

Kusum Agrotech Ltd. Vs. the State of Rajasthan and ors.

Kusum Agrotech Ltd. Vs. the State of Rajasthan and ors.

SooperKanoon Citation : sooperkanoon.com/757408

Court : Rajasthan

Decided On : May-29-2009

Reported in : RLW2009(4)Raj3162

Judge : R.S. Chauhan, J.

Appellant : Kusum Agrotech Ltd.

Respondent : The State of Rajasthan and ors.

Disposition : Petition allowed

Judgement :

R.S. Chauhan, J.

1. The petitioner has challenged the order dated 8-11-2004, passed by Deputy Inspector General (Stamps) and Collector Stamps, Kota whereby the learned Collector held that an order passed by a High Court under Section 394 of the Companies Act, 1959, ('the Companies Act' for short) permitting amalgamation of two companies is covered under the definition of word 'conveyance', contained in Section 2(xi) of Rajasthan Stamps Act, 1998 ('the Act' for short). Therefore, the petitioner company is liable to pay the stamp duty. The Learned Collector had also directed the Sub-Registrar (Stamps) to calculate the extent of stamp duty payable. He further directed the Sub-Registrar to recover the stamp duty in case the petitioner company does not deposit the requisite stamp duty. The petitioner

company has also challenged the order dated 21-6-2006, passed by Rajasthan Tax Board, Ajmer ('the Board' for short), whereby the learned Board has upheld the order dated 8-11-2004.

2. The factual matrix of the case in a short compass is that the petitioner company wanted to amalgamate with its sister concern, M/s. Kusum Products Ltd. Therefore, the petitioner company moved an application before the Hon'ble Calcutta High Court under Section 391(2) read with Section 394 of the Companies Act. Vide order dated 16-6-1999 the Hon'ble Calcutta High Court approved the scheme for amalgamation. Therefore, the assets and liabilities of the transferring company i.e. the petitioner company stood transferred to M/s. Kusum Product Ltd. The petitioner company owned certain land in Khasra Nos. 217 and 235 in village Tather, Tehsil Ladpura, admeasuring 4.96 hectare, where the petitioner company had established its factory. Since the said immovable assets was also being transferred to M/s. Kusum Product Ltd., on 12-10-1999 the petitioner company informed the Additional District Magistrate City Kota ('the ADM' for short) about the merger of two companies. It further informed the ADM that, henceforth, the petitioner company will be known as M/s. Kusum Product Ltd.

After a lapse of two years on 29-11-2001, the petitioner company received a notice from the District Collector (Stamps) Kota asking the Company to show cause as to why the stamp duty may not be levied on the transfer of aforementioned land to M/s. Kusum Product Ltd. pursuant to the order dated 16-6-1999, passed by the Hon'ble Calcutta High Court. On 7-1-2002, the petitioner company filed its reply. However, vide letter dated 14-2-2002, the learned District Collector referred the case to the learned Collector Stamps. Vide order dated 8-11-2004, the learned Collector Stamps held as aforementioned. Since, the petitioner was aggrieved by the said order, it filed a revision petition before the Revenue Appellate Authority. But subsequently, the revision petition was transferred to the learned Board. After hearing the petitioner as well as the State, vide order dated 21-6-2006, the learned Board confirmed the order dated 8-11-2004 and dismissed the revision petition filed by the petitioner. Hence, this petition before this Court.

3. Mr. Sunil Nath, the learned Counsel for the petitioner, has vehemently raised a plethora of contentions before this Court: firstly, the Hon'ble Calcutta High Court passed the order of amalgamation under Section 394 of the Companies Act on 16-6-1999.

Secondly, at that relevant time, the definition of the word 'conveyance' as contained in Section 2(xi) of the Rajasthan Stamps Act did not include an order passed by a High Court under Section 394 of the Companies Act.

Thirdly, the definition was amended on 27-5-2004 and by way of amendment, the definition of the word 'conveyance' was enlarged to include 'every order made by the High Court under Section 394 of the Companies Act, 1956, in respect of amalgamation of the companies'. Since, the amendment came into force on 27-5-2004, the said amendment could not be given a retrospective effect so as to include an order passed by the High Court in 1999.

Fourthly, relying on the case of *Mathuram Agrawal v. State of M.P.* : AIR 2000 SC109 , a Constitutional Bench decision, the learned Counsel has contended that before a tax liability can be imposed three criteria need to be specified; a) subject of the tax needs to be defined; b) the person who is liable to pay the tax needs to be identified; c) the rate at which the tax is payable needs to be prescribed. In the pre-amended definition of the word 'conveyance' an order passed by the High Court under Section 394 of the Companies Act was not defined as a subject of the stamp duty.

Moreover, the person by whom the said stamp duty was payable was also not identified. Lastly, the rate at which stamp duty was payable was also not prescribed. In fact, these three elements were included for the first time in the definition of the word 'conveyance', and in the Schedule-I of the Act only on 27-5-2004. Therefore, prior to 27-5-2004, the liability to pay the stamp duty does not exist. Such a liability can not be imposed upon the petitioner company. For, it is a settled principle of law that any law which adversely affects the vested rights or imposes a duty is not given retrospective effect. In order to buttress this contention, the learned Counsel has relied upon the case of *Mithlesh Kumar v. Prem Bihari Khare* : [1989]177ITR97(SC) . Moreover, according to Mr. Nath, while

interpreting a fiscal statute, the statute should be construed narrowly and that, too, in favour of the assessee.

Fifthly, Section 3 of the Act, which is the charging provision, clearly states that 'every instrument mentioned in the Schedule (Schedule-I) on or after the date of commencement of the Act, would be chargeable to stamp duty'. An order passed by the High Court under Section 394 of the Companies Act was not inserted as an instrument in the said Schedule till 27-5-2004. Such an order was included under Article 21 Schedule I only on 27-5-2004. Therefore, even under the charging Section, Section 3 of the Act, an order passed in 1999 was not chargeable. Thus, the order passed by the Hon'ble Calcutta High Court could not be subjected to payment of stamp duty.

Sixthly, according to Notification 14/ 2004, the State Government declared that 'insertion of Article 21 in the Schedule I- dealing with an order passed by the High Court under Section 394 of the Companies Act-should be taken as a new source of revenue for the Government'. Thus, even the Government intended to give Article 21 of Schedule I and amended definition under Section 2(xi) of Act of 1998 a prospective effect and not a retrospective one.

Seventhly, no instrument needs to be created after an order is passed by the High Court under Section 394 of the Companies Act. For, according to Section 394(2) of the Companies Act, the assets of the transferor company stand automatically transferred to the transferee company. Thus, the order passed by the High Court does not amount to an instrument. Moreover, the property is being transferred not because of the intention of the parties, but because of operation of law. Therefore, the transfer does not come within the definition of word 'conveyance'. Hence, the order of the Hon'ble Calcutta High Court is not subject to stamp duty. In order to buttress this contention, the learned Counsel has relied upon *Madhu Intra Ltd. and Anr. v. Registrar of companies and Ors.* (2006) 130 Comp. Cases 510 (Cal.).

Eighthly, the learned Collector has erred in relying upon the notification No. 6/2004 for imposing the stamp duty. For, a notification issued in 2004 can not be applied retrospectively to include an order passed by the Hon'ble Calcutta High Court in 1999.

Lastly, the learned Collector has committed an error while relying on certain judgments of Hon'ble Supreme Court namely, *Ruby Sales and Service Pvt Ltd. v. State of Maharashtra and Ors.* : (1994)1SCC531 , to conclude that the amendment brought in the definition of word 'conveyance' was by way of abundant caution. Moreover, the learned Collector has ignored the fact that an amendment which adversely affects the rights of the people or imposes a liability upon them cannot be given a retrospective effect. Furthermore, he has ignored the fact that there is not an iota of evidence to suggest that the Legislature wanted to give a retrospective effect to the amendment. Therefore, the approach of both the learned Collector Stamps and of the learned Board is highly misplaced.

4. On the other hand, Mr. S. N. Kumawat, the learned Additional Advocate General for the State, has opposed the contentions raised by the learned Counsel for the petitioner. He claims that the amendment dated 27-5-2004 was merely clarificatory in nature. According to him even the original definition of word 'conveyance' included an order passed by a Hon'ble High Court under Section 394 of the Companies Act. For, according to him the original definition dealt with transfer of properties 'inter-vivos' i.e. the transfer of property between two living persons. Since, the Company is deemed to be a juristic person, therefore, the transfer of property from one company to another is, ipso facto, covered within the definition of word 'conveyance'. Moreover, Section 2 (xix) of the Act defines the word 'instrument' meaning as 'every document by which any right is purported to be transferred'. Since, the order passed by the Hon'ble Calcutta High Court under Section 394 of the Companies Act transferred the property from one company to another, the said order falls within the definition of the word 'instrument'. Therefore, according to the learned Counsel, both, the learned Collector Stamps as well as the learned Board were justified in holding that an order passed by a High Court under Section 394 of the Companies Act does fall within the definition of word 'conveyance'. Hence, the petitioner is liable to pay the stamp duty.

Secondly, relying on the case of *Ruby Sales and Service Pvt Ltd.* (supra), the learned Counsel has contended that the order passed by Hon'ble Calcutta High Court was a 'consent decree'.

According to the Apex Court, as observed in the case of Ruby Sales and Service Pvt Ltd. (supra), a consent decree does fall within the definition of word 'conveyance'. Therefore, the order dated 26-6- 1999 is subject to payment of stamp duty.

Thirdly, an instrument dealing with immovable property, worth more than Rs. 100/- , is compulsorily registrable under Section 17 of the Registration Act, 1908. But, before the instrument can be registered, the requisite stamp duty needs to be paid. Therefore, the petitioner company has no other option, but to get the instrument registered. Thus, it is liable to pay the stamp duty.

Lastly, a stamp duty is payable on the date when the instrument is presented for registration. In order to buttress this contention the learned Counsel has relied on the case of State of Rajasthan and Ors. v. Khandaka Jain Jewellers (2007) 14 SCC 339. Therefore the learned Collector Stamps as well as the learned Board were justified in directing the petitioner to pay the stamp duty on the date when the instrument was presented for registration.

5. Heard learned Counsel for the parties, examined the impugned orders and perused the material available on record, and the case law produced at the Bar.

6. This case raises following interesting legal issues:

1) Whether an amendment in law can be given a retrospective effect so as to include an order passed by a High Court?

2) Whether the original definition of word 'conveyance' included an order passed by High Court under Section 394 of the Companies Act or not?

3) Whether the definition of the word 'conveyance', which was amended on 27-5-2004, was by way of clarification or whether the amendment created a tax liability for the first time?

4) Whether the order passed by a High Court under Section 394 of the Companies Act is compulsorily registrable under the provisions of Section 17 of the Registration Act, 1908 or not?

5) Whether the learned Collector and the learned Board have committed an illegality while retrospectively applying the amended definition of the word 'conveyance' and by retrospectively applying the notification issued by the State Government?

7. Article 225 of the Constitution of India clearly states that 'no tax liability shall be levied or collected except by an authority of law'. Therefore, before a tax, in the shape of a fee or duty, can be levied and collected has to be backed by an authority of law. In the case of Mathuram Agrawal (supra) the Apex Court has clearly observed that there is no tax liability in law in case there is ambiguity in a fiscal statute. Before a tax can be imposed three criteria must be laid down by a Statute, namely, subject of the tax should be defined, person who is liable to pay tax should be identified, and the rate at which tax is leviable should be prescribed. In the absence of these three factors tax cannot be levied. For, unless and until these three criteria are specifically prescribed, the liability to pay a tax remain in the realm of uncertainty. The rule of law demands and dictates that there should be certainty in law. Moreover, an uncertain statute cannot claim to possess the authority of law.

In the above mentioned case, the Apex Court also observed that the intention or the governing purpose of tax in Statute cannot be assumed beyond what is stated in plain language. Furthermore, it is a settled principle of interpretation of fiscal legislation that a fiscal statute should be interpreted narrowly and that too in favour of tax payer. Hence, while answering the legal issues in this case, these principles will have to be borne in mind.

8. Originally the word 'conveyance' was defined as 'Conveyance' includes, 'a conveyance on sale, every instrument, by which property, whether movable or immovable is transferred inter vivos, which is not otherwise specifically provided for by the Schedule'. This definition refers to an instrument which is covered under the Schedule. But prior to 27-5-2004, Schedule-I did not include an order passed by the High Court under Section 394 of the Companies Act. It is only after the amendment carried out on 27-5-2004 that Article 21 of the Schedule-I was inserted; Article 21 dealt with the order of High Court passed under Section 394 of

the Companies Act. Thus, the plain and grammatical reading of original definition, as mentioned above, clearly shows that subject of the tax-an order passed by the High Court under Section 394 of the Companies Act-was not even defined. Moreover, neither the original definition of word 'conveyance', nor the original Schedule-I, as it stood prior to 27-5- 2004, identified the person by whom the stamp duty would be payable, in case an order passed by the High Court under Section 394 of the Companies Act is chargeable under the Act. Furthermore, the said duty was not even prescribed in the original Schedule-I of the Act. It is a settled principle of interpretation that the words can neither be added or subtracted from a provision through interpretation. It would tantamount to doing violence to the language of the provision. It would also tantamount to amending the provision-a power which does not rest with the judiciary. Thus a plain and grammatical reading of word 'conveyance' and plain and grammatical reading of Schedule-I clearly reveals that an order passed by High Court under Section 394 of the Companies Act is neither included in definition of 'conveyance' nor included in Schedule-I. Thus, prior to 27-5-2004 an order passed by High Court under Section 394 of the Companies Act was not liable for payment of stamp duty.

It is also settled principle of law that any law which adversely affects the right of people or imposes a liability on the people, generally is not retrospective in nature. [(Refer to Mithlesh Kumari (supra)]. the retrospectivity of the provision has to be spelt out by the clear language of the statute. In the present case, there is nothing in the Act to spell out the intention of the legislature to apply the amendment retrospectively. Thus, too the amendment cannot be applied retrospectively.

Even according to notification No. 14/2004 the Government had clearly stated that stamp duty imposed under Article 21 of the Act should be seen as 'a new source of revenue for the Government'. Thus, even the Government intended to apply the amendment prospectively and not retrospectively.

9. Of course, Mr. Kumawat, has argued that amendment was clarificatory in nature. According to him the order passed by the High Court under Section 394 of the Companies Act was included in the original definition of word 'conveyance'. For, according to him such an order tantamounts to a consent decree. Relying on

the case of Ruby Sales and Service Pvt. Ltd. (supra) he has argued that a consent decree is included in the definition of word 'instrument'. Therefore, it falls within the definition of word 'conveyance' as it originally stood. However, the said judgment does not cover the present case. For, the issue in the said case was 'whether a consent decree where under the title of immovable property is conveyed expressed, falls under the definition of 'conveyance' under Section 2 (g) or an 'instrument' under Section 2(l) of the Bombay Stamp Act or such consent decree falls outside the ambit and scope of definition of 'conveyance' or 'instrument' under the Act'? In the said case, the consent decree had expressly stated that an immovable property is being conveyed between the two parties. However, an order passed under Section 394 of the Companies Act is not a consent decree. Moreover, the order does not contain expression of the parties that the properties are being conveyed from one company to the other. In fact, the property is being transferred not because of intention of the parties, but because of operation of law. Therefore, the opinion of the Supreme Court that the amendment in definition of word 'conveyance' was by abundant caution. Such an observation does not apply to the present case. Hence, the case of Ruby Sales and Service Pvt. Ltd. (supra) does not buttress the contention of Mr. Kumawat.

Mr. Kumawat has further relied on the case of Hindustan Lever and Anr. v. State of Maharashtra : AIR 2004 SC326 to argue that an order passed by a High Court under Section 394 of the Companies Act falls within the definition of the word 'instrument'. Therefore, ipso facto, it would fall within the definition of word 'conveyance'. However, even this case does not rush to the rescue of the learned Counsel. For, a bare perusal of the facts of the said case clearly reveal that the definition of word 'conveyance' contained in Bombay Stamp Act was amended by Maharashtra Act 17 of 1993, which came into force on 1-3-1993. According to the amendment the definition of the word 'conveyance' was enlarged to include every order made by High Court under Section 394 of the Companies Act. Thus the amendment is similar to the amendment made by State of Rajasthan on 27-5-2004. While in the present case the amalgamation took place prior to the amendment, in the case of Hindustan Lever (supra) the amalgamation took place after the amendment had come into force. Therefore, the retrospective applicability of the amendment was not in issue in the case of Hindustan Lever (supra). Thus,

on factual matrix the case of Hindustan Lever (supra) and the present case stand on different footing.

10. In the case of Som Mittal v. Government of Karnataka : 2008 CriLJ1927 the Apex Court held as under:

Judgments are not to be construed as statutes. Nor words or phrases in judgments to be interpreted like provisions of a statute. Some words used in a judgment should be read and understood contextually and are not intended to be taken literally. Many a time a judge uses a phrase or expression with the intention of emphasising a point or accentuating a principle or even by way of a flourish of writing style. Ratio decidendi of a judgment is not to be discerned from a stray word or phrase read in isolation. Similar view was expressed in the Dadu Dayalu Mahasabha Jaipur (Trust) v. Mahant Ram Niwas and Anr. : AIR 2008 SC2187 .

11. Thus, before a case law can be applied, the court should appreciate the factual matrix in which the case was decided. For, facts of two cases may be so different from one another, that a principle annunciated in the former case may not be applicable to the latter case. As mentioned above, the facts of Ruby Sales and Service Pvt. Ltd. (supra) and of Hindustan Lever (supra) are clearly different from facts of the present case. Hence, neither of these two cases support the contentions of the respondent.

12. Mr. Kumawat has emphasised the compulsory need for registering an instrument dealing with immovable property worth more than Rs. 100/-. According to learned Counsel such an instrument cannot be registered until and unless the requisite stamp duty is paid. However, the said contention is without any merit. Relevant portion of Section 17 of the Registration Act, 1908 is as under:

17. Documents of which registration is compulsory.-

(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. 1864 (XVI of 1864), or the Indian Registration Act, 1866 (20 of 1866), or the Indian Registration Act, 1871 (8 of 1871), or the Indian Registration

Act, 1877 (3 of 1877), or this Act came or comes into force, namely:

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:

Provided that the State Government may, by order published in the Official Gazette, exempt from the operation of this Sub-section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees. (2) Nothing in clauses (b) and (c) of Sub-section (1) applies to--

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock company, notwithstanding that the assets of such company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the company has mortgaged, conveyed or

otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such company; or

(v) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest ; or

(vi) any decree or order of a Court except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding] ; or

(vii) any grant of immovable property by the Government ; or

(viii) any instrument of partition made by a Revenue officer ; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871 (26 of 1871), or the Land Improvement Loans Act, 1883 (19 of 1883); or

(x) any order granting a loan under the Agriculturists Loans Act, 1884 (12 of 1884), or instrument for securing the repayment of a loan made under that Act ; or

(xa) any order made under the Charitable Endowments Act, 1890 (6 of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property ; or

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage money, and any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage ; or

(xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue officer.

Explanation.--A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

(3) Authorities to adopt a son, executed after the first day of January, 1872, and not conferred by a will, shall also be registered.

According to the learned Counsel, an order passed by the High Court under Section 394 of the Companies Act is included in Section 17 (1)(e) of the Registration Act. However, the said order clearly falls under Section 1(b), which deals with non-testamentary instrument which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property. However, such an instrument also falls under Section 17 (2)(vi). Section 17(2) clearly states that nothing in clauses (b) and (c) of Sub-section (1) applies to 'any decree or order of a Court, [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding].

13. As stated above, an order passed by the High Court under Section 394 of the Companies Act has not been passed on a compromise entered into between the parties. However, it is an order passed by the High Court which is clearly covered under Section 17 (2)(vi) of the Registration Act. Therefore, the said order passed by the Calcutta High Court on 16-6-1999 needs no registration under the Registration Act. Hence, the question of payment of stamp duty on the said order does not even arise.

14. Although Mr. Kumawat has raised a issue that stamp duty is payable on the date when the instrument is presented for registration, but the said issue is not germane to the controversy before this Court. For, Mr. Sunil Nath, learned

Counsel for the petitioner, has nowhere argued that the petitioner is not liable to pay the stamp duty chargeable and leviable on the date when the instrument was presented for registration. His entire thrust has been that in the year 1999, when the said order was passed by the High Court, the said order was not covered by the provisions of the Stamp Act. Therefore, the orders dated 8-11-2004 and 21-6-2006 are unsustainable, as both the impugned orders retrospectively apply the amended definition of the word conveyance. Hence the contention raised by Mr. Kumawat is irrelevant.

15. The Learned Collector (Stamps) has relied upon the notification No. 6/2004. However, the said notification having been issued in the year 2004, cannot be given a retrospective effect on an order passed on 16-6-1999 by the Calcutta High Court under Section 394 of the Companies Act. Therefore, the very basis for referring the case to the Sub-Registrar for quantifying the stamp duty is highly misplaced.

16. The learned Board has failed to appreciate the legal issues involved in the present case. The issue before the learned Board was with regard to retrospective applicability of amendment carried out in the definition of word 'conveyance' and the insertion of Article 21 of Schedule-I of the Act. Instead of tackling the said issue, without appreciating the differences in factual matrix of the case, but relying on the case of Ruby Sales & Services Pvt. Ltd. (supra), the learned Board has upheld the order passed by the learned Collector dated 8- 11-2004. Thus, the approach of the learned Board is unsustainable.

17. For the reasons mentioned above, this Court quashes and sets aside the order dated 8-11-2004 and the order dated 21-6-2006. Accordingly, the writ petition is, hereby, allowed. There shall be no order as to costs.