

(2009) 08 CHH CK 0005
In the Chhattisgarh High Court

Bilaspur Infrastructures Pvt. Ltd.	Vs	APPELLANT
State of Chhattisgarh and Others		RESPONDENT

Date of Decision : 13-08-2009

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Stamp Act, 1899 — Section 64
Transfer of Property Act, 1882 — Section 105

Citation : AIR 2010 Chh 19

Hon'ble Judges : R.N. Chandrakar, J;Dhirendra Mishra, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Dhirendra Mishra, J.—By this petition under Article 226/227 of the Constitution of India, the petitioner has challenged the order dated 24th March, 2006 (Annexure P/1) passed by respondent No. 2/ Board of Revenue, Bilaspur, whereby the appeal preferred by the petitioner has been dismissed by maintaining the order of the Collector of Stamp, Bilaspur dated 5-11-2004 (Annexure R/2).

2. Facts, in brief, necessary for the purposes of this petition are that the Municipal Corporation, Bilaspur (for brevity "Corporation") invited tenders for construction of Rajeev Plaza Garden and Commercial Complex known as "Rajeev Plaza" on a piece of land owned by the Corporation. The tender submitted by the petitioner for a lumpsum amount of Rs. 2,1111 crores as premium was accepted and an agreement dated 27-3-2003 (hereinafter referred to as "instrument") for construction of Rajeev Plaza was executed between the Corporation as owner and the petitioner as developer on 27-3-2003 vide Annexure P/3. The petitioner paid the entire amount under the agreement within the stipulated time period, and completed the construction work within the stipulated time and started making allotment of the shops to the intending lessees as per terms and conditions of the agreement.

3. The Collector of Stamp, Bilaspur (in short "the Collector") by issuing notice

dated 31st March, 2004 (Annexure P/4) alleged that the petitioner has not paid appropriate stamp duty on the agreement for construction of Rajeev Plaza and thereby, caused loss of revenue to the Government. It was further alleged that the sale deed/lease deed of shops have been executed in favour of different parties and in the aforesaid documents also, the amount of premium has not been mentioned, and by suppressing the fact, revenue loss has been caused and his act is punishable u/s 27 read with Section 64 of the Indian Stamp Act, 1899 (in short "the Act, 1899").

4. The Collector vide its order dated 5-11 -2004 (Annexure R/2) held that the instrument in question is a lease deed as per Section 2(16) of the Act, 1899 and Section 105 of the Transfer of Property Act and on the same stamp duty as per Clause 35-B of Schedule 1-A is payable. However, registration was not compulsory as the lease was only for a period of one year. Accordingly, it has been held that the total stamp duty of Rs. 15,83,500/- was payable and fine of Rs. 1000/- has been imposed u/s 33 read with Section 40-B of the Act, 1899.

5. The petitioner's appeal has been further dismissed by the Board of Revenue by the impugned order with a finding that the finding of the Collector that the instrument is a lease deed, is in accordance with law.

6. Shri Manindra Shrivastava, learned Sr. Advocate appearing for the petitioner, submitted that under the agreement the petitioner had to construct the commercial complex as per drawing and design annexed with the tender documents. It was agreed that the petitioner shall be free to make allotments of shops/offices/halls. The allottees are required to execute a lease deed in favour of the Corporation and ownership of the entire structure shall be that of the Corporation and the petitioner had no right or title whatsoever in the said Rajeev Plaza. As per clause of the agreement, lease rent was fixed for different floors with a stipulation of increase of 10% every three year, the period of lease was for 30 years with a binding renewal clause; the entire costs of the development and construction were to be borne by the petitioner in accordance with the layout approved by the Town & Country Planning Department and the map sanctioned by the Corporation. If the entire construction was not completed within the stipulated time, the petitioner was required to deposit penalty @ Rs. 2 lacs per month. The Collector had no jurisdiction to initiate an enquiry in respect of such unregistered agreement u/s 33 of the Act, 1899 and thus, the order dated 5-11-2004 (Annexure R/2) is wholly without jurisdiction, null and void.

It is further submitted that the agreement dated 27-3-2003 was an agreement for development and construction through promoter and builder. All other rights/ title on the lands of the superstructure remained with the owner-Corporation. The Collector was not justified in reaching to the conclusion that the instrument in question is a lease deed, whereas the same was an agreement for development and construction through promoter and builder.

7. Reliance is placed on the judgments in the matters of State of Maharashtra

and Others Vs. Atur India Pvt. Ltd., and ICICI Vs. State of Maharashtra and Others, .

8. On the other hand, Mr. Vinay Harit, learned Dy. Advocate General appearing for the State/respondents No. 1 to 3, submitted that the Collector exercising powers conferred under Sections 33, 40B and 48B of the Act, 1899 requisitioned the instrument and thereafter, issued show-cause notice to the parties to the instrument. After considering various objections raised by the petitioner herein, and after examining the terms and conditions present in the instrument, it has been held that the Corporation transferred the land to the petitioner for a period of one year for the purpose of constructing shops and allotting the same to any person of its choice and thus, possession of the land in question was transferred temporarily with a right to use and enjoy it to the petitioner and in consideration thereof, the Corporation has received a fixed sum as premium, The instrument creates an interest over the Immovable property in favour of the petitioner. In the light of above facts, the instrument is a lease deed as defined u/s 2(16) of the Act, 1899 and Section 105 of the Transfer of Property Act.

9. As Hamida Siddiqui, learned Counsel appearing for the Corporation, submitted that to ascertain whether the document creates a lease or is an agreement of construction simpliciter, the real test is the intention of the parties. If the document creates an interest in the property, it is a lease, but if it only permits another to make use of the property, of which the legal possession continues with the owner, it is licence.

10. Reliance is placed on judgment in the matter of Chandy Varghese and Others Vs. K. Abdul Khader and Others, .

11. We have heard learned Counsel for the parties.

12. The petitioner has impugned the order of the Collector of Annexure R/2. which has been subsequently confirmed by the Board of Revenue vide Annexure P/I, mainly on the following grounds:

(i) that the Collector had no jurisdiction to initiate proceedings u/s 33 of the Act, 1899 as the instrument in question was never impounded and it was never presented for registration under the Registration Act, and

(ii) that the Courts below have erred in holding the aforesaid instrument as lease deed.

13. The Collector registered a case u/s 33 read with Section 40-B and 48-B of the Act, 1899 against the Corporation and the petitioner for non-payment of appropriate stamp duty as per rules and registration fees over the instrument for recovery of proper duty. Section 33 of the Act, 1899 under Chapter-IV deals with examination and impounding of the instruments, which reads as under:

33. Examination and impounding of instruments. (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of

a public officer, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same:

(Provided that nothing contained in this Sub-section shall be deemed to authorize the Collector to impound any instrument which has not been executed but is brought to him u/s 31 for determining the duty with which the instrument is chargeable or any instrument which he is authorized to endorse u/s 32).

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped with a stamp of the value and description required by law in force in India when such instrument was executed or first executed.

14. Section 38 deals with the procedure to be followed after the instruments are impounded. Section 40 provides for Collector's power to stamp instruments impounded u/s 33 as well as instruments sent to him u/s 38, Sub-section (2). Sub-section (b) of Section 40 empowers the Collector to direct payment of proper duty or the amount required to make up the deficiency, together with penalty if the instrument is chargeable with duty and is not duly stamped.

Section 48-B deals with the original instrument to be produced before the Collector in case of deficiency, which reads as under:

48-B. Original instrument to be produced before the Collector in case of deficiency Where the deficiency of stamp duty is noticed from a copy of any instrument, the Collector may, by order require the production of original instrument from a person in possession or in custody of the original instrument for the purpose of satisfying himself as to the adequacy of amount of duty paid thereon. If the original instrument is not produced before him within the period specified in the order it shall be presumed that the original document is not duly stamped and the Collector may proceed in the manner provided in this Chapter:

Provided that no action under this section shall be taken after a period of five years from the date of execution of such instrument.

15. From bare perusal of the above provisions, it is manifestly clear that if the Collector notices from a copy of any instrument deficiency of stamp duty, he may require production of original instrument from any person in possession or in custody of such original instrument for satisfying himself as to the adequacy of the amount on duty paid thereon. The only limitation for exercising power u/s 48-B is that the same cannot be exercised after expiry of a period of five years from the date of execution of such instrument.

16. In the instant case, the instrument in question came to the notice of the Collector, whereupon he took cognizance of the matter, impounded the instrument u/s 33 and thereafter, passed the order under Sub-section (b) of Section 40 of the Act, therefore, in our considered opinion, the argument

advanced on behalf of the petitioner that the Collector had no jurisdiction to impound the said instrument and pass the order, is without any basis.

17. Now coming to the second question, whether finding of both the Courts below that the instrument is a lease deed, is erroneous? The instrument is styled as agreement for construction of Rajeev Plaza Garden and Commercial Complex. The Corporation is party No. 1 whereas the petitioner is party No. 2 to the said agreement. Clause (1) of the agreement provides for payment of Rs. 2.1111 crores by the petitioner to the Corporation in four installments. The last instalment is payable within nine months from the date of execution of the agreement. Clause (2) confers upon the petitioner an exclusive right to allot all the shops, offices, halls etc. to any person at his discretion. It further stipulates that the allottees shall execute a registered lease deed as per rule with the Corporation and expenditure in execution thereof will not be borne by the Corporation. Even after execution of the lease deed, ownership of the shops would continue with the Corporation and the petitioner would not have any right over the shops/offices etc. The allottees would be also liable for payment of municipal rent at the rate given in Clause (2) and the rent shall be payable from the delivery of possession.

According to Clause (3), the petitioner is to follow reservation roster of the Corporation for allotment of the constructed shops. As per Clause (5), expenditure over the construction and development work would be borne by the petitioner and the construction is to be done as per provisions of the Chhattisgarh Nagar Tatha Gram Nivesh Adhiniyam, 1973 after due approval of the competent authority. Clause (10) clarifies that the portion of the building, which does not fall within sellable area, would be under the ownership and possession of the Corporation. Similarly, open places of the building such as; corridor, lift, stairs, toilet and public conveyance would also be in possession of the Corporation. Clause (17) stipulates that immediately after expiry of the construction period (one year or in the event of extension of time for construction, one year and six months), rent of the ground floor shall be payable. If the petitioner has not taken decision to allot the shops to anyone in this period, in that case he would himself deposit rent with the Corporation. After one year from completion of the construction period, the petitioner will have to make allotment of the first floor and the top floor, otherwise the Corporation shall be entitled to recover rent from the petitioner.

18. On close scrutiny of the terms and conditions of the instrument in question, it is clear that the Corporation has delivered possession of the land to the petitioner for a temporary period for construction of commercial complex. The Corporation has also transferred the right to allot the shops/offices/halls etc. construction over the land to the petitioner. The expenditure towards construction is to be borne by the petitioner. In consideration of transfer of the above right, the petitioner is to pay Rs. 2.1111 crores in four instalments within nine months from the date of execution of the deed. From the clauses extracted

from the instrument hereinabove, the intention of the parties can safely be inferred that the Corporation transferred possession of its land to the petitioner for a limited period of 11 months with a right to construct shopping complex over the same, with a further right to allot the same after construction to the persons of his own choice.

19. In the matter of Atur India Pvt. Ltd. a notice was issued inviting offers for lease for various plots for purchase of plot of land for putting up multi-storeyed buildings. The plots and structures were to be given on 99 years" lease at specified rates. The respondent submitted his offer along with a questionnaire, wherein it was clearly mentioned that the offer was as promoter. The Collector, Bombay informed the respondent regarding acceptance of his offer by the State and he was called upon to make payment towards security. The respondent complied with the direction of the Collector and also furnished guarantee bond. However, the petitioner had drawn attention to the answer in the questionnaire that the respondent was acting as a promoter and the lease might be granted in favour of the co-operative society, and he was only acting as a promoter and builder for the aforesaid scheme. The Collector, Bombay informed the respondent that the Government had sanctioned the lease of the plot in favour of the respondent as promoter of the co-operative society. The respondent further informed that it has agreed to sell the plots in the buildings and the purchasers of the said flats would form a co-operative society, which has been registered. A request was made by the respondent that the deed of lease be prepared in the name of the Co-operative Housing Society Ltd. at the earliest convenience.

The Collector informed the respondent that a direct lease deed in respect of plot will be executed in the name of the Co-operative Society provided the respondent pays the amount equal to stamp duty chargeable on the document between the original allottee and the Government, and the amount equal to the stamp duty chargeable on the document of assignment by the original allottee to the co-operative society, company etc. had the lease deed been executed with the original allottee etc. The stand of the respondent from the inception was that the lease is to be executed in favour of the Co-operative Housing Society formed by the purchasers of the flats. The Collector specifically agreed to this course. The offer of the company was as of promoter and builder and the lease was never to be executed in its favour. The Superintendent of Stamp raised a demand for stamp duty for a sum of Rs. 1,86,175/- as the agreement arrived at by the various correspondents between the State and the respondent amounted to lease falling under Article 36 of the Bombay Stamp Duty Act, 1958.

This led to filing of writ petition before the High Court of Bombay. Learned single Judge of the High Court dismissed the writ petition holding that Article 36 of Schedule-I of the Bombay Stamp Act, 1958 is applicable. However, Division Bench reversed the judgment of the learned single Judge and held that the correspondence between the State and the respondent spelt out an agreement to lease; but that agreement was not for the benefit of the respondent but for the

co-operative housing society, and accordingly, demand of the Superintendent of Stamp was quashed.

Dismissing the appeal of the State of Maharashtra, the Hon''ble Supreme Court held that the notice inviting offer, offer of the respondent and acceptance of the Collector of the tender of the respondent for lease, would merely constitute an agreement to lease. Referring to Clause 13 of the memo of terms and conditions for lease, it was held that by the respondent accepting the offer on December 15, 1970, the relationship of lessor and the lessee between the appellant and the respondent had not come to be established. There was no actual demise on the date of the accepting tender. Therefore, it is only an agreement to lease. It will not fall u/s 2(n) of the Act, in which case, it is not an instrument chargeable to duty and the question of impounding does not arise.

20. The facts in the above cited judgment, are clearly distinguishable from the facts of the present case as in the instant case, after execution of the agreement, the land in question was transferred to the petitioner by the Corporation for a limited period with a right to enjoy, possess, construct shopping complex and allot the shops/offices/halls etc. so constructed, to any person of his choice.

21. In the matter of ICICI, an agreement of lease was executed by the respondents in favour of the appellants. The question before the Hon''ble Supreme Court was, whether the stamp duty under Article 36 of the Bombay Stamp Act, 1958 is payable in respect of the above document? Clause (2) of the agreement specifically mentioned that the document is not to be construed as demise in law and the same does not give the licensee any legal interest therein until the lease contemplated is executed and registered and the licensee shall only have a licence to enter upon said land for the purpose of performing this agreement. In these circumstances, the Hon''ble Apex Court held that the document gives only a right to use the property in a particular way for the purpose of constructing building or buildings. Under this document, no interest in the land is conveyed in favour of the appellants. The agreement does not create a lease nor does it demise any interest in land in favour of the appellants.

22. In the matter of Chandy Varghese and others the Hon''ble Supreme Court while considering whether a particular document or transaction creates a lease or licence, referring to its decision in the matter of Associated Hotels of India Ltd. Vs. R.N. Kapoor, , held that it is not the form but substance of the document, which has to be seen to gather intention of the parties for determining whether the document/transaction is a lease or licence. If the document creates an interest in the property, it is lease; but if it only permits another to make use of the property, of which legal possession continues with the owner, it is licence. If under the document, a party gets exclusive possession of the property, "prima facie", he is considered to be a tenant; but circumstances may be established which negative the intention to create a lease.

23. Section 105 of the Transfer of Property Act, 1882 defines lease as under:

105. Lease defined. (A) A lease of Immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined.- The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

Section 216 of the Act, 1899 defines lease thus:

2(16) "Lease" means a lease of immovable property and includes also --

(a) a patta;

(b) a kabuliyat or other undertaking in writing, not being a counterpart of a lease, to cultivate, occupy or pay or deliver rent for, immovable property;

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

(d) any writing on an application for a lease intended to signify that the application is granted.

24. From conjoint reading of the definition of lease under the aforesaid Acts, the ingredients of lease are; (1) transfer of a right, to enjoy immovable property, (2) such transfer is for a certain time, (express or implied), or in perpetuity; (3) for consideration which is either premium, or rent, or both; and (4) acceptance of the transfer by the transferee.

25. We have already extracted the relevant clauses of the agreement between the parties. From the terms and conditions of the instrument, it is evident that the Corporation demised its land to the petitioner for a limited period; delivered possession and authorized the petitioner to undertake construction of shopping complex over its land at his own costs, and further authorized to allot the shops/offices/halls etc. so constructed by him, to any person of his choice. The above said right was transferred for a premium of Rs. 2.1111 crores and the petitioner accepted the above transfer and paid the premium. Thus, the contents/instrument clearly reveals the intention of the parties that the Corporation divested itself of the possession of its land and the petitioner comes into it for a limited period of one year with a right to possess, construct shopping complex and allot the same to the persons of his choice.

26. The fact that the instrument provides for a condition that the Corporation shall enter into an agreement of lease with all the allottees, who have been allotted shops/offices etc. by the petitioner clearly reveals that the Corporation has demised its land to the petitioner and thereby divested itself of the right to construct and allot the shops so constructed to the allottees of its choice.

27. On the basis of aforesaid analysis, we are of the considered opinion that the Collector has rightly held that the instrument in question is a deed of lease and the same is chargeable to stamp duty as per Entry No. 35-B of Schedule 1A of the Act, 1899. The Board of Revenue has not committed any illegality or infirmity in confirming the order of the Collector. The instant petition is without any substance; the same deserves to be dismissed and is, accordingly, dismissed.

No order as to costs.