(1999) 04 SC CK 0019

In the Supreme Court Of India

Case No : Civil Appeal No. 2220 of 1999

ICICI APPELLANT

Vs

State of Maharashtra and Others RESPONDENT

Date of Decision : 09-04-1999

Acts Referred:

Bombay Stamp Act, 1958 — Article 36, 3
Easements Act, 1882 — Section 52
Transfer of Property Act, 1882 — Section 105

Citation : (1999) 3 CTC 454 : (1999) 8 JT 233 : (1999) 5 SCC 708

Hon'ble Judges : Sujata V. Manohar, J;R. P. Sethi, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Sujata V. Manohar, J.—The only narrow question in this appeal is whether in respect of an agreement of lease dated 13-6-1994 executed by the respondents in favour of the appellants, stamp duty under Article 36 of the Bombay Stamp Act, 1958 is payable. Article 36 deals with "lease including an under-lease or sub-lease and any agreement to let or sub-let or any renewal of lease." Explanation III of Article 36 which was in force at the material time, makes it clear that "an agreement of lease shall not be chargeable as a lease unless there is an immediate and present demise".

2. In the present case, the document is on the face of it an agreement to create a lease in future. It is, however, submitted by the respondents that in substance the document itself creates a lease. The document demises immediately and presents an interest in the land in favour of the appellants. If we examine the agreement under Clause 1 of the agreement of lease, there is a clear provision that during the period of three years from the date of possession, the licensees (as the appellants are described), shall have a licence and authority only to enter upon the land for the purpose of erecting a building or buildings for the purpose of housing its offices and no other purpose, and until the grant of a lease, the

licensee shall be deemed to be a bare licensee only of the said land at the same rent and subject to the same terms including liability for payment of rates, land revenue and taxes, as if the lease had been actually executed.

3. Clause 2 expressly provides that the agreement does not demise any interest in land in favour of the appellants. Clause 2 is as follows:

2 Not a demise.-Nothing contained in these presents shall be construed as a demise in law of the said land hereby agreed to be demised or any part thereof so as to give to the licensee any legal interest therein until the lease hereby contemplated shall be executed and registered, but the licensee shall only have a licence to enter upon the said land for the purpose of performing this agreement.

4. Clause 7 of the agreement is as follows:

7. Grant of lease.-As soon as the said officer has certified that the building and works have been erected in accordance with the terms thereof and if the licensee shall have observed all the stipulations and conditions hereinbefore contained, the authority shall grant, and the licensee or his nominee subject to the following conditions shall accept a lease (which shall be executed by the parties in duplicate) of the said land and the building erected thereon for the term of 80 years from the date of possession on payment of ground rent at the following rates....

Ground rent

The lessee shall have to pay annual ground rent at the following rates, payable annually in advance, without any deductions whatsoever, on the 10th of January in each and every year:

-- S.No. Year of lease Rate of Rate of ground rent ground rent payable by payable by lessee of lessee of land to be land to be used for used for commercial residential and para commercial purpose purpose and public amenities. -- 1. From the Commencement Nil Nil of the terms of lease up to the end of 3 years

2. From the 4th year up 1% of the premium Nil year up amount to the 20th year of the term of lease. 3 From the 21st year up 2% of the premium Nil term of lease, amount

4. From the 51st year of 3% of the premium Nil the term of amount lease up to the end of the term of lease. --

5. Clause 8 requires that the lease, as and when executed in terms of Clause 7, shall be prepared in duplicate and all costs, charges and expenses in that connection as also in connection with the execution of the agreement and its duplicate shall be paid by the licensee alone.

6. Therefore, there is a clear intention of the parties to execute a document of lease in future. Until such document is executed, the status of the appellants is that of a licensee. In fact, we are informed by the appellants that pursuant to this agreement, a lease has, in fact, now been executed between the parties on 8.4.1999 and stamp duty amounting to Rs. 5,45,30,600 has been paid by the appellants on the document of lease.

7. Our attention has been drawn to a decision of this Court in Associated Hotels of India Ltd. Vs. R.N. Kapoor, where this Court has made a distinction between a lease and a licence. Referring to Section 105 of the Transfer of Property Act, this Court has observed that it defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. A lease is, therefore, a transfer of an interest in land and the interest transferred is called the leasehold interest. It follows that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the Indian Easements Act, defines a licence thus:

52. Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence.

8. Therefore, is a document gives only a right to use the property in a particular way or under certain terms, while it remains in possession and control of the owner thereof, it will be a licence. In the present case, the licensee has been put in possession only for the purpose of constructing a 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. In this connection, a reference may also be made to subsequent decision of this Court in State of Maharashtra and Others Vs. Atur India Pvt. Ltd., where this Court has made a distinction between a lease and an agreement for lease.

9. Although it has been contended by the respondents that there is a demise of interest in the land under the said agreement, the agreement does not demise any such interest in the land. Clause 2 expressly sets out that this agreement is not to be construed as a demise in law of the said land so as to give to the licensee any legal interest in the land. Article 36 of the Bombay Stamp Act is, therefore, not attracted to the said document.

10. In the premises, the appeal is allowed and the judgment of the High Court is set aside.