(2020) 03 BOM CK 0038

In the Bombay High Court

Case No : Writ Petition No. 2365 Of 2006

Abhijeet Ashoka Infra Structure Pvt. Limited — APPELLANT

Vs

Joint District Registrar (Class-I) And The Collector Of Stamps And Anr — RESPONDENT

Date of Decision : 06-03-2020

Acts Referred:

Maharashtra Stamps Act, 1958 — Section 2, 2(n), 2(l), 2(n)(iii), 3, 6, 39(1)(b), 53(1A), 54
Transfer Of Property Act, 1882 — Section 105
Stamp Act, 1899 — Section 2(16)(c)
Maharashtra Stamps Act, 1958 — Article 5(h), 25, 36, 36(b)

Citation : (2020) 03 BOM CK 0038

Hon'ble Judges : A.S. Chandurkar, J;Vinay Joshi, J

Bench : Division Bench

Advocate : D.V. Chauhan, Tajwar Khan

Final Decision : Dismissed

Judgement

A.S. Chandurkar, J

1. The challenge raised in this writ petition is to the order dated 28/02/2006 passed by the Chief Controlling Revenue Authority, Maharashtra State,

Pune thereby confirming the order dated 11/11/2005 passed by the Collector of Stamps in proceedings under the Maharashtra Stamps Act, 1958 (for

short, the said Act). By the said order, the agreement between the parties has been adjudicated as a â??leaseâ? falling under Article 36(b) of

Schedule-I to the said Act.

2. The facts in brief are that an advertisement was issued by the State of Maharashtra for constructing a bridge across Vainganga river. That work

was to be done on â?? Build, Operate and Transferâ?? (BOT) basis. The offer made by the petitioner came to be accepted. A Concession Agreement

was accordingly entered into between the petitioner and the State of Maharashtra through the Secretary, Public Works Department on 16/11/1998.

The Collector of Stamps initiated proceedings for adjudication of proper stamp duty payable on the said agreement. After considering the agreement

entered into by the petitioner on 05/07/2005 a communication was issued to the petitioner in which it was stated that the agreement was in the nature

of lease as per provisions of Section 2(n)(iii) of the said Act. The petitioner was called upon to show cause as to why stamp duty should not be

recovered in terms of Section 39(1)(b) of the said Act. According to the petitioner the Concession Agreement could not be treated as â??leaseâ? as

defined by Section 2(n) of the said Act. The petitioner submitted its explanation on 19/07/2005 and after exchange of communications, the Joint

District Registrar and Collector of Stamps called upon the petitioner to pay deficit stamp duty of Rs.7,84,76,540/-. However on 11/11/2005 an order

came to be passed by the Joint District Registrar and Collector of Stamps under Section 39(1)(b) of the said Act and the petitioner was called upon to

pay the deficit stamp duty within a period of thirty days. Being aggrieved by that order the petitioner filed an appeal under Section 53(1A) of the said

Act. Though the petitioner filed an application under Section 54 of the said Act seeking a reference of the question of law to this Court no orders were

passed on that application. Ultimately by the impugned order the appeal preferred by the petitioner came to be rejected by the respondent No.2. Being

aggrieved the said order has been challenged in this writ petition.

3. After the writ petition was entertained and admitted by the learned Single Judge, by virtue of administrative directions issued, the writ petition was

directed to be placed before the Division Bench. Accordingly we have heard the learned counsel for the parties.

4. In support of the challenges raised to the impugned order Shri D.V. Chauvan, learned counsel for the petitioner submitted that on complete reading

of the Concession Agreement which was not a registered document it was clear that the same could not be termed to be a â??leaseâ? as defined by

Section 2(n) of the said act. The subject matter of the Concession Agreement was the construction of a bridge over Vainganga river and the

agreement was to be executed on â??BOTâ? basis. With a view to enable the petitioner to recover the cost of construction it was permitted to

collected toll for a period of eighteen years and nine months which included the construction period of two years and six months. Referring to Clause-

1.13 of the Concession Agreement it was submitted that the petitioner was entitled to collect fees as notified by the Government of India under the

National Highways Act and the fees were to be retained by the petitioner collected from the vehicles using the facility. Referring to Clause 3.14 it

was submitted that exclusive possession of any immovable property was never handed over to the petitioner and it was merely required to undertake

the construction of the bridge. The overall control was retained by the respondent No.1 and therefore by no stretch of imagination the Concession

Agreement could be treated as a â??leaseâ??. There was no relationship of lessor and lessee between the parties nor was any land described to

constitute a lease. Referring to the judgment of the Honourable Supreme Court in ICICI vs. State of Maharashtra and ors. (1999) 5 SCC 70 8it was

submitted that as possession of the immovable property in the form of land remained with the owners thereof and the Concession Agreement merely

gave a right to the Company to construct the bridge, the document in question could not be treated as a lease. He also referred to the judgment of

learned Single Judge in Larsen and Toubro Ltd. and ors. vs. The State of Maharashtra and ors. 2012(7) ALL MR 460 to substantiate his contention.

He sought to distinguish the decision of Honourable Supreme Court in State of Uttarakhand and ors. vs. Harpal Singh Rawat (2011) 4 SCC 575 by

submitting that in that case the agreement in question specifically permitted collection of toll which clarified the intention of the parties. He also

submitted that the decisions of the Allahabad and Andhra Pradesh High Courts referred to in the impugned orders had no application to the facts of

the present case. It was therefore submitted that by incorrectly construing the provisions of the said Act, the impugned order came to be passed. The

same was thus liable to be set aside.

5. On the other hand Ms Tajwar Khan, learned Assistant Government Pleader for the respondents submitted that the Concession Agreement

permitted the petitioner to collect toll from the vehicles using the bridge. The definition of the expression â??leaseâ? as per Section 2(n) of the said

Act being inclusive in nature, it was rightly treated as â??leaseâ? for the purposes of the said Act. The petitioner was permitted to retain control of

the bridge in question for the period as provided in the Concession Agreement. Reference was also made to Articles 25 and 36 of Schedule-I to the

said Act and it was submitted that since the intention of the parties was clear in permitting the petitioner to collect toll, the impugned adjudication did

not call for any interference. She also referred to the provisions of Section 6 of the said Act to justify the demand as made. Placing reliance on the

decisions in State of Uttarakhand and ors. (supra) it was submitted that the order passed by the respondent No.2 did not call for any interference. It

was also urged that there was a distinction between a â??leaseâ? as contemplated by Transfer of Property Act, 1882 and â??leaseâ? as defined

under Section 2(n) of the said Act. It was therefore submitted that since all relevant provisions of the said Act had been taken into consideration while

passing the impugned order, there was no reason to interfere with the same.

6. We have heard the learned counsel for the parties at length and we have given due consideration to their respective contentions.

The question to be considered is with regard to the stamp duty that is liable to be paid on the execution of the Concession Agreement dated

16/11/1998. For that purpose the nature of the Concession Agreement would be required to be seen. Under Section 3 of the said Act the stamp duty is

liable to be paid on the instrument as executed and not on the transaction. An instrument as defined by Section 2(l) of the said Act includes a

document by which any right or liability is created or extended. Perusal of the Concession Agreement indicates that the State Government had invited

bids for constructing a bridge across Vainganaga river under Build, Operate and Transfer scheme. Private investment in the said project was

permitted and with a view to enable the party constructing the bridge to recover the project cost, a concession period was fixed during which period

the said party was entitled to collect fees for the purposes of reimbursement of the total project cost. The concession period fixed was eighteen years

and nine months which included the construction period of two years and six months from the date of signing of the agreement. The fees to be

collected from vehicles using the bridge were the fees as fixed by the Government under National Highways Act, 1956 and the fees so collected

during the concession period were to be retained by the party constructing the bridge. Thereafter at the end of the concession period the project,

namely the bridge was to be handed over to the Government. It was clarified that the possession of the land on which the proposed project was to be

constructed was with the Public Works Department and the same was to be handed over to the party making the construction but the same would not

amount to transfer of ownership.

7. It would be necessary to refer to relevant provisions of the said Act. Section 2 defines various expressions which expressions would get their

meaning as defined unless there was anything repugnant in the subject or context. Section 2(l) defines an â??instrumentâ?? to include every

document by which any right or liability is either created or purported to be created. Section 2(n) defines a lease of immovable or movable property.

The said definition is inclusive in nature. Section 2(n)(iii) is relevant for the present purpose and it reads thus:

2(n) â??leaseâ?? mean a lease of immovable property and includes also:

(i) â?¦., (ii)â?¦.

(iii) any instrument by which tolls of any description are let;

Section 3 mandates every instrument as mentioned in Schedule-I to be chargeable with stamp duty. Section 6 specifies that if any instrument comes

within two or more descriptions in Schedule-I and the duties payable therein are different, such document would be chargeable only with the highest of

such duty.

Article 36(b) reads thus:

36. LEASE, including an under-lease or sub-lease and any agreement to let or sub-let or any renewal of lease:

(a) â?¦

(b) where the lease is granted for fine or premium or money advanced or to be advanced and where no rent is fixed;

The same duty as is leviable on a conveyance under clause (a), (b) [(c) or (d)], as the case may be, of Article 25, on the amount of such fine or

premium or money advanced or to be advanced.

8. From a complete reading of the entire agreement it becomes clear that by virtue of execution of said document the party constructing the bridge

was entitled to recover the cost of the project through collection of toll from the vehicles using the said bridge during the period of 18 years 9 months.

The amount of premium was also fixed at Rs.261.88 crores. Even if the entire cost of the project was recovered prior to that period the party

constructing the bridge was entitled to retain such fees till the completion of the concession period. The said document therefore creates a right in

favour of the petitioner to recover fees from vehicles using the bridge. The Concession Agreement is thus an â??instrumentâ? as defined by Section

2(l) of the said Act.

9. The definition of the term â??leaseâ? under Section 2(n) of the said Act is distinct from the definition of the term â??leaseâ? under Section 105 of

the Transfer of Property Act, 1882. Under Section 2(n) of the said Act the term is not restrictive. Besides a lease of immovable or movable property

or both, any instrument by which tolls of any description are let is also included in the said definition. The term â??letâ? in the context of rent

legislation has a different connotation and the same would not be relevant in the present context. In Blackâ??s Law Dictionary, the word â??letâ??

also means to allow or to permit. A lease therefore would also include any instrument by which tolls of any description are let.

10. In State of Uttarakhand and ors. (supra) the provisions of Section 2(16)(c) of the Stamp Act, 1899 as applicable to the State of Uttarakhand fell

for consideration. Those provisions are in pari materia to the provisions of Section (2)(n) of the said Act. The question that was considered in the said

decision was with regard to the stamp duty payable on a lease agreement executed between the State Government and the contractor entitling the

latter to collect toll tax. After noticing that the said definition was inclusive in nature it was held that since the contractor was permitted to collect toll

tax for use of a particular road, the agreement in question fell within the ambit of the term â??leaseâ? as defined by Section 2(16)(c) of the Stamp

Act, 1899.

We find that the ratio of the aforesaid decision interpreting pari materia provisions would squarely apply to the case in hand. Merely because there

was a specific auction held for grant of lease and to collect toll tax would not make much difference in view of the fact that in the present case under

Concession Agreement the petitioner was permitted to collect toll with a view to recover the project cost.

11. It may also be noted that the Honourable Supreme Court in the aforesaid decision has referred to the judgment of Allahabad High Court in Banney

Khan vs. Chief Inspector Stamp AIR 1976 All 475 as well as the judgment of the Andhra Pradesh High Court in Uppalapati Durga Prasad vs.

Executive Engineer (R & B) (2001) 4 Andh LT 228 and has thereafter affirmed those decisions by observing that when toll is collected for using a

road or bridge then in such cases neither the road nor the bridge is leased out. It is only the right to collect toll that is leased out and thus right of

leasing out the collection of toll would be a â??leaseâ? for the purposes of the Stamp Act, 1899. In the impugned order the appellate Authority has

referred to the aforesaid two decisions while dismissing the appeal. We find that the appellate Authority has rightly adjudicated the appeal by applying

the correct legal provisions.

11. Heavy reliance was placed by the learned counsel for the petitioner on the judgment of the Honourable Supreme Court in ICICI (supra). Its

perusal would indicate that the document in question was an agreement to create a lease in future. It was thus held in the said facts that the intention

of the parties was to execute a document of lease in future and till such document was executed, the status of the appellant therein was that of a

licensee. In the light of these facts the ratio thereof is clearly distinguishable and is thus not applicable to the case in hand. Similarly the ratio of the

decision in Larsen and Toubro Ltd and ors. (supra) would also not be applicable to the case in hand inasmuch as in said case also there was no lease

created in favour of the parties and such lease was to be created after the construction was to be completed.

12. It is thus found that the Concession Agreement has been rightly found to be chargeable as a lease as defined by Section 2(n) of the said Act.

Article 36 (b) of Schedule-I has rightly been made applicable rather than Article 5(h) of the said Act in view of the fact that Section 6 mandates a

document to be charged with the higher duty prescribed when it comes under two or more descriptions in Section Schedule-I. It is found that the

appellate Authority has applied the correct legal principles while passing the impugned order. There is no reason to interfere with that adjudication.

Consequently the impugned order is liable to be upheld.

13. In the result the challenge to the impugned order fails. The writ petition is

dismissed. Rule stands discharged with no order as to costs.

In terms of order dated 07/12/2007 the petitioner shall abide by the undertaking given with regard of payment of balance amount of stamp duty.

