(2010) 05 AHC CK 0374

In the Allahabad High Court

Case No : C.M. W.P. No. 9950 of 2010

Narendra Dhar APPELLANT

Vs

State of U.P. and Another RESPONDENT

Date of Decision : 26-05-2010

Acts Referred:

Stamp Act, 1899 — Article 23, 35, 63, 2(10), 2(16)
Transfer of Property Act, 1882 — Section 105, 54

Citation : AIR 2010 All 145

Hon'ble Judges : Pankaj Mithal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Pankaj Mithal, J.—Heard Sri J.P. Pandey, learned Counsel for the Petitioner and learned Standing Counsel for the Respondents and with their consent, the writ petition is being finally decided.

2. I have also perused the pleadings of the parties.

3. Agra Development Authority developed a residential colony Sanjay Place Group Housing Scheme at Agra. One of the houses in the said scheme i.e. Flat No. 1/2 H.I.G. situate on the ground floor having an area 85.13 sq. metre was allotted to one Kishan Chand Shivhare. A composite lease-cum-sale deed in respect thereof was executed and registered on 9.1.1987 leasing out the land for a period of 80 years and sale of the superstructure though actually superstructure was made by the Agra Development Authority on behalf of the lessee from his funds only. The aforesaid lessee/purchaser subsequently, transferred his rights in the said house in favour of the Petitioner vide sale deed dated 31.3.2003 (Annexure 2 to the writ petition) for a consideration of Rs. 4,00,000/-. The Petitioner on the said instrument paid stamp duty on the value of Rs. 4,81,000/- being the value as per the circle rate notified in accordance with Article 63 of Schedule I-B of the Indian Stamp Act, 1899 (hereinafter referred to as an ''Act''). On reference, proceedings u/s 47 of the Act were drawn

against the Petitioner which came to be registered as Stamp Case No. 11 of 2006-07. The District Magistrate vide order dated 22.2.2007 determined the stamp duty on the aforesaid instrument in accordance with Article 23(vi) of Schedule I-B of the Act treating it to be a lease for more than 30 years chargeable as a conveyance. Accordingly, deficiency in stamp duty of Rs. 1,05,200/-with interest of 1.5% per month from the date of the execution of the instrument till the payment has been directed to be deposited. A penalty of Rs. 10,500/- has also been imposed.

4. Aggrieved by the aforesaid order, Petitioner preferred a revision before the Chief Controlling Revenue Authority, U.P which came to be dismissed by the Additional Commissioner, Stamp, Agra Division, Agra on 23.12.2009.

5. Both the aforesaid orders dated 22.2.2007 and 23.12.2009 have been challenged by the Petitioner in this writ petition.

6. The fundamental question which arises for determination is, whether the document in question i.e. the sale deed dated 31.3.2003 transferring all rights in the house concerned is, transfer of lease by way of assignment falling under Article 63 of Schedule I-B of the Act or is a lease/sub-lease chargeable to stamp duty as a deed of conveyance as defined u/s 2(10) of the Act according to Article 23 read with Article 35(vi) of Schedule I-B of the Act.

7. Learned Counsel for the Petitioner has argued that since Article 63 of Schedule I-B of the Act is a specific provision dealing with the transfer of lease by way of assignment, the general provisions relating to chargeability of lease deed stand excluded.

8. Learned Standing counsel has opposed the above submission and has contended that the document in question is not transfer of lease by assignment but in fact is a document of lease/sub-lease whereunder full leasehold rights have been transferred and since it happens to be a lease of more than 30 years it is chargeable to stamp duly as a conveyance under Article 23 of Schedule I-B of the Act.

9. It would be beneficial to reproduce the relevant portions of Articles 23, 35(vi) and 63 of the Schedule I-B which reads as under

23. Conveyance [as de- Sixty rupees fined by Section 2(10) not being a transfer charged or exempted under No. 62-

(a) if relating to immovable property where the amount or value of the considera- tion of such conveyance as set forth therein or the market value of the immovable property which is the subject of such conveyance, whichever is greater does not exceed Rs. 500.

Where it exceeds Rs. One hundred and twenty- 500 does not exceed Rs. five rupees: 1,000.

and for every Rs. 1000 or One hundred and twenty- part thereof in excess of five rupees. Rs. 1,000. Provided that the duty payable shall be rounded off to the next multiple of ten rupees.

35. Lease. Including an under-lease or sub-lease and any agreement to let or sub-let-(a) where by such lease the rent is fixed and no premium is paid or delivered- (i) .... (ii) .... (iii) .... (iv) .... (v) .... (vi) where the lease pur- The same duty as a Con- ports to be for a term ex- veyance [No.23 clause ceeding thirty years or in (a)], for a consideration perpetuity or does not equal to market value of purport be for any defi- the property which is the nite term. subject of the lease.

63. Transfer of lease by The same duty as a Con- way of assignment, and veyance [No.23 Clause (a) not by way of under- for a consideration equal lease. to for the amount of the consideration for the transfer.

10. The term ''sale'' though defined u/s 54 of the Transfer of Property Act has not been defined under the Act but the same is covered by the term ''conveyance'' as defined u/s 2(10) of the Act which reads as under:

Conveyance.- Conveyance includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos, and which is not otherwise specifically provided for by Schedule I, Schedule I-A or Schedule I-B, as the case may be.

11. According to the above definition any instrument of sale transferring movable or immovable property inter vivos which is not otherwise specifically provided in either of the Schedules to the Act is a conveyance.

12. The lease is defined u/s 105 of the Transfer of Property Act as well as u/s 2(16) of the Act. Under a lease generally, there is transfer of right to enjoy property normally for a fixed period on rent and it also includes a sub-lease or a underlease. Generally, a sub-lease is executed by the lessee to a third person, conveying the same interest which he enjoys but for a shorter term and reserving to himself revisionary interest. Therefore, under a lease there is only a partial transfer of the property with the right of reversion on the expiry of the specified term.

13. A lease which contains a provision permitting its transfer by lessee is a assignable lease. Assignment of lease occurs where lessee transfers entire unexpired remainder of term of his lease to a third party i.e. a new lessee.

14. Assignment or assignment of lease is nowhere defined in any statute but according to Blacks Law Dictionary (6th edition), assignment of lease is distinguishable from sub-lease to the extent that in assigning, lessee transfers his entire estate in the demised premises, whereas in sub-lease the sub-lessee acquires something less than the lessee''s entire interest. In the case of transfer of lease by assignment, the transferee becomes the lessee in place of the outgoing lessee and comes in direct contact with the original lessor whereas, in

the case of sub-lease or under lease the transferee becomes a tenant of the lessee liable to pay rent to him.

15. Another distinct feature of lease is that in a lease there is only partial transfer and the right of reversion remains with the lessor. In transfer of lease by way of assignment there is an absolute transfer of whatever rights are possessed by the lessor and even the right of reversion is not kept reserved in the eventuality of the expiry or cancellation of the assignment. Thus, there is a very thin line of distinction between the sublease and transfer of lease by assignment.

16. The distinctive features between a lease/sub-lease and transfer of lease by assignment are broadly as under :.

Sub-lease Transfer of lease by way ----------- ------------------------- of assignment ------------- (i) transfer of some- (i) transfer of entire in- thing less than the entire terest in the property en- interest in the property joyed by the lessee for the and that too for a shorter entire remainder of the term. term of the lease.

(ii) right of reversion (ii) absolute transfer remains vested in the with no right of reversion lessee on expiry or can- in favour of the lessee/ cellation of sub lease. transferee. (iii) transferee be- (iii) original lessee comes a tenant of the severes all the connections lessee and enjoys the and the transferee steps property through him into his shoes. only on payment of rent in some form or other.

17. The Apex Court in The Madras Refineries Ltd. Vs. The Chief Controlling Revenue Authority, Board of Revenue, Madras, has laid down that in order to determine whether a particular document is a lease or a deed of assignment, one has to look at the substance of the lease and not to the nomenclature of the document.

18. I have gone through the lease executed by the Agra Development Authority in favour of Kishan Chand Shivhare dated 13.3.2003. It is undoubtedly a document of lease-cum-sale leasing out land for 80 years outright sale of superstructure with the right of reversion in land in favour of Agra Development Authority in the event of cancellation, expiry or surrender of the lease. On the other hand, the so called lease/sale dated 31.3.2003 executed by Kishan Chand Shivhare in favour of the Petitioner is concerned, it is an absolute transfer of all rights possessed of Kishan Chand Shivhare in the entire property including land and building in favour of the Petitioner. It does not stipulate that in any eventuality or contingency the property would revert back to aforesaid Kishan Chand Shivhare. It in effect brings the Petitioner in direct contact with the original lessee i.e. Agra Development Authority. It is not a partial transfer keeping any right of reversion reserved. Apart from the above, there is no material on record to establish that the Petitioner has acquired rights in the aforesaid property as a sub-lessee or that he is paying or is liable to pay any rent to Kishan Chand Shivhare. In this view of the matter, it is a document of transfer of lease by way of assignment by Kishan Chand Shivhare as distinguished from

sub-lease.

19. In the case of M/s. Residential Welfare Association, NOIDA v. State of U.P and Ors. 2009(2) ADJ 204 (SC) : 2010 (3) ALJ 262 (SC) which has been relied upon by the learned Counsel for the Petitioner the Supreme Court was dealing with a similar situation with regard to the chargeability of the stamp duty wherein, the NOIDA authority had initially leased out a land to several co-operative societies by executing lease deeds. Societies in turn leased out the same in favour of its members. In that context the Apex Court treated those documents of subsequent transfer of rights executed between the societies and the members as transfer of lease by assignment and it accordingly, held that the instrument is chargeable to stamp duty under Article 63 of Schedule I-B of the Act and that the stamp duty shall be paid on the consideration of the amount shown in the deed itself and not on the market value of the land or construction.

20. It may not be out of context to clarify hereunder Article 63 of Schedule I-B stamp duty is chargeable on transfer of lease by way of assignment on the sale consideration like a conveyance under Article 23(a) and there is no reference of market value of the property under transfer. On the other hand, under Article 35(a)(vi) of Schedule I-B of the Act stamp duty is payable on the market value as conveyance under Article 23(a) of Schedule I-B of the Act.

21. In view of the above discussions, I am of the opinion the aforesaid document of lease/sale deed dated 31.1.2003 falls exclusively within Article 63 of Schedule I-B of the Act and is chargeable to stamp duty as deed of conveyance as provided under Article 23(a) of the Schedule I-B on sale consideration.

22. It has also been contended that the penalty imposed is not justified under the facts and circumstances. The impugned orders does not assign any reason for imposing penalty though by implication it may have imposed on account of evasion of stamp duty. However, the said implied reason is not sufficient inasmuch as there is no finding in any of the orders that the Petitioner by concealing the relevant material from disclosure as contemplated by Section 27 of the Act and that the non-payment of the stamp duty is deliberate with the intention to evade the same. In the circumstances the penalty imposed cannot at all be justified.

23. The writ petition is accordingly allowed.

24. A writ of certiorari is issued quashing the impugned orders dated 22.2.2007 and 23.12.2009 (Annexure No. 4 and 8 respectively to the writ petition) with the direction to the Additional Collector, Stamps, Agra to realise stamp duty on the aforesaid document from the Petitioner according to Article 63 of Schedule I-B of the Act and not otherwise.