A.F.R.

Neutral Citation No. - 2024:AHC:153200

Judgment Reserved on 03.09.2024

Judgment delivered on 20.09.2024

Court No. - 2

Case :- WRIT - C No. - 5229 of 2021

Petitioner :- Somansh Prakash And 8 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Tarun Agrawal

Counsel for Respondent :- A.C. Mishra, A.C.S.C.

WITH

Case :- WRIT - C No. - 4980 of 2021

Petitioner :- Somansh Prakash And 8 Others

Respondent :- State Of U.P. And 3 Others

Counsel for Petitioner :- Tarun Agrawal

Counsel for Respondent :- A.C. Mishra, A.C.S.C.

HON'BLE PIYUSH AGRAWAL, J.

1. Since the similar controversy involved in the both the writ petitions, both are being decided together with this common judgment.

2. For convenience, the facts of Writ-C No. 5229 of 2021 are being delineated here:-

3. Heard Sri Tarun Agrawal, learned counsel for the petitioners, and Sri A.C. Mishra, learned Additional Chief Standing Counsel for the State-respondents.

4. By means of instant writ petition, the following prayer has been made:-

"(I) Issue a writ, order or direction in the nature of certiorari quashing the impugned order dated 22.12.2020 passed by the respondent no.2 and the impugned order dated 31.05.2106 passed by the respondent no.3 (Anneuxre Nos. 13 & 9 respectively);

(II) Issue a writ, order or direction in the nature of mandamus restraining the respondents from undertaking any coercive measures to recover the amount of deficiency of and penalty imposed vide the impugned order dated 22.12.2020 passed by the respondent no.2 and impugned order dated 31.05.2016 passed by respondent no.4;

(III) Issue a writ, order or direction in the nature of mandamus commanding the respondents to forthwith refund the one third amount deposited by the petitioners alongwith interest @ 9% per annum compounded annually;

(IV) ……..

(V) ……..."

5. Counsel for the petitioners submits that the petitioners, who are nine in numbers, belongs to the same family, who possess a joint family properties. He further submits that in order to avoid complication and to maintain peace and harmony in the family, in the month of July/August, 2011, the petitioners entered into an oral settlement for partition of the family properties amongst themselves and also exchanged possession of their respective shares. Thereafter, in order to avoid any further controversy in future, they resolved to reduce the aforesaid oral settlement into writing in the form of a memorandum of settlement on 23.05.2012; wherein terms and conditions of the oral settlement dated July/August 2011 was mentioned. It was also mentioned therein that ten months' ago, the possession was occupied by the respective family members.

6. Thereafter, one of the family members to seek declaration of his title instituted a suit in which compromise dated 29.09.2012 was filed, which took place pursuant to the memorandum of settlement dated 23.05.2012. Thereafter, order dated 8.10.2012 was passed and on 16.10.2012 pursuant to the aforesaid compromise, decree order was passed.

7. Thereafter, one of the family members, namely; Raghav Swarup applied for sanction of map of his portion before Muzaffar Nagar Development Authority along with copy of the decree and memorandum of settlement. Afterward, memo of the same was forwarded by the officer of Muzaffar Nagar Development Authority to the Collector to enquire about payment of stamp duty.

8. On the said basis, the proceedings were instituted against the petitioners under Indian Stamp Act, 1899 and a notice was issued to which the petitioners submitted their reply, but not being satisfied from the same, the impugned order was passed against which an appeal was filed, which also met the same fate. Hence the instant writ petition.

9. Learned counsel for the petitioners further submits before reducing the memorandum of settlement in writing, the petitioners occupied their respective share of properties pursuant to the oral partition which took place way back in July/August, 2011. He further submits that at the time of execution of Memorandum of Settlement dated 23.05.2012, they were already in possession of their respective share of property as per oral settlement between them.

10. He further submits that once the petitioners were not co-owners of the property in question, Section 2 (15) of the Indian Stamp Act is not applicable. He further submits that even Article 45 of Schedule 1-B of Indian Stamp Act, 1899 does not aid to the State-respondents in any manner. He further submits that the partition

deed is also not required for registration, if the petitioners were not co-owners of the property in question, at the time of reducing the same in writing.

11. In support of his submission, learned counsel for the petitioners has placed relied upon the Full Bench Judgment of this Court passed in the case of ***Siya Ram and Ors. Vs. State of U.P. (Misc. Stamp Act Reference No.104 of 1972), decided on 08.05.1972*** as well upon the judgment of Hon'ble Apex Court passed in the case of ***S. Sai Reddy Vs. S. Narayana Reddy and Others, (1991) 3 Supreme Court Cases 647*** and upon the judgment of Delhi High Court passed in the case of ***Mangat Ram and Another Vs. Ram Narain Gupta and Another [(I.A. 2698/07 in CS (OS) No.549/1995].***

12. He further submits that even after amendment of Section 2 (15) by which clause (iii) has been added, does not aid in any manner to the State authorities as on the date of reducing the memorandum of settlement in writing i.e. on 23.05.2012, petitioners cease to be co-owners.

13. He further submits that for imposing of penalty, reason for the same is mandatory and where there is no intention to avoid stamp duty, the penalty cannot be imposed.

14. In support of his submission, he has placed reliance upon the judgment of this Court passed in the case of ***M/s. Aegis BPO Services Limited Vs. State of U.P. and others, [2010 (9) ADJ 237]***. He prays for allowing the writ petition.

15. *Per contra,* learned Additional Chief Standing Counsel supports the impugned orders and submits that the partition deed was executed on 23.05.2012, but the same was not got registered in order to avoid payment of stamp duty thereof as prescribed under Section 2(15) of the Indian Stamp Act, 1899.

16. He further submits that an Original Suit No. 710 of 2012 was filed and during the pendency of the said suit, a compromise dated 29.09.2012 was filed, which took place between the parties, in pursuance whereof, order dated 8.10.2012 and thereafter, the decree dated 16.10.2012 was passed in favour of the petitioners.

17. Once, it is an admitted fact that the partition deed was executed on 23.05.2012, in view of Section 2(15) of the Indian Stamp Act, 1899, it was required to register as well as payment of due stamp duty thereof was required to be paid. But the petitioners did not choose to do the same and therefore, proceedings were rightly been initiated against the petitioners. The petitioners would have succeeded in defaulting the State Exchequer for not paying the due stamp duty, if present proceedings were not initiated against them. He further submits that so far as the penalty is concerned, if the officer of the Muzaffar Nagar Development Authority have not referred the matter to the Collector, the petitioners would have succeeded in their intention for not paying the stamp duty to State Exchequer, therefore, the levy of penalty is also justified.

18. Upon hearing the counsel appearing for the parties, the Court has perused the records.

19. The record reveals that the partition deed was executed in writing on 23.05.2012; wherein it has specifically been mentioned that the petitioners being the family members, entered into an oral partition of the joint property of the family and after due process, they occupied their respective shares of the property, this fact has not been disputed at any stage of litigation by the State-respondents.

20. Once the possession had already been taken by the respective family members i.e. ten months ago from the date of execution of the partition deed, the question arises as to whether Section 2 (15)

of the Indian Stamp Act, 1899 as amended in 1972 is applicable, which reads as under:-

> *"**Section 2(15)-"Instrument of partition means any instrument whereby co-owners of any property divide or agree to divide such property in severalty, and also includes***
>
> *(i) a final order for effecting a partition passed by any revenue authority or any civil court;*
>
> *(ii) an award by an arbitrator directing a partition; and*
>
> *(iii)* **when any partition is effected without executing any such instrument, any instrument or instruments signed by the co-owners and recording, whether by way of declaration of such partition or otherwise, the terms of such partition amongst the co-owners.**

21. From bare reading of the afore-quoted Sections, it clearly shows that if an instrument of partition is executed, duly signed by the co-owners, on previous terms of partition without possession, stamp duty is liable to be paid on the said instrument.

22. In other words, Section 2 (15) (iii) of the Act will be applicable, if an instrument of partition is executed by co-owners of the property, on a declaration of terms of a previous partition by co-owners, then it should be without possession.

23. Once the shares of each family member were divided and separate possession of their respective shares were occupied by them, they cease to be co-owners of the property on the date of execution of memo of partition in written. In other words, once the respective parties had taken possession of their shares, they cease to be the co-owner of the property.

24. From perusal of the memorandum of settlement, it further reveals that an agreement of partition of the property was reduced in

writing, which had already completed and respective parties had come into actual physical possession of their respective shares of the property, which was agreed to be allotted to them and the necessary steps were already taken into consideration to get their respective title duly recorded in terms of oral family settlement and to abide by the memorandum.

25. But in the case at hand, at the time of execution of partition deed, the possession of the respective shares of the petitioners had already been occupied by them.

26. The Full Bench of this Court in the case of **Siya Ram (supra)**, in para no.3 has specifically held as under:-

> *"…… … **before aid of this sub-section can be taken, the instrument must be one which is executed by co-owners, and the partition must be effected by that instrument. In the present case as the partition had already taken place earlier and the parties had entered into separate possession of their shares, they ceased to beco-owners of the properties over which they had taken over separate possession. Moreover, inasmuch as the present document only referred to the fact of partition having taken place earlier, it did not come within the purview of this sub-section.** ……..."*

27. The Hon'ble Supreme Court in the case of ***S. Sai Reddy (supra)*** has dealt with the issue of the claim of the daughters to claim a share in the joint Hindu family property on the basis of a State amendment to the Hindu Succession Act granting equal rights to the daughters in Hindu joint families. A preliminary decree defining the shares of the parties had already been passed in the suit when the law was amended by the State granting equal rights to daughters. The Supreme Court held "unless and until the final decree is passed and the allottees of the shares are to be in possession of the respective property, the partition is not complete".

A completed partition was explained as "a partition of the property by metes and bounds".

28. The Hon'ble Apex Court in ***S. Sai Reddy (supra)*** in para no.7 has held as under:-

> ***" ……... Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. ……..."***

29. Further, no cogent material was brought on record by the State-respondents to show that the partition was not complete on the date of execution of settlement of memorandum as well as petitioners were not in possession of their respective shares of the property.

30. In the case in hand, the petitioners, on an oral settlement, had already put in possession of the respective shares, the partition was completed much before the date of reducing in writing the memo of partition.

31. The aforesaid principle was applied by the A.P. High Court in A. Krishna and Anr. Vs. A. Arjun Rao and Anr. AIR 2004 AP 502. The Court held:

> *"10. The underlying object of Section 35 of the Stamp Act is to ensure that the instrument chargeable with duty is duly stamped, as otherwise it would cause loss to the exchequer, and in order to save revenue to the State, the provision makes the instrument which is not duly stamped inadmissible in evidence. In the instant case, the plaintiffs by seeking to produce the document dated 3-6-1977, which is in the nature of memorandum of partition between the parties, are seeking to extinguish the exclusive right created in favour of Defendant No. 2. As per the recitals of the document, it is clear that partition has been* ***effected by specifying the shares, which includes payment of maintenance to their mother, in that view of the matter, the document dated 3-6-1977***

> ***cannot be said to be memorandum regarding past partition. A perusal of the document further discloses that actual partition was not done by metes and bounds as per earlier partition. By virtue of the document, according to the plaintiffs, separate possession was sought to be delivered to the respective parties, and as such, it is evidencing partition. In this context, it is relevant to state that the document sought to be marked does not contain recitals that the parties have already taken possession of the properties by virtue of the earlier oral partition and continue to enjoy the said property separately after taking possession by virtue of the earlier partition. In the absence of any such recitals in the document, the Court below has rightly come to the conclusion that the document is required to be stamped*** *and registered."(emphasis supplied)*

32. The Delhi High Court in the case of ***Mangat Ram (supra)*** has held that the parties had not taken complete possession of their shares, therefore, instrument for partition are covered under Section 2 (15) of the Indian Stamp Act, 1899 and the same is liable for payment of due stamp duty. However, in the case at hand, the parties had already occupied their respective shares of the property before reducing the memorandum of settlement in writing on 23.05.2012 and therefore, they cease to be co-owners.

33. Process of partition is not complete until the parties have divided the properties by metes and bounds.

34. The record further reveals that the parties had arrived at an oral family settlement and to implement its terms, steps were taken to occupy the respective possession by metes and bounds i.e. by delivery of possession of the respective shares of property that were occupied before reducing the memo of partition deed in writing.

35. The record furthermore reveals that for imposing penalty, not a single reason has been assigned and however, for levying the penalty, the *mens rea* is essential. It is further essential that every

administrative authority or judicial authority, before levying penalty, reason whatsoever has to be recorded, as without the same, the consequence of the impugned order may be very harsh and the same may fails to justify the essence of the order.

36. The record shows that in view of the oral family settlement, the respective parties not only divided their shares but also taken possession of their respective shares by metes and bounds, then at the time of reducing in writing the memorandum of settlement, will not be treated as instrument which is covered under Section 2 (15) (iii) of the Act.

37. There is no finding recorded in the impugned orders that there was any attempt to evade stamp duty or to deprive the State Exchequer or the rightful revenue. In the absence of such finding, there appears to be no justification for imposing the penalty.

38. It is settled law that reason is the heartbeat of every conclusion. An order without valid reasons cannot be sustained. To give reasons is the rule of natural justice. One of the most important aspect for necessitating to record reason is that it substitutes subjectivity with objectivity. It is well settled that not only the judicial order, but also the administrative order must be supported by reasons recording in it.

39. Highlighting this rule, the Hon'ble Supreme Court, in the cases of ***Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs. Shukla & Brothers, (2010) 4 SCC 785, M/s Travancore Rayon Ltd. v. Union of India, 1969 (3) SCC 868*** have observed that the administrative authority and the tribunal are obliged to give reasons, absence whereof would render the order liable to judicial chastisement.

40. This Court in the case of ***M/s. Aegis BPO (supra)*** has held that so far as imposition of penalty is concerned, no reason has been assigned for imposing the same.

41. Once the reason has not been assigned by the competent authority for levying the penalty then on this ground alone, the impugned orders cannot be sustained.

42. In the case in hand, the impugned orders do not refer any reason whatsoever for justifying the levy of penalty, hence the levy of penalty cannot sustain in the eyes of law and the same is quashed.

43. In view of the facts as stated above as well as law down in the aforesaid judgments, the impugned orders are set aside.

44. Accordingly, the writ petition succeeds and is ***allowed***.

45. Any amount deposited by the petitioners during the pendency of the present proceedings, shall be refunded to them along with interest @ 4% from the date of deposit till the actual payment is made, within a month from today from the date of production of certified copy of this order.

Order Date :- 20.09.2024
Pravesh Mishra/-