in question clearly falls within the scope of the Explanation I and it is open to the Legislature to levy duty on different kinds of agreement in different rates. If the Legislature thought that it would be appropriate to collect duty at the stage of agreement itself if it fulfils 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 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 con-

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Aveyance. Therefore, it cannot be said that levy of duty is not upon the instrument but on the transaction. [308-G-H; 309-A-E]

2. It is clear that the object of the Stamp Act is to levy stamp duty on different kinds of instruments. The Legislature has chosen to levy a rate of duty equivalent to conveyance in respect of an agreement though the transaction may not have been completed because of certain instruments arising out of such agreement being executed and possession thereof being taken prior to or simultaneous with the document or subsequently. But in the Explanation to the Act it is not clear that if the document provides that possession has to be taken without execution of the conveyance certainly it would attract the appropriate duty. If the agreement provides that possession will be handed over on the execution of a conveyance as contemplated under Section 11 of the Maharashtra Ownership Flat Act, then the Explanation shall not be attracted at all and here it is clear that in the terms of the agreement there is no provision made at all for the execution of the conveyance. Thus the provisions of the Act could be applied to the agreement and, a conveyance could be executed subsequently when it is not clear as to when the conveyance is to be executed and the stipulated time within which the possession has to be handed over. Therefore, it is clear that the document would attract duty as if it is a conveyance as provided in the Explanation. [309-H; 310-A-D]

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1655 of 1996 Etc. Etc.

From the Judgment and Order dated 13.2.92 of the Bombay High court in L.P.A. No. 395 of 1991.

F M.S. Bhandari and A.M. Khanwilkar for the Appellants.

M.S. Nargolkar, D.M. Nargolkar for the Respondents.

The Judgment of the Court was delivered by

G **RAJENDRA BABU, J.** The question raised for consideration in these appeals is identical as to the duty payable under the Bombay Stamp Act, 1958 on an agreement for sale of flats covered by the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 [hereinafter referred to as 'the MOF Act' H and the Maharashtra Apartment Ownership Act, 1970.

A Writ Petition before the High Court to Bombay was filed by the appellants on the allegation that on October 8, 1987 they entered into an agreement for purchase of a flat with one M/s Century Enterprises. The agreement for sale was executed in terms of Section 4 of the MOF Act. It was lodged for registration on November 3, 1987 as required under Section 4 of the MOF Act read with Section 17(1) of the Indian Registration Act, 1908. The consideration disclosed in the agreement was shown at Rs. 3,75,000 for the purpose of purchase of the flat and a registration fee of Rs. 3,750 was paid in addition to copying fee and postal charges. The Sub-Registrar of Bombay, by a letter sent to the appellants in February 1988, informed them that the agreement had been impounded and being sent to the Superintendent of Stamps, Bombay. There was also a communication sent by the Assistant Director of Town Planning, Stamp and Valuation dated March 9, 1990 in terms of Rule 3(1) of the Bombay Stamp (Determination of True Market Value of Property) Rules, 1981 to the appellants informing them that he had received a reference from the Collector under Section 32A of the Bombay Stamp Act for determination of true market value of the property and he had reason to believe that the market value of the property had not been truly and fully set out. The first appellant by a reply sent on October 26, 1990 stated *inter alia* various contentions that the document in question is only an agreement for sale and no right, title or interest passed on to the appellants so as to attract duty as a conveyance and/or instrument; that Section 32A of the Bombay Stamp Act had no application; that the appellant was not liable for duty under Entry 25 of Schedule I of the Bombay Stamp Act; that the agreement for sale had been executed under Section 4 of the MOF Act and in terms of the said provision it was mandatory to register the same under Section 17(1) of the Indian Registration Act; that the provisions of the Bombay Stamp Act were not applicable and consequently proceedings under Section 32A of the Bombay Stamp Act could not have been initiated; and that, therefore, action of impounding the document was illegal. Even before the disposal of those objections, the appellants filed a Writ Petition challenging the legality and correctness of the notice and also sought for striking down the provisions of the Bombay Stamp Act relating to determination of market value. The matter was placed before the Division Bench which disposed of the said matter.

The principal question advanced before us as was done before the High Court is whether the document in question, that is, an agreement to

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- A sell, is a document conveying right, title and interest of the flat in favour of the appellants. Section 4 of the MOF Act requires an agreement to be drawn in respect of sale with each of the persons who have taken a flat or flats on ownership basis before accepting any money as advance or deposit and such advance payment of money or deposit cannot exceed 20% of the sale price under the agreement. Section 4(1A) provides that the agreement
- B should be in the prescribed form and to contain several matters mentioned therein. The terms and conditions of the agreement recited that the purchaser agreed to purchase and acquired from the builders a flat admeasuring about 473 sq. ft. carpet area for the price of Rs. 3,75,000 which had been paid in the manner set out therein. If there is default in the matter
- C of payment of any of the instalments, the amount paid by the purchasers to the builders under the agreement would stand forfeited. However, an option was also reserved by the builders to regularise on payment of interest at 24% on such defaulted amounts. It was also agreed that if the agreement is terminated, the purchasers cease to have any right, claim or demand in respect of the premises agreed to be purchased by him nor shall
- D the purchaser be entitled to claim specific performance of this agreement and/or compensation or damages. In Paragraph 7 of the agreement it was stated that subject to the purchaser making full payment of all amounts due and payable by him under the agreement and subject to force majeure, possession of the said premises is expected to be delivered by the builders
- E to the purchaser on or before the 30th November, 1987. The agreement was dated 8th October, 1987 and the possession was to be handed over by 30th November 1987. Paragraph 13 provided that in the event of any amount by way of premium, development tax, betterment charges or any other tax or payment of a similar nature or security deposit for water connection which was payable to the State Government or Municipal Corporation would be paid by the purchasers in proportion to the area the purchasers have agreed to purchase. Paragraphs 14 and 15 of the agreement read as follows :-
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G "14. Nothing contained in these presents is intended to be nor shall it be deemed to be a grant, demises, conveyance, assignment or transfer in law of the said property premises or the building thereon, or any part thereof to the purchaser by the builders.

H "15. The Purchaser shall not let, sub-let, sell, transfer, assign or otherwise deal with or dispose of the said premises or his interest

or benefit under this agreement till all the dues payable by him to the builders under this agreement have been fully paid up and until previous consent in writing of the Builders in that behalf is obtained by him."

On examination of these terms the High Court took the view that the agreement in question could be construed to be a conveyance falling under Section 2(g) of the Bombay Stamp Act inasmuch as the right, title and interest in the flat stands transferred in favour of the purchaser on payment of instalments as provided therein.

The High Court also examined the scope of Explanation I to Article 25 of Schedule I of the Bombay Stamp Act and held that the same was attracted to the case. Under the agreement there is an obligation to hand over the possession even before execution of a conveyance and, therefore, it was a "conveyance" for the purpose of duty payable under the Bombay Stamp Act and there was no obligation in the agreement to enter into a conveyance at a later stage and clearly it was a case which attracted said Explanation. Handing over of the possession on the very date of execution was not relevant for determining the nature of the document. On that basis the High Court upheld the stand taken by the State in the matter of levy of duty. Other questions raised in the Writ Petition are not the subject matter of these appeals and, therefore, we do not advert to those questions. On the conclusion reached by the High Court the Writ Petition stood dismissed.

The learned counsel appearing for the appellants urged before us that the conclusion reached by the High Court either on the question of construction of the agreement amounting to a "conveyance" or on the applicability of the Explanation I to Article 25 of Schedule I to the Bombay Stamp Act is incorrect. It was submitted that the agreement in question had been executed only in terms of Section 4 of the MOF Act and that under the scheme of the Act a deed of conveyance had to be drawn in terms of Section 11 thereof. Therefore, it was submitted that the document executed in terms of Section 4 of the MOF Act cannot be construed to be a "conveyance". He also submitted that under the same Act duty can be levied only on the "instrument" and not on any "transaction". Here, in the present case, by Explanation I to Article 25 of the Schedule 1, what has been done is to provide for levy of duty on a "transaction", namely, handing

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- A over possession and not on the "instrument" as such and hence the provision is *ultra vires* the Constitution.

Under Entry 44 of List III-Concurrent List of the Seventh Schedule of the Constitution, any State as well as the Central Government levy stamp duties other than duties or fees collected by means of judicial stamps, but

- B not including rates of stamp duty and in respect of such instruments mentioned in Entry 91 of List 1-Union List of the Seventh Schedule to the Constitution. A duty is leviable under Section 3 of the Bombay Stamp Act which indicates the instruments executed in the State or those outside the State but brought into the State for the first time relating to any property
- C situate or to any matter or thing done or to be done in the State shall be chargeable to stamp duty prescribed under the Bombay Stamp Act. Article 25 of Schedule I refers to conveyance and the amount of conveyance as sought to be explained by the Explanation. Explanation I to Article 25 of Schedule I to the Bombay Stamp Act reads as follows :

- D *"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 provision 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 the section :

- F 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."
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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 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

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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. Therefore, 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 in 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 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 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.

The learned counsel for the appellants urged that the character of an instrument cannot be determined by reason of a subsequent event to take place such as handing over of possession. But a close examination of the provisions of the Explanation will make it clear that in the case of an agreement to sell immoveable property possession is transferred at any time without executing the conveyance in respect thereof, such an instrument is deemed to be a "conveyance". The object of the Explanation is clear that if an agreement is entered into and that agreement itself contemplates the delivery of possession of the property within the stipulated time, then such an agreement should be deemed to be a conveyance for the purpose of duty liviable under the Bombay Stamp Act.

It is clear that the object of the Stamp Act is to levy stamp duty on H

- A different kinds of instruments. The Legislature, has, in the present case chosen to levy a rate of duty equivalent to conveyance in respect of an agreement though the transaction may not have been completed because of certain instruments arising out of such agreement being executed and possession thereof being taken prior to or simultaneous with the document or subsequently. But in the Explanation it is not clear that if the document provides that possession has to be taken without execution of the conveyance certainly it would attract the appropriate duty. If the agreement provides that possession will be handed over on the execution of a conveyance as contemplated under Section 11 of the MOF Act, then the Explanation shall not be attracted at all. In the present case, it is clear that
- B in the terms of the agreement there is no provision made at all for execution of the conveyance. On the other hand, what is submitted is that the provisions of the MOF Act could be applied to the agreement and, therefore, a conveyance could be executed subsequently when it is not clear as to when the conveyance is to be executed and the stipulated time within which the possession has to be handed over. If that is so, it is clear that the document would attract duty as if it is a conveyance as provided in the Explanation. Thus we find no error in the view taken by the High Court. It is not necessary to examine in these appeals as to whether the instrument in question itself conveys a title or not. Therefore, we uphold the decision of the High Court made in this regard. The appeals are dismissed.

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N. J.

Appeals dismissed.