
(2011) 05 AHC CK 0439
In the Allahabad High Court
Case No : C.M.W.P. No. 26071 of 2011

Old World Hospitality (P) Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 05-05-2011

Acts Referred:

Companies Act, 1956 — Article 6, 9
General Clauses Act, 1897 — Section 3(26)
Stamp Act, 1899 — Section 33, 47, 56(1)

Citation : (2011) 10 ADJ 621 : AIR 2011 All 162 : (2011) 5 AWC 5144 : (2011) 113 RD 628

Hon'ble Judges : Arun Tandon, J

Bench : Single Bench

Judgement

Arun Tandon, J.—This writ petition has been filed for quashing the order dated 26.9.2005 passed in proceedings u/s 33/47-A of the Indian Stamp Act in Case No. 349 of 2004-05 as also the Appellate Order dated 25.4.2011 passed in Stamp Appeal No. 70 of 2005-06 preferred u/s 56(1A) of the Indian Stamp Act, 1899.

2. Facts in short giving rise to the present writ petition are as follows:

(i) Petitioner before this Court claims to have entered into an agreement dated 22.9.2002 with M/s. Anubhav Hotels and Resorts (Ltd.). Both the parties to the agreement are Companies duly incorporated under the Companies Act. A copy of the agreement entered into between the parties has been brought on record as Annexure-1 to the writ petition. This agreement was executed on an stamp paper of Rs. 100/- only. Petitioner has been termed as Operator while the Respondent Company has been termed as owner in the agreement. The agreement is for developing an hospitality facility in the building situate in the property A-79-A, Sector 16 NOIDA known as Savoy Suites. The Additional District Magistrate (Finance & Revenue) treating the document to be a lease deed/ issued notice to the Petitioner to show cause as to why stamp duty short paid be not realized.

The proceedings in that regard were registered as Case No. 48 of 2003-04. The Petitioner responded to the notice so issued and contended that the document executed between the two Companies was only a license and duly stamped, therefore, the notice was bad.

(ii) The Additional Collector after considering the rival contentions raised on behalf of the parties recorded that the possession of the property was transferred in favour of the Operator to the exclusion of others and further that the payment for the right conferred was to start from the date the business transactions commenced. The income generated was to be distributed between the two companies as per the share disclosed in the agreement. The Additional Collector found that having regard to the over all terms and conditions of the agreement, it was to be treated as a lease and not a license. Accordingly a demand of stamp duty of Rs. 10,56,000/- was raised. In addition thereto, the Petitioner was saddled with penalty of Rs. 10,56,000/- + interest @ 1.5% from the date of execution of the deed till the date of actual payment.

(iii) Not being satisfied with the order so passed by the Additional Collector, the Petitioner filed an Appeal u/s 56(1A) of the Indian Stamp Act before the Board of Revenue at Allahabad. The Appeal was registered as Stamp Appeal No. 70 of 2005-06. The Board of Revenue under the impugned order dated 25.4.2011 has dismissed the Appeal after affirming the findings recorded by the Additional Collector. The Board of Revenue has come to a conclusion that in view of the various clauses of the document, it was to be treated as a lease deed and not a mere license. Accordingly, the demand of stamp duty and penalty with interest has been upheld.

3. Challenging the order so passed Shri Dhruv Narain, Senior Advocate assisted by Shri S.K. Singh, submits that the intention of the parties who were literate had to be ascertained from a simple reading of the language of the document. In so many words it was agreed between the parties that only a license was being granted for providing the facility. The Court was taken through Clauses 2.1, 5.4, 5.5., 5.7 and 5.8 of the agreement for the purpose. Counsel for the Petitioner further contended that from a reading of the aforesaid Clauses which were entered into between the two literate persons, it cannot be said by any stretch of imagination that any lease has been granted. He further submits that the Apex Court in the case of Delta International Limited Vs. Shyam Sundar Ganeriwalla and Another, has specifically held that when an agreement has been executed between two literate persons (like two Companies in this case), it has to be presumed that they have mentioned in the agreement whatever they intended with full understanding and to avoid any wrong inference of intention. Heavy reliance has been placed on the following part of the said judgment:

When the parties which are capable of understanding their rights fully, expressly agreed and declared that document should not be construed in any manner as creating any relationship as landlord and tenant between them, it would be impermissible to conjecture or infer that their relations should be construed as

that of landlord and tenant because of certain terms mentioned in the deed can have double intentment.

4. I have heard learned Counsel for the parties and have gone through the records of the present writ petition.

5. There can be no two opinions with regard to the legal proposition which has been laid down by the Apex Court in the case of Delta International, Ltd. (*supra*). However, it has to be kept in mind that in the aforesaid case, the Apex Court was considering the rights *inter se* between the parties to agreement. The Apex Court in that judgment was not considering the intentment of the agreement with reference to the Indian Stamp Act which provides for different methods for calculation of stamp duty in the matter of lease and license. The Apex Court in the case of Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others, has held as follows:

It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

6. The said judgment has been followed by the Apex Court in the case of Dr. Rajbir Singh Dalai v. Chaudhari Devi Lal University, Sirsa and Anr. AIR 2008 SCW 5817

7. This Court has, therefore, no hesitation to hold that the judgment in the case of Delia International (*supra*) so heavily relied upon by the Counsel for the Petitioner will not lead this Court to a conclusion that merely because the two Companies have used the word "License" in various clauses of the agreement as referred to by the Counsel for the parties, it has to be treated as a License and this Court may look no further.

8. It is settled law that a document has to be read as a whole and every part of the document has to be considered for arriving at a conclusion as to whether the same answers the description of a lease or a license when the matter *qua* chargeability of the stamp duty on such a document is involved.

9. This Court has itself considered the various Clauses of the agreement entered into between the parties.

10. Clause 2.1 of the agreement confers the right to plan, design, execute, manage and maintain the facilities described in the deed along with related equipment in favour of the Operator. Clause 3.1 provides that the capital cost to be incurred for the said facility shall be borne by the Owner and Operator jointly as per the approved budget. Clause 3.5 states that subsequent to the commissioning of the facility, the liability of cost incurred towards light power, water, air-conditioning etc. shall be of the Operator only. The Operator shall be bound to provide all necessary personnel for operating the facilities through its own expenses exclusively including internal maintenance etc. (Reference 5.12 and 5.13). Other obligations cast upon the Operator have specifically been disclosed in paragraph 5.2. Under Clause 5.6 and 5.7 the Operator is to provide a

duplicate key for entrance into the facilities with a right upon the owner to enter into the premises. The right to the Operator to use the brand name of the facility was restricted in respect of any other premises for doing the same business under Clause 5.8.

11. Clause 9.2 provides that Operator shall pay annual license fee of Rs. 33 lakh per annum to the owner as minimum guarantee or 14% of the gross operating receipts as mentioned in Clause 9.1 whichever is higher.

12. Clause 14 provides that term of the agreement shall be 9 years from the date of commencement which can be extended further on mutually acceptable terms for a further period of 9 years.

13. Article VI provides for owner's responsibilities/covenants.

14. Clause 6.1 lays down that the owner shall make available the following:

(a) The area of the said facility described in Schedule A-I.

(b) The assets as described in Schedule B Part One and Part Two.

(c) All costs and expenses enumerated under Schedule F.

15. Clause 6.2 (e) provides that the owner shall not enter into any agreement with any other party for designing, managing and operating the said facility during the period of agreement.

16. The right of the owner to determine the agreement is confined to only cases where there is material breach of the terms of the agreement. The rights and obligations under the agreement have been permitted to be transferred by both the parties to their respective holding, subsidiary Company in accordance with the Companies Act. Article 9 of the agreement provides for the gross operating receipts and the sharing of the same. The term of the agreement has been provided under Clause 14. Under Clause XXVIII, the cost of stamp paper on which the Agreement had to be executed is to be borne by the Operator.

17. From the Clauses which have been quoted herein above, it cannot be disputed that the Operator has been given an exclusive right to arrange and provide the facilities in the said premises for the period of the agreement to the exclusion of everybody else. Further the material cost for capital works etc. were to be shared between Owner and the Operator and the operating costs have to be borne by the Operator only. The term of the lease and the money payable has specifically provided as noticed above.

18. The distinction between a lease and a license, has been examined by the Five Judges Bench of this Court in the case of Smt. Guddi Vs. State of Uttar Pradesh and others, wherein in paragraph 11 it has been held as follows:

Coming to the question of correctness or otherwise of the three-Judge decision of this Court in Board of Revenue v. Mulak Raj and Anr. 1984 ALJ 331 it is our considered view that though the decision of the Supreme Court in Ananda

Behera's case has been noticed, but it has not been properly appreciated and applied. It appears to us that the decision is also not in consonance with the ratio of Ananda Behera's case and other decisions of the Supreme Court noted earlier. Referring to Ananda Behera's case, it is stated in paragraph 23 of the judgment; "In that case, the dispute was about fishery rights. Their Lordships held that the rights were in the nature of "profit of prendre" and the same could only be acquired by a document in writing. In that case, both the requirements necessary for claiming the rights of profits a prendre were satisfied. The Court while holding that the nature of the right involved was in the matter of the agreement. The land could not be taken away or used in any way except that the produce, viz. sand and gravel which lay on the land. It could not be taken away from any other land except the one which was specified and the intention of the parties was clear from the documents in question that only the produce had to be collected-stacked and taken away. The Court held that it was a specified right without in any way affecting the land on which the produce was available and since there was no transfer of immovable property, the document was not intended to be a lease but was in the nature of license, i.e., to take away the produce of the land. As discussed earlier, the Supreme Court has categorically held that a profit a prendre coupled with permission to use land in whatever manner is "immovable property" as defined in Section 3(26) of the General Clauses Act and, therefore, requires a registered document for creating any interest therein. In view of the exposition of the position of law by the Supreme Court, the decision of this Court in Board of Revenue v. Mulak Raj cannot be taken to be good law.

19. In the background of the law as explained by the Five Judges Bench in the case of Smt. Guddi (supra), this Court finds that a lease has been granted in favour of the Petitioner and not a mere license as is suggested by the Petitioner. In view of the aforesaid, this Court finds no good ground to interfere with the orders impugned.

20. At this stage Counsel for the Petitioner submits that imposition of penalty of a like amount for which the document was found to deficient in the stamp duty is arbitrary and too excessive more so when absolutely no reasons have been recorded for imposition of such huge penalty.

21. Having examined the orders and the material on record, this Court finds that imposition of penalty, not supported by sufficient reasons, appears to be excessive in the facts of the case. Substantial justice would be done if the penalty is reduced to 50% of that imposed subject to the condition that the Petitioner deposits the other amounts demanded along with 50% of the penalty imposed within two months from today failing which he shall not be entitled to the benefits of this order.

22. Writ petition is disposed of, subject to the observations made herein above.