

**(2010) 08 AHC CK 0107**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 17148 of 2010

Aegis BPO Service Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

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**Date of Decision :** 30-08-2010

**Acts Referred:**

Constitution of India, 1950 — Article 14, 21  
Stamp Act, 1899 — Article 35, 5, 6, 17, 2(14)

**Citation :** AIR 2011 All 30

**Hon'ble Judges :** Pankaj Mithal, J

**Bench :** Single Bench

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## **Judgement**

Pankaj Mithal, J.—Under challenge in this writ petition is the order dated 3.3.2010 passed by the District Magistrate/Collector, Gautam Budh Nagar in Stamp Case No. 46/2007-08 State v. Aegis BPO Services Limited determining deficiency in stamp duty of Rs. 58,31,90,0/r and imposing penalty of Rs. 5,83,190/- and further directing to pay the deficiency with interest @ 1,5% per month from the date of execution of the instrument i.e. 1.7.2006 till its payment.

2. The aforesaid order passed in exercise of powers u/s 33/47A of the Indian Stamp Act, 1899 (hereinafter referred to as the Act) is appealable/revisable u/s 56 of the Act but the order has been assailed directly by invoking writ jurisdiction on the allegation that it is patently without jurisdiction and the document is void on which no stamp duty is leviable.

3. Irrespective of the alternative remedy so available the Court entertained the writ petition and vide order dated 9.4.2010 granted time to the learned Standing counsel to file counter affidavit. A counter affidavit has been filed and though an objection to the maintainability of the writ petition without exhausting the alternative remedy has been raised but the same has not been seriously pressed for the reason that the writ petition involves only legal issues which can be decided on the basis of the affidavits exchanged between the parties.

4. In Government of Andhra Pradesh and Others Vs. Smt. P. Laxmi Devi, their

Lordships of the Supreme Court while dealing with the demand of deficiency of stamp duty opined that where the demand is arbitrary and exorbitant, it is always open to the party to file a writ petition challenging such a demand made u/s 47A of the Act as it is well settled that arbitrariness violates Article 14 of the Constitution of India.

5. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, exceptions to rule of exhausting alternate remedy available have been spelled out and one such exception is where the order impugned is said to be without jurisdiction.

6. Accordingly, in view of the above legal position with the consent of the parties I have proceeded to hear the writ petition on merits for final disposal.

7. The facts leading to the filing of this writ petition are necessary to be stated first.

8. The Petitioner entered into an agreement dated 1.7.2006 at Mumbai with its sister concern M/s. ESSAR Properties Limited for using part of the building situate on plot No. 5 Block A Sector 3 NOIDA having an area of 2324.10 sq. meters on rent of Rs. 13,50,000/-per month for a period of 108 months. A copy of the said agreement was on record of the U.P. Trade Tax Department. The Assistant Commissioner (Stamps) while examining the record of the Trade Tax Department came across the same and after obtaining a photocopy of it made a reference on 21.8.2007 to the District Magistrate/Collector for determining the stamp duty payable on it. The said reference was registered as case No. 46/2007-08 u/s 33/47A of the Act and a show cause notice dated 18.9.2007 was issued to the Petitioner calling upon it to produce the original document and proof of payment of stamp duty, failing which, stamp duty shall be determined and penalty shall be imposed in accordance with law. The aforesaid notice was duly replied by the Petitioner inter alia on the ground that the document is void, M/S.ESSAR Properties Limited who had executed the same was neither the owner nor in possession of the aforesaid property on the relevant date and as such could not have conveyed any right in the property; it is not an instrument; in any case it can not be treated as lease deed but a simple agreement or a license; the authority had no right to summon the same from the Petitioner and to charge stamp duty. The District Magistrate/Collector repelling the above arguments vide impugned order has determined the deficiency treating it to be a document of lease/ agreement of rent chargeable to stamp duty u/s 3 read with Article 35 of Schedule 1-B of the Act.

9. I have heard Sri N.K. Seth, Senior Advocate assisted by Sri A.K. Goel learned Counsel for the Petitioner and Sri Sanjay Goswami along with Sri Nimai Das in opposition on behalf of the Respondents.

10. To begin with Sri Seth has submitted that as the document was executed in Mumbai and was not produced before any authority in U.P. for any purpose, therefore, the order passed is without jurisdiction. The argument has been noted

only to be rejected. Section 17 of the Act provides that all instruments chargeable with duty and executed by any person in India shall be stamped before or at the time of execution. Section 3 of the Act is the charging Section. A conjoint reading of both the above provisions leaves no room of doubt that stamp duty is payable on the date of execution of every instrument chargeable to stamp duty if executed in India. So execution of an instrument chargeable to stamp duty anywhere in India is sufficient for realising stamp duty and its execution out side U.P., at Mumbai would make no difference so as to affect the jurisdiction of the authorities under the Stamp Act of the State of U.P., where the property is situate.

11. Sri Seth has then argued that the document dated 1.7.2006 does not create any right in the property in favour of the Petitioner and as such is not an instrument chargeable to stamp duty.

12. The "instrument" is defined u/s 2(14) of the Act as under:

(14) "Instrument- "Instrument" includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded.

13. The above definition of the instrument includes every document by which any right or liability is created or purported to be created, transferred, limited, extended, extinguished or recorded. A plain reading of the document in question which is on record as annexure 1 to the petition shows that it contains a heading "rental agreement" and it purports to allow the Petitioner to use and occupy ground floor of the building situate at A-5, Sector 3, NOIDA consisting of a basement, ground floor, second floor and the terrace on rental basis for a period of 108 months from the date of agreement on a monthly payment of Rs. 13,50,000/-. In view of plain and simple language employed to the above effect in the document, it is apparent that the said document creates a right in favour of the Petitioner to use the said property on rent and as such would certainly be an instrument as defined under the Act.

14. Now, the issue is whether the document in question is void and can not be subjected to payment of stamp duty on the ground that on the relevant date the party executing the same had no right title or any interest so as to transfer any right to use the same in favour of the Petitioner.

15. It is pertinent to keep in mind that an instrument is chargeable to stamp duty u/s 3 read with Section 17 of the Act on its execution. The validity of the document has no concern with the chargeability of stamp duty. Similarly, whether the person executing the instrument is authorized to execute it or not is not material and relevant. The only thing which is relevant is that the document should be an instrument chargeable to stamp duty which is realizable on its execution. Even registration of the document is not necessary for the payment of stamp duty.

16. In the present case no doubt M/s. ESSAR Properties, the executant of the instrument on first July 2006 had not acquired any right in the property in question but nonetheless the instrument was executed creating rights in favour of the Petitioner as tenant which instrument is chargeable to stamp duty in view of Section 3 read with Section 17 of the Act. It is to be noted that an instrument need not be one which creates right or liability in the present but also in future. This is implicit from the use of the words "purports to be created" used in Section 2(14) of the Act. Thus, where a document has been executed purporting to be creating right or liability in future in anticipation of some rights to be acquired, it would also be an instrument u/s 2(14) of the Act.

17. The Petitioner admittedly had acquired rights in the property in question with the due permission of the NOIDA subsequently vide transfer deed dated 24.8.2006 and as such became entitled to let out the same to the Petitioner with effect from the above date if not from 1st July 2006. The rental agreement therefore would atleast be creating rights in the immovable property by transfer from a future date and would be covered by the expression "purports to be created" used in Section 2(14) of the Act. In this view of the matter also it would fall within the meaning of an instrument u/s 2(14) of the Act and can be subjected to payment of stamp duty.

18. The next submission on behalf of the Petitioner is that document was never produced before the District Magistrate/Collector nor before any other relevant authority entitled to receive evidence and therefore the District Magistrate/Collector was not authorized to draw the proceedings on the basis of the copy of the document by directing the Petitioner to produce the original.

19. Section 47A of the Act authorizes the registering authority before whom any instrument chargeable to stamp duty is produced to refer it for determination of the market value before registering it, if he is satisfied that proper stamp duty has not been paid. Once the instrument is registered, the Collector is authorized to take suo-motu action or on a reference by any of the authorities specified under the Act, to draw proceedings for determination of the market value and the deficiency in stamp duty. Simultaneously, Section 33 of the Act provides for the examination and impounding of instruments whether required to be registered or not. The provisions of of Sub-sections (4) and (5) of Section 33 are very relevant and material for the purposes of deciding the submission raised above. They are reproduced herein below:

33. Examination and impounding of instruments:

(1) to (3)....

(4) Where deficiency in stamp duty paid is noticed from the copy of any instrument, the Collector may suo motu or on a reference from any Court or from the Commissioner of Stamps or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorized by the Board of Revenue in that behalf, call for the original

instrument for the purpose of satisfying himself as to the adequacy of the duty paid thereon, and the instrument so produced before the Collector shall be deemed to have been produced or come before him in the performance of his functions.

(5) In case the instrument is not produced within the period specified by the Collector, he may require payment of deficit stamp duty, if any, together with penalty u/s 40 on the copy of the instrument. Provided that no action under Sub-section (4) or Sub-section (5) shall be taken after a period of four years from the date of execution of the instrument.

Provided further that with the prior permission of the State Government an action under Sub-section (4) or Sub-section (5) may be taken after a period of four years but before a period of eight years from the date of execution of the instrument.

20. The aforesaid provisions enable the Collector on noticing deficiency in stamp duty from the copy of the instrument to take suo-motu action or on a reference from any Court or from Commissioner, Additional Commissioner, Deputy Commissioner or any other officer authorized by the Board of Revenue and to call for the original instrument for the purposes of satisfying himself as to the adequacy of the stamp duty paid and in case the instrument is not produced to proceed to determine the deficiency together with penalty on the copy of the instrument.

21. In addition to above, Section 73/73-A of the Act authorises the officers to inspect records or documents maintained by public officer and to take notes and extracts as may be necessary to secure any duty or to discover any fraud in relation to any duty payable.

22. In the case at hand, there is no dispute that the copy of the instrument was on record of the U.P. Trade Tax Department. It was examined by the Assistant Commissioner (Stamps) in exercise of powers u/s 73 of the Act and thereupon on being satisfied that proper stamp duty has not been paid on it, he had made a reference to the Collector u/s 33(4) whereupon Collector had called upon the Petitioner to submit the original instrument. The Petitioner having failed to produce the original, the Collector proceeded to determine the deficiency on the basis of the copy of the instrument as provided u/s 33(5) of the Act. In such a situation, no error of jurisdiction has been committed by the Collector in passing the impugned order.

23. Sri Seth in this connection has placed much reliance upon a decision of the Supreme Court in the case of Distt. Registrar and Collector, Hyderabad and Another Vs. Canara Bank Etc., In this case the validity of Section 73 of the Stamp Act in its applicability to the State of Andhra Pradesh vide Section 6 of the Andhra Pradesh Act 17 of 1986 was declared to be ultra vires by the High Court. The matter came up for consideration before the Supreme Court and the Court upheld the decision of the High Court on the ground that seizure of any

document in custody of any Bank infringes right of privacy of a person which is integral part of Article 21 of the Constitution of India. In Andhra Pradesh Section 73 of the Act permits the person authorized by the Collector to enter any premises and to inspect the documents not only of the office of the public officer but also in custody of any bank subject to notice of 30 days for the purposes of discovery of any fraud or omission in relation to any duty and for making good the deficiency in stamp duty. The Supreme Court in the above context observed that u/s 73 of the Act as applicable in the Andhra Pradesh, the Collector or the person authorized by him is empowered to inspect the registers, books, records, papers documents or proceedings in the public office which obviously means that the inspection must relate to public documents in custody of public officer or to public record of private documents available in his office but it would not extend to private documents of the customers of the Bank or copies of such private documents as it would amount to breach of confidentiality and would therefore be violative of privacy rights of the customers of the Bank. However, the situation in U.P., is quite different. In the State of U.P., there is no amendment in Section 73 in the principal Act which only empowers the officer authorized to inspect the documents such as registers, books, papers and proceedings in custody of every public officer and to take such notes and extracts as may be necessary for the purpose to secure duty under the Act.

24. Thus, the aforesaid provision as applicable in U.P. does not authorise inspection of any documents available in custody of the Bank or any private authority. The inspection of document whether public or private in custody of a public office has not been held to be illegal or amounting to infringing the right of privacy of a person. In this view of the matter, the authority cited does not in any way helps the Petitioner.

25. The provision of Section 73 of the principal Act has not been declared to be ultra-vires and in the present case the documents of public office i.e., of U.P. Trade Tax Department were inspected in exercise of powers u/s 73/73-A of the Act whereupon the instrument being discovered was referred under Sub-sections (4) and (5) of Section 33 of the Act for the levy of proper stamp duty.

26. The other case Som Dutt Builders Limited Vs. State of Uttar Pradesh and Kanpur Development Authority, also does not come to the rescue of the Petitioner. In the said case the learned Single Judge of this Court was dealing with the impounding of a document and in that connection held that when the original document was not produced and the procedure provided for impounding in Section 40 was not followed, the provisions of Section 33(1) of the Act enabling impounding of the document would not be attracted and the authorities would have no power to summon the original document for the purposes of finding out whether it has been properly stamped or not. The above authority is confined to the impounding of a document under Sub-section (1) of Section 33 of the Act and is not applicable where the proceedings have been drawn under Sub-sections (4) and (5) of of Section 33 of the Act. Impounding of a document is a

matter distinct from the chargeability of the instrument to stamp duty.

27. Accordingly, the submission that no action could have been taken on the basis of the copy of the instrument and by directing for production of the original is misconceived and is not tenable in law.

28. It has also been argued that the instrument, is not a lease deed but a simple agreement/license falling under Article 5 of Schedule 1-B of the Act on which a fixed stamp duty of Rs. 100/- is payable. The rates of stamp duty payable on various types of agreements in general are prescribed under Articles 5 and 6 of Schedule 1-B of the Act. In the aforesaid Articles a lease or an agreement to let have not been included. On the other hand, lease or an agreement to let has been specifically provided for under Article 35 of Schedule 1-B for the purposes of levying stamp duty at the rate provided therein, Article 35 of Schedule 1-B of the Act being a special entry would prevail over the entry of Article 5 of Schedule 1-B of the Act which is of a general nature. Therefore, the instrument in question being an agreement to let would be chargeable to stamp duty in accordance with the rate prescribed under Article 35 of Schedule 1-B of the Act and would not be covered by the general entry of agreement contained in Article 5 of Schedule 1-B of the Act.

29. The various authorities cited at the bar to establish that the instrument in question is not a lease deed but only an agreement to lease has no relevance. In the present case, the instrument herein is as per its title is rental agreement" which means an agreement to let. The contents of the instrument also proves it to be an agreement to let. An agreement to let along with lease is specifically included under Article 35 of Schedule 1-B of the Act therefore the general entry of "agreement" as provided under Article 5 of Schedule 1-B of the Act would not apply. The Petitioner as such does not derive any benefit from the authorities so cited which only brings out a distinction between a lease, license and agreement to lease.

30. In *Darbari Singh Saini v. Board of Revenue Alld.* 1972 ALJ 632, the three Judges special bench of this Court in a reference made u/s 57 of the Act by the Chief Revenue Controlling Authority while considering a similar agreement highlighting the distinction between a lease or an agreement to let and a simple agreement held that an agreement binding the parties to give on lease land either in the present or future would essentially be an agreement to let and would be covered by Article 35 of Schedule 1-B of the Act and would not fall under Article 5 of the Schedule 1-B of the Act. In this view of the matter, the distinction sought to be drawn by learned Counsel for the Petitioner also has no substance and fails.

31. In the end a feeble attempt has been made to contend that instrument dated 1.7.2006 was cancelled vide letter dated 20.7.2006. A plain reading of the said letter reveals that it is a letter written by the authorized signatory on behalf of M/s ESSAR Properties Limited to the Petitioner that M/s ESSAR Properties Limited

till date has not purchased the property in question and is also not having possession over it, the agreement be treated as cancelled as it has no right to enter into any such agreement. The said letter is unilateral in nature and is not in the form of an agreement. An agreement executed can be cancelled or nullified only by another agreement under the signatures of both the parties.

32. The agreement can not be treated as cancelled in view of such a letter only. Moreover, cancellation of an agreement would have no significance in so far as payment of stamp duty is concerned which is payable as soon as the instrument is executed. Its subsequent cancellation has no impact over it. The agreement postulates period of letting to be 108 months but the Petitioner contends that there is a typing error and actual period of letting envisaged in the agreement is only 18 months which error has been rectified vide letter dated 2.7.2006. Be, as it may be, the submission that the agreement is actually for a period of 18 months and not for 108 months is purely a factual matter, which can not be examined in exercise of writ jurisdiction.

33. Now, as far as imposition of penalty is concerned, the authority below has not assigned any reason for imposing the same. There is no finding recorded that there was any attempt to evade stamp duty or to deprive the exchequer of the rightful revenue. In the absence of such a finding there appears to be no justification for imposing any penalty.

34. In view of the aforesaid facts and circumstances, I am of the opinion that the document in question is an "instrument" and is in the form of an agreement to let which is covered by Article 35 of Schedule 1-B of the Act and is chargeable to stamp duty accordingly and its subsequent cancellation, if any, would not affect the chargeability of stamp duty under the Act.

35. Accordingly, the writ petition stands allowed in part. The impugned order dated 3.3.2010 in so far as it imposes penalty and to the extent that it treats the agreement to let to be of 108 months is quashed with liberty to the Petitioner to agitate the matter with regard to period of letting and the determination of deficiency in stamp duty before the appropriate appellate or revisional forum in accordance with law u/s 56 of the Act. In all other respects the order impugned is maintained.

36. Parties to bear their own costs.