

Vimpson Precision Pvt. Ltd. and ors. Vs. State of Gujarat and anr.

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Court : Gujarat

Decided On : Dec-10-1992

Reported in : (1993)2GLR1015

Judge : M.B. Shah and; D.G. Karia, JJ.

Appellant : Vimpson Precision Pvt. Ltd. and ors.

Respondent : State of Gujarat and anr.

Judgement :

M.B. Shah, J.

1. In this group of matters, the petitioners have challenged the order dated 6th April, 1992 issued by the State Government in exercise of its powers under Clause (a) of Section 9 of the Bombay Stamp Act, 1958 (hereinafter referred to as 'the Stamp Act') superseding previous Government orders including an order dated 28th March, 1987 issued under Section 9(a), and providing for remission or reduction, with effect from 1st April, 1992, of the duty payable on the instrument of mortgage deed, as defined in Clause (p) of Section 2 of the Stamp Act, executed by any person on behalf of any industrial undertaking in favour of any of the Financial Institutions specified in Annexure 'I' and also executed by or on behalf of any of the said Financial Institutions, for securing repayment of loan advanced or to be advanced to such industrial undertaking.

2. Questions involved in these petitions are: (i) from which date the order dated 28th March, 1987 stands cancelled or superseded? and (ii) whether the order dated 6th April, 1992 published in the Official Gazette on 2nd July, 1992 could have retrospective effect from 1st April, 1992

3. Admittedly, the order dated 6th April, 1992 (Annexure 'A') is published in the Official Gazette on 2nd July, 1992. The effect of the aforesaid order is that it supersedes the previous order dated 28th March, 1987 (Annexure 'B') which is published in Gujarat Government Gazette Part IV-A dated 30th April, 1987. By the order dated 28th March, 1987 the Government of Gujarat had reduced with effect on and from 1st April, 1987 the duty payable on the instrument of mortgage deed as defined in Clause (p) of Section 2 of the Stamp Act executed by any person on behalf of any industrial undertaking in favour of any of the Financial Institution specified in Annexure 'I' to the said order.

4. In Special Civil Application No. 2899 of 1992 the instrument of mortgage is executed on 7th April, 1992, in Special Civil Application No. 2964 of 1992 the instrument is executed on 1st April, 1992, in Special Civil Application No. 3266 of 1992 the mortgage deed is executed on 1st April, 1992, in Special Civil Application No. 3315 of 1992 the instrument are executed by petitioners Nos. 1, 2 and 3 on 6th April, 1992, 1st April, 1992 and 3rd April, 1992 respectively, in Special Civil Application No. 3316 of 1992 the instrument is executed on 7th April, 1992, in Special Civil Application No. 3735 of 1992 the instrument is executed on 3rd April, 1992 and in Special Civil Application No. 4090 of 1992 instrument is executed on 1st April, 1992. It is the contention of the petitioners that, even though the mortgage instrument are executed prior to 2nd July, 1992, yet the petitioners are directed by the respondents to pay stamp duty on those instruments on the basis of the order dated 6th April, 1992 which is published in the Official Gazette on 2nd July, 1992. It is their contention that the demand is illegal and the order dated 6th April, 1992 cannot be given any retrospective effect from 1st April, 1992.

5. At the time of hearing of these matters, Mr. S.N. Soparkar, learned Advocate for the petitioners, has raised the following contentions:

(1) In view of the order dated 28th March, 1987, the petitioners were required to pay stamp duty on the mortgage deed as prescribed therein till the order is rescinded or superseded as provided under Section 9 of the Stamp Act. Section 9 specifically provides that the State Government can reduce or remit, prospectively or retrospectively, stamp duty on any instrument by publishing an order to that effect in the Official Gazette. Therefore, the said order can only be rescinded or superseded by its publication in the Official Gazette.

(2) Power to give concession retrospectively does not and cannot include the power to withdraw the same retrospectively and, therefore, the impugned order insofar as it seeks to withdraw the concession prior to its publication is invalid.

He submitted that if it is held that the order dated 6th April, 1992 is having retrospective effect then it would lead to absurd results, because-

(a) stamp duty is required to be paid on or before the execution of the instrument and, therefore, increase in the stamp duty retrospectively would run counter to the Scheme of the Stamp Act. It may create numerous complications;

(b) even though the petitioners have executed instruments on proper stamp duty, yet they can be prosecuted under Section 59 of the Stamp Act; An act, which was not an offence at the relevant time, would become an offence at the subsequent date. This would be in violation of Article 20(1) of the Constitution of India; and.

(c) under Section 33 the instruments can be impounded for non-payment of proper stamp duty. For that purpose, Sub-section (2) of Section 33 specifically provides that it is required to be ascertained whether the instrument is stamped with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed.

6. As against this Mr. Chhaya, learned Assistant Government Pleader, submitted that the Stamp Act specifically empowers the State Government to reduce or remit the stamp duty either prospectively or retrospectively. Therefore, it implies that the State Government can withdraw the concession retrospectively. Power to withdraw the concession retrospectively would be implied because of Section 21

of the General Clauses Act, The petitioners were aware of the fact that there would be an increase in the stamp duty and they have agreed to pay the shortfall in the stamp duty at the time of execution of the instrument. Hence, they are estopped from challenging the validity of the impugned order dated 6th April, 1992. The fact that the petitioners were aware of the order can also be verified from the fact that present petitions are filed prior to publication of the order in the Official Gazette. The effect of the impugned order is only a reduction in the stamp duty as provided under Section 9(a) of the Stamp Act and not an increase in the stamp duty. He submitted that, by the order dated 6th April, 1992, the petitioners were required to pay much less than the normal rate of stamp duty as provided in Section 3 of the Stamp Act.

7. For appreciating the aforesaid contentions, it would be necessary to refer to various provisions of the Stamp Act. Section 3 which is a charging Section provides that subject to the provisions of the Stamp Act and the exemption contained in Schedule I, the instruments mentioned therein shall be chargeable with duty of the amount indicated in Schedule I as the proper duty. Section 2(h) defines the phrase 'duly stamped'. It is as under:

2(h) 'duly stamped' as applied to an instrument means that the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the time being in force in the State.

(Emphasis supplied)

This would mean that duly stamped instrument will be the instrument which bears stamp of not less than the proper amount in accordance with the law for the time being in force in the State. Section 9 empowers the State Government to reduce or remit by rule or order published in the Official Gazette, whether prospectively or retrospectively, the stamp duties. Section 9 reads as under:

9. The State Government may, by rule or order published in the Official Gazette-

(a) reduce or remit, whether prospectively or retrospectively, in the whole or any part of the State the duties with which any instruments or any particular class of instruments or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons, or by or in favour of any members of such class are chargeable, and

(b) provide for the composition or consolidation of duties in the case of issues by any incorporated company or other body corporate of bonds or marketable securities other than debentures.

From this Section, it is apparent that the State Government has power to reduce or remit the stamp duty chargeable as provided under Section 3 with regard to any instrument by rule or by passing an order, but that rule or order is required to be published in the Official Gazette. Under Section 17 all instruments chargeable with duty and executed by any person in the State are required to be stamped before or at the time of execution. In view of this provision it would be apparent that at the time of execution of the instrument it must be duly stamped. So the relevant date for verifying whether the instruments are duly stamped or not would be the date of their execution and not the subsequent date.

8. In the present cases, admittedly, the mortgage instruments are executed in the month of April 1992. Therefore, the question would be, what would be the proper stamp duty on the date of the execution of the instruments? The proper stamp duty would be as provided under Section 3 read with Section 9 of the Stamp Act. Under Section 9(a) admittedly the State Government has issued an order on 28th March, 1987 and by the said order, the normal stamp duty which was payable under Section 3 was reduced with effect from 1st April, 1987. The rates of stamp duties are also specified in Annexure 'II' to the said order.

9. The next question would be, from which date the order dated 28th March, 1987 stands superseded or cancelled? It is sought to be contended by the respondents that the said order would stand cancelled with effect from 1st April, 1992 as provided in the order dated 6th April, 1992. In our view, this submission cannot be accepted for the obvious reason that Section 9 specifically provides that the State Government by rule or order published in the Official Gazette can reduce or remit

the stamp duties for the instruments mentioned therein. Therefore, for the order becoming effective it is a condition precedent that it is required to be published in the Official Gazette. Admittedly, the order dated 6th April, 1992 is published on 2nd July, 1992 in the Official Gazette. Therefore, supersession of the order dated 28th March, 1987 would be effective from 2nd July, 1992.

10. Further, it cannot be said that the order dated 6th April, 1992 reduces the stamp duty which was required to be paid by the petitioners on the date of the execution of the mortgage deeds. In effect, by the order dated 6th April, 1992 the stamp duty which is required to be paid for the mortgage instruments is increased in comparison to the stamp duty which is required to be paid on the basis of the order dated 28th March, 1987. No doubt, the said stamp duties are less than the normal stamp duties which are required to be paid on the basis of Section 3 of the Stamp Act. But, it cannot be said that on the mortgage deed there is reduction in the stamp duty which was required to be paid as per the order dated 28th March, 1987.

11. Further, there is no provision in the Act which empowers the State Government to increase the stamp duty with retrospective effect. Under Section 9 of the Stamp Act the State Government has power to reduce or remit, prospectively or retrospectively, the stamp duty, but that would not mean that the State Government would have power to increase the stamp duty retrospectively. Power under Section 9 does not include power to rescind an order with retrospective effect. Normally, withdrawal of reduction or remission could have prospective effect.

12. If the contention of the State Government that it has power to increase the stamp duty retrospectively is accepted, it would create numerous complications and we agree with the learned Advocate for the petitioners that it would run counter to the Scheme of the Act. As stated earlier, Section 17 specifically provides that all instruments chargeable with duty are required to be stamped before or at the time of execution. This is further clear from Section 33 which provides for impounding of instruments which are not duly stamped. Sub-section (2) of Section 33 provides that for the purpose of impounding the instrument it is

required to be ascertained whether it is affixed with a stamp of the value and description required by the law for the time being in force in the State when such instrument was executed or first executed. From the aforesaid Sections, it is apparent that the relevant criterion, which is prescribed for ascertaining as to whether the instrument is duly stamped, is the date on which such an instrument is executed and not a subsequent date. If the impugned order is given retrospective effect, it would mean that a person who has executed the instrument on a proper stamp at the relevant time can be prosecuted under Section 59. Therefore, it would be difficult for us to accept the contention that the State Government has power to increase the stamp duty retrospectively or that it has power to withdraw the reduction or remission with retrospective effect.

13. The learned Assistant Government Pleader submitted that in view of Section 21 of the Bombay General Clauses Act, the State Government can exercise its power under Section 9 of the Stamp Act with, retrospective effect. In our view this submission is totally misconceived. Section 21 of the Bombay General Clauses Act only provides that where, by any Bombay Act or Gujarat Act a power to issue notifications orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued. In view of Section 21 of the General Clauses Act, the State Government is entitled to rescind an order issued under Section 9 reducing or remitting the stamp duty. This Section further provides that the said power can be exercised in the like manner meaning thereby that it can be exercised in the same manner in which the power under Section 9 could be exercised. For exercising the power under Section 9, publication of the order in the Official Gazette is a condition precedent. In the present case, as the order superseding or rescinding the order dated 28th March, 1987 is published in the Official Gazette on 2nd July, 1992, it would have effect from 2nd July, 1992. This position of law, in our view, is very clear. In the case of *Mahendra Lai v. State of U.P.* : AIR 1963 SC1019 , the Supreme Court dealt with the similar contention and held that notification under Section 4 of the Forest Act is required to be published in the Gazette and unless it is so published, it is of no effect. Under Section 21 of the General Clauses Act the said notification could be cancelled or modified but it could be done in the like

manner and subject to the like sanction and conditions i.e., by notification in the Gazette. If that it is not done, then it would have no effect Further, dealing with the similar contention the Division Bench of This Court in the case of Dosabhai Kerawala v. State (1970) XI GLR 361, has held that Section 21 of the General Clauses Act merely enacts a rule of interpretation. It provides that where there is a power to issue a notification, it must be construed as also impliedly giving a power to cancel the notification. Cancellation, which is so authorised as a matter of statutory interpretation, is prospective cancellation and power under Section 21 of the General Clauses Act does not include the power to rescind the notification with retrospective effect. The relevant observations are as under:

The question then arises, what was the effect of cancellation of the first Section 6 notification by the notification dated 4th April, 1963? Now the power to cancel a notification under Section 6 must be conceded in view of the observations of the Supreme Court in paragraph 19 of the judgment of Wanchoo, J. Vishnu Prasad Sharma's case (supra). As observed by the learned Judge, under Section 21 of the General Clauses Act, 1897 'the power to issue a notification includes the power to rescind it' and therefore 'it is always open to Government to rescind a notification under Section 4 or under Section 6'. But this power does not include a power to rescind the notification with retrospective effect. Section 21 merely enacts a rule of interpretation. It does not confer any new power. All that it says is that where there is a power to issue a notification, it must be construed as also impliedly giving a power to cancel the notification. But the cancellation which is so authorised as a matter of statutory interpretation is prospective cancellation. Section 21 does not say expressly or by necessary implication that the power shall include a power to rescind with retrospective effect. This appears to be clear on a plain reading of the section but we find that there is a decision of the Supreme Court where the same view has been taken. The Supreme Court pointed out in the *Straw Board . v. G. Mill Worker's Union* : (1953)ILLJ186SC at pages 97-98: 'It is true that the order of 26-4-1950 but, in view of the absence of any distinct provision in Section 21 that the power of amendment and modification conferred on the State Government may be so exercised as to have retrospective operation the order of 26-4-1950, viewed merely as an order of amendment or modification, cannot, by virtue of Section 21, have that effect. If, therefore, the amending order

operates prospectively, i.e., only from the date of the order, it cannot validate the award...' The first Section 6 notification could not therefore be cancelled with retrospective effect, and indeed, if we look at the notification dated 4th April, 1963, it is clear that it did not even attempt to do so. The cancellation of the first Section 6 notification was prospective; it took effect on the date on which it was made, namely, 4th April, 1963. The first Section 6 notification was therefore not obliterated or wiped out altogether, it did not cease to exist ab initio as would have been the case if the cancellation had been retrospective in effect.

(Pmphasis supplied)

14. In this view of the matter, in our view, the order dated 28th March, 1987 reducing or remitting the stamp duty can be rescinded or cancelled only by an order which is published in the Official Gazette. The order dated 6th April, 1992 is published in the Official Gazette on 2nd July, 1992 and, therefore, it would be operative only from that date under the Stamp Act. The State Government has no power to increase the stamp duty with retrospective effect. As the State Government has no power or authority to increase or cancel reduction or remission in the stamp duty with retrospective effect, there is no question of estoppel against the petitioners on the ground that they have agreed to pay the differential increase in the stamp duty. Hence, it is held that on the instruments which were executed by the petitioners before 2nd July, 1992 the respondents are entitled to recover the stamp duty only on the basis of the order dated 28th March, 1987.

15. In the result, all these Special Civil Applications are allowed. Rule made absolute to the aforesaid extent with costs.

On 2nd July, 1992 the Court has passed the following interim order:

The differential stamp duty permitted to be deducted by the G.S.P.C. by that order can be utilised by the G.S.F.C. for affixing the additional stamp on the concerned document so that the G.S.F.C. Security may not get jeopardised. For that purpose, it will be open to the G.S.F.C. to debit the same to the account of the petitioner. If ultimately the petitioner succeeds, the amount of differential stamp duty which is in

dispute will have to be refunded by the State of Gujarat within such time as directed by This Court to the petitioner. The rate of interest which should be made payable by the State of Gujarat to the petitioner on this disputed amount in case of such refunds will be as ultimately fixed by This Court at the final stage. At the request of the learned Advocates for the parties, rule is made returnable on 24th July, 1992.

16. In view of the aforesaid interim order, the petitioners have paid the differential amount of stamp duty. It is contended by the learned Advocate for the petitioners that the G.S.F.C. and other Financial Institutions are charging interest on the loan amount paid to the petitioners at the rate more than 18%.

17. Hence the respondents are directed to refund, within three months from today, the differential amount of stamp duty, if paid, to the petitioners with interest at the rate of 15% per annum from the date of the payment by the petitioners.

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