AIR 2011 Bom 100 : (2011) 3 ALLMR 581 : (2011) 4 BomCR 334 : (2011) 113 BOMLR 1184 : (2011) 4 MhLj 579

Bombay High Court (Aurangabad Bench)

Case No: Reference Case No. 2 of 2010

State of Maharashtra		APPELLANT
	Vs	
Prashant Shegaonkar		RESPONDENT

Date of Decision: March 16, 2011

Acts Referred:
Bombay Stamp Act, 1958 â€" Section 2#Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 1, Order 21 Rule 85, Order 21 Rule 94, Order 46 Rule 7, 113#Registration Act, 1908 â€" Section 17(2)

Citation: AIR 2011 Bom 100 : (2011) 3 ALLMR 581 : (2011) 4 BomCR 334 : (2011) 113 BOMLR 1184 : (2011) 4 MhLj 579

Hon'ble Judges: R.M. Borde, J; D.B. Bhosale, J

Bench: Division Bench

Advocate: N.B. Khandare, Government Pleader, for the Appellant;

Judgement

R.M. Borde, J.
The learned Principal District Judge, Aurangabad has forwarded this reference u/s 113 of the Code of Civil Procedure.

The points formulated by the learned District Judge in the statement submitted to High Court are as noted below:

I. Whether the interpretation of term ""instrument"" used in Section 147 of Delhi Municipal Corporation Act, 1957 made in the case reported as

Municipal Corporation of Delhi Vs. Pramod Kumar Gupta, can be extended to the provisions of Bombay Stamp Act viz. for clause No. 16 from

Schedule I annexed to Bombay Stamp Act.

II. Whether in view of the interpretation of term, ""instrument"" made by Hon''ble Apex Court in aforesaid case law, said clause of Schedule I of

Bombay Stamp Act needs to be treated as invalid.

III. Whether due to interpretation of provisions of Order 21 Rule 94 of CPC in relation to the provisions of Indian Registration At made in 2007

SCW 4080 (B. Arvindkumar v. Govt of India) needs to be used at the time of recovering the Stamp Duty on Sale certificate issued by Civil

Court.

IV. Whether in view of the interpretation made by Hon''ble Apex Court in aforesaid two cases, Bombay Amendment to Order 21 Rule 85 of

CPC with regard to recovery of Stamp duty in respect of Sale Certificate needs t be treated as invalid.

2. An application was tendered by auction purchaser in Regular Darkhast No. 60/2009 claiming refund of stamp duty deposited by the auction

purchaser alongwith interest, if any. While considering the application, relying on the judgment of the Supreme Court in the matter of Municipal

Corporation, Delhi v. Pramod Kumar Gupta reported in 1991 AIR (SC) 401, the learned District Judge was pleased to allow the application. It

was further ordered by the District Judge that the amount be refunded only refcase2.10 3 after hearing the District Government Pleader.

Accordingly, the District Government Pleader was heard in the matter and, on consideration of the arguments, the learned Principal Distirct Judge

was pleased to recall the order passed earlier in respect of refund of stamp duty. It is also further directed that the payment shall not be released to

the auction purchaser till the opinion of the High Court is received.

3. In the statement forwarded by the learned District Judge as contemplated by Order XLVI Rule 7 of the Code of Civil Procedure, it is recorded

as below:

In the humble opinion of this Court, the interpretation made by Hon''ble Apex Court can not be extended to the provisions of Bombay Stamp Act and Order 21 Rule 85 of CPC (Bombay Amendment) in view of the special provision made in this regard in Maharashtra and the fact that

surcharge on the stamp duty was under challenge, not the stamp duty. However the interpretation of the case of Hon''ble Apex Court can be made

only by High Court and so the reference.

4. In an application tendered by the applicant - auction purchaser, reference is made to a judgment in the matter of B. Arvind Kumar v.

Government of India and Ors. reported in 2007 AIR SCW 4080. The learned refcase2.10 4 District Judge has referred to a judgment of the

Supreme Court in the matter of Municipal Corporation, Delhi v. Pramod Kumar Gupta (cited supra) wherein the Supreme Court while

interpreting the provisions of Section 147 of the Delhi Municipal Corporation Act, 1957, has ruled that sale certificate issued under order XXI

Rule 94 is not an instrument of sale and therefore, no duty is chargeable u/s 147 of Delhi Municipal Corporation Act, 1957. The question that

arose for determination in the matter before the Supreme Court was as to whether u/s 147 of Delhi Municipal Corporation Act, 1957, surcharge

on duty is payable on a sale certificate issued by the Civil Court under Order XXI Rule 94 of the Code of Civil Procedure.

5. Reliance is also placed by the applicant before District Court, on the judgment of the Supreme Court in the matter of B. Arvind Kumar vrs.

Government of India and Ors. (cited supra) wherein the question arose for determination as to whether the sale certificate conveys any right, title

or interest to auction purchaser for want of registered deed of transfer. The Hon''ble Supreme Court on interpretation of provisions of Section

17(2)(xii) of the Registration Act ruled that the certificate of sale presented to any purchaser of any property sold at a public auction, by a civil

court or refcase2.10 5 revenue officer does not fall under the category of non testamentary document which requires registration under Sub-

section (b) and (c) of Section 17(1) of the said Act. So far as the instant application presented by the auction purchaser is concerned, the applicant has placed reliance on the judgment of the Supreme Court reported in 2007 AIR SCW 4080 (cited supra) for claiming refund of court fees.

6. Order XXI Rule 85 of the CPC (Bombay amendment) requires the purchaser to deposit the amount required for general stamp duty of the

certificate under Rule 94 in the Court together with full amount of purchase money. The relevant provision in its applicability to be State of

Maharashtra reads thus:

85 Time for payment in full of purchase money :The full amount of purchase money payable, together with the amount required for general stamp

paper of the certificate under Rule 94, shall be paid by the purchaser into Court before the Court closes on the 15th day from the date of the sale

of the property.

Provided that, in respect of the purchase money, the purchaser shall have the advantage of any set off to which he may be entitled under Rule 72:

Provided further that, if as a result of some bona fide mistake or miscalculation the amount deposited falls short of the full amount of the purchase

money, the Court refcase2.10 6 may in its discretion, allow the shortfall to be made up after fifteen days of sale, and if the full amount of the

purchase money is deposited within such time as the Court may allow, the Court may condone the delay, if it considers it just and proper to do so.

7. Section 2(l) of Bombay Stamps Act, 1958 defines ''instrument'' as

Instrument"" includes every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or

recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share,

debenture, proxy and receipt;

Schedule I of the Bombay Stamps Act prescribes stamp duty payable on instruments and clause 16 of Schedule I provides for stamp duty payable

on a certificate of sale. The relevant entry reads thus:

16 CERTIFICATE OF SALE (in respect of The same duty as is leviable on a Conveyance

each property put up as a separate lot and sold) under clause (a), (b) (c) or (d) as the case may

granted to the purchaser of any property sold bybe, of Article 25 on the market value of the

public auction by a Civil or Revenue Court, or property.

Collector or other Revenue Officer or any other

officer empowered by law to sell property by

public auction.

Thus, for the purpose of the Stamp Act, a sale certificate is an instrument chargeable with stamp duty as prescribed under Clause 16 of Schedule I

of the Bombay Stamps Act, 1958. The provisions of Bombay Stamps Act provide for levy of stamp duty payable on different categories of

instruments whereas the provisions of Section 17(1) of the Registration Act, 1908, provide for categories of documents in respect of which

registration is compulsory. Sub-Section 2 of Section 17 provides for the categories of documents to which the provisions of Clauses (b) and (c) of

Sub-Section 1 of Section 17 do not have applicability. Both the enactments i.e. Bombay Stamps Act and Registration Act, 1908 operate in

different fields.

8. So far as the instant reference is concerned, the applicant has nowhere challenged the validity of the provisions of the Stamps Act prescribing

stamp duty on instruments i.e. sale certificate nor the applicant has raised any challenge to the provisions of Order XXI Rule 85 of the CPC in its

applicability to the State of Maharashtra. In this context, it would be necessary to refer the provisions of Section 113 of the Code of Civil

Procedure. A reference to the High Court can be made by the court on its satisfaction that the case pending before it involves a question of validity

of any Act or Ordinance or Regulation or of any provision contained refcase2.10 8 in the Act or Ordinance or Regulation, determination of which

is necessary for disposal of the case. Section 113 of the CPC reads thus:

113 Reference to High Court: Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for

the opinion of the High Court, and the High Court may make such order thereon as it thinks fit:

Provided that where the Court is satisfied that a case pending before it involves a question as to the validity of any Act, Ordinance or Regulation or

of any provision contained in an Act, Ordinance or Regulation, the determination of which is necessary for the disposal of the case, and is of

opinion that such Act, Ordinance, Regulation or provision is invalid or inoperative, but has not been so declared by the High Court to which that

Court is subordinate or by the Supreme Court, the Court shall state a case setting out its opinion and the reasons therefor, and refer the same for

the opinion of the High Court.

So far as satisfaction of the District Judge as regards the case before him involving a question relating to validity of the Act, Ordinance or

Regulation or any provision contained in the Act, Ordinance or Regulation is concerned, the learned District Judge himself in his statement has

recorded that, in his opinion such question does not arise. It is specifically recorded by the learned District Judge in concluding part of his statement

that so far as interpretation made by the Apex Court in the judgment of Municipal Corporation of Delhi v. Pramod Kumar Gupta is concerned, the

same cannot be extended to the provisions of Bombay Stamps Act or Order XXI Rule 85 of the Code of Civil Procedure, in view of special

provisions made in that regard in the Maharashtra Act. It is also recorded by the learned District Judge that the question that arose for

determination before the Apex Court in the judgment cited supra was as regards the surcharge recoverable on the stamp duty payable by the party

and the challenge does not relate to a question of recovery of stamp duty. When the learned District Judge himself is not convinced that the case

appearing before him involves any question of validity of Act, Ordinance or Regulation or any provision contained in the said Act, Ordinance or

Regulation, it was not at all necessary for the District Judge to make a reference and he could have proceeded to decide the matter appearing

before him in accordance with law.

9. The Supreme Court in the matter of Central Bank of India Vs. Vrajlal Kapurchand Gandhi and Another, has observed as below:

17. The proviso is relevant for our purpose. It operates in the following circumstances:

(a) The court is satisfied that a case pending before it involves a question as to the validity of any Act, ordinance or regulation, or of any provision

contained therein.

(b) Determination of the aforesaid question is necessary for disposal of the case.

(c) The court is of the opinion that such Act, ordinance or regulation or a provision contained in an Act, ordinance or regulation is inoperative.

(d) But the Act, ordinance or regulation or provision concerned has not been declared invalid or inoperative by the High Court to which the court

where the case is pending is subordinate or by the High Court to which the court where the case is pending is subordinate or by the Supreme

Court.

In the matter of Mohammed Azharuddin v. Dr. A.C. Muthaiah and Ors. reported in AIR 2002 Andhra Pradesh 409 the Andhra Pradesh court

has observed thus:

39 Though it is contended on behalf of the Petitioner that the Civil Court instead of ordering the Plaintiff to delete certain paragraphs, ought to have

stated the case and referred the matter for the opinion of the High Court u/s 113 of CPC , I am not inclined to accept the same having regard to

the proviso appended to Section 113 of CPC which postulates that when there is a question before refcase2.10 11 the Civil Court relating to the

validity of any Act, Ordinance or Regulation or any provision of an Act which in its opinion is invalid or become inoperative but has not been

declared by the High Court as such, then only the Civil Court may state the case and refer the matte for the opinion of the High Court. In this case, admittedly, no issue is involved in the present proceedings relating to the validity of any Ordinance, Regulation or any Act or any provision of any

Act which has become invalid but which has not been declared as such by the High Court necessitating the Civil Court to refer the matter to the

High Court for its opinion. Having regard to the pleadings in the plaint and in the light of the relief claimed by the Plaintiff, no such issue, prima

facie, appears to be involved in the proceedings requiring the opinion of the High Court. I, therefore, reject the contention of the counsel for the

Petitioner in this regard.

Reference can be made to a judgment of the Andhra Pradesh High Court in the matter of In the Matter of: District Munsif, Chittoor, Referring

Officer, , it is observed in paragraph No. 5 of the judgment thus:

This proviso says that the court in order to make a reference should be satisfied that in a pending case before it, the validity of any Act, Ordinance

or Regulation or of any provision contained therein is involved, the determination of which is essential for the disposal of the case and that the High

Court or the Supreme Court has not expressed its opinion in that behalf. It is only in that event that it is obligatory on it to make a reference stating

the case, setting out its opinion and the reasons there for.

10. On consideration of the provisions of Section 113 of the CPC as well as the statement forwarded by the learned District Judge in accordance

with Order XLVI Rule 1 of the Code of Civil Procedure, we are of the considered opinion that the reference made by the District Judge is

uncalled for. Neither the applicant before the District Court in an application has raised challenge to validity of any of the provisions either of the

CPC or the Stamps Act, nor the learned District Judge has expressed his opinion as regards invalidity of any of the provisions of the Bombay

Stamps Act or Order XXI Rule 85 of the CPC in its applicability to the State of Maharashtra. The requirement laid down in proviso to Section

113 of the CPC has not been satisfied and as such the reference made by the learned District Judge is incompetent. There is no question as

regards validity of any Act, Ordinance or Regulation or any provision contained in any Act, Ordinance or Regulation has been framed nor in the

opinion of the learned District Judge such question is necessary to be determined by the High Court. The learned District Judge in his statement has

opined that the judgment of the Apex Court cited before him is not applicable to the matter at hand and cannot be made applicable for the purpose

of interpreting the provisions of Bombay Stamps Act or Order XXI Rule 85 of the Code of Civil Procedure. The learned District Judge, however,

thought that interpretation of the case of refcase2.10 13 the Hon''ble Supreme Court can be made only by the High Court and as such referred the

matter u/s 113 of the Code of Civil Procedure. It was for the learned District Judge to apply and interpret the law and proceed to decide the

matter. The matter cannot be referred to the High Court for interpreting the decision of the Supreme Court in context of its applicability to the

matter in hand. In view of the reasons recorded above, we are of the considered opinion that the reference made by the learned Principal District

Judge is incompetent and is not in consonance with the provisions of Section 113 of the Code of Civil Procedure. As such, the reference stands

disposed of. The Principal District Judge shall proceed to decide the application pending before him in accordance with the provisions of law.