

(2010) 02 MP CK 0009

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3041 of 2004

R.V. Infrastructure Engineers Pvt. Ltd.

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 11-02-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 254
Easements Act, 1882 — Section 52, 56, 60
General Clauses Act, 1897 — Section 3(26)
Registration Act, 1908 — Section 2(7)
Stamp Act, 1899 — Section 2(16), 29, 48B
Tolls (Madhya Pradesh) Amendment Act, 1932 — Section 2
Transfer of Property Act, 1882 — Section 105, 3

Citation : (2010) ILR (MP) 608 : (2010) 5 MPHT 488 : (2010) 2 MPLJ 357

Hon'ble Judges : S.C. Sinho, J;Arun Mishra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Arun Mishra, J.

In these writ petitions, question involved is whether a transaction where the right to collect tolls is given in lieu of the amount spent by the Concessionaire in the construction of roads, bridges etc. under the Build, Operate & Transfer (BOT) scheme amounts to a "lease" as contemplated u/s 105 of the Transfer of Property Act, 1882 (hereinafter referred to as "T.P. Act") and Section 2(16) of the Indian Stamp Act, 1899.

The constitutional validity of the amendment made in proviso to third clause of Article 33 of the Schedule 1-A as amended by Indian Stamp (M.P.) Act, 2002 has also been challenged. Further prayer has been made to declare Sections 48 and 48B as amended by M.P. Act 24 of 1990 as ultra vires.

Facts are being referred from W.P. No. 3041/2004, R.V. Infrastructure Engineers Pvt. Ltd. v. State of M.P. and Ors. The Petitioner is a Company engaged in

construction of roads, etc. Respondent No. 3/M.P. Rajya Setu Nirman Nigam Ltd. (hereinafter referred to as "MPRSNN") is a Company incorporated and registered under the Companies Act. State Government has authorized MPRSNN for reconstruction, strengthening, widening and rehabilitation on Badnawar-Badnagar-Ujjain-Dewas Road project of approximately length of about 106 kms. on Build, Operate and Transfer basis vide order dated 1-2-2001. NIT was issued by MPRSNN inviting the bids, letter of acceptance was issued on 25-4-03 requiring execution of Concession Agreement within 30 days. Concession agreement dated 31-7-03 was executed. A show-cause notice was served upon the Petitioner by Revenue Officer, Collector (Stamps), Ujjain which required to produce original copy of the agreement. Petitioner had submitted that notice is vague. In order to point out the correct position, Petitioner at his own submitted reply-cum-representation (P-4). Collector thereafter passed the impugned order against the Petitioner on 31-3-2004 purporting to exercise power u/s 48-B of Indian Stamp Act directing recovery of deficit stamp duty of Rs. 98,60,000 and fine of Rs. 5,00,000 total Rs. 1,03,60,000. Petitioner has submitted that the transaction is not "lease". The Concession Agreement has two parts-- (a) it offers for use and development of the highway site to the Concessionaire to repair, construction and maintenance of roads under a Bond BOT Scheme; and (b) it entitles Concessionaire after completion of the project and during the agreed toll period to levy, collect and appropriate the fees (toll) for the user of project highway by the travelling public pursuant to and in accordance with the fee notified. Petitioner has submitted that right to collect toll as per the Concession Agreement arises only after completion of project. The right is dependent on various contingencies and fulfillment of conditions enumerated in the Agreement. Benefit of the toll will accrue only when the project is successfully completed. The property (road) is yet to be created. The agreement may be terminated even before completion of the project. The transaction does not amount to "lease" within Section 2(16)(c) of the Indian Stamp Act. It is a "license" not a "lease". Government is providing subsidies to promote and complete the project. No machinery of adjudication has been provided u/s 48B of the Indian Stamp Act as amended in M.P. u/s 48 the Collector has power to recover the duty and penalty by coercive method. Section 48-B suffers with the same flaw. Both the Provisions 48 and 48-B are unconstitutional. Petitioner has also submitted that Article 33 of Schedule 1-A as amended by Indian Stamp (M.P.) Act, 2002 is ultra vires due to lack of Legislative competence. Schedule 1-A levies stamp duty on instrument properly and legally characterized as lease. From the amended provision, it is clear that though instrument is not a "lease", it is sought to be made liable to bear stamp duty. Thus, the provision is violative of Article 14 of the Constitution of India. The charging Section cannot impose the stamp duty. The stamp duty cannot be levied on the basis of mere estimate of expenditure in the project. When the tenders were floated, there was no whisper of liability of payment of Stamps Duty on the agreement. Provision contained in Clause 6.8 of the Concession Agreement has not been taken into consideration, hence the writ applications have been preferred.

The Respondent Nos. 1 and 2 have filed their return in W.P. No. 3041/2004, R.V. Infrastructure Engineers Pvt. Ltd. v. State of M.P. and Ors. which has been adopted in all the petitions. In nutshell the case of Respondent Nos. 1 and 2 is that as document is an "instrument" as defined u/s 2(16) of the Indian Stamp Act. Section 3 provides that the instrument shall be chargeable with duty of the amount indicated in the Schedule. Article 33 of Schedule 1 -A has been amended in State of M.P. vide Act No. 12 of 2002. The provisions clearly specifies that duty chargeable is 2% on the amount likely to be spent on the agreement under the lease by the lessee. Any agreement by which right to collect tolls is given in lieu of amount spent by the lessee in construction of roads, bridges, etc. under BOT Scheme, it chargeable to stamp duty at the rate of 2%., Though the agreement was titled as Concession Agreement, but in fact same was an Agreement to Lease. The right was transferred to Petitioner to collect tolls for fifteen years in lieu of amount worth Rs. 49.30 crores which would be spent in construction, strengthening and rehabilitation of Badnawar-Badnagar-Ujjain-Dewas Road. The order passed by the Collector (Stamp) is proper, it has been passed after giving due opportunity of hearing. The agreement in question is chargeable to stamp duty under proviso to Article 33-C of Schedule 1-A of the Indian Stamp Act. The process of recovery of land revenue has been given in Chapter XI of M.P. Land Revenue Code, 1959. Thus, there is a machinery for adjudication as well as for recovery. Provision of Sections 48 and 48B cannot be said to be arbitrary. The amendment is within the competence of State Legislature.

In the return filed by MPRSNN/Respondent No. 3 it is submitted that Respondent is bound by law to deduct the tax which is being done lawfully. BOT Scheme agreement attracts levy of stamp duty at 2% under Article 33(c) of Schedule 1-A, principle of estoppel is not attracted.

Shri Kishore Shrivastava, Shri Ajay Mishra, Sr. Advocates, Shri Imtiyaz Hussain, Shri Satish Agrawal, Shri U.K. Upadhyay and Shri Akshat Agarwal, Advocate for the Petitioners have submitted that possession was not given, no rent was payable, thus, the transaction does not amount to lease u/s 105 of the T.P. Act or Section 2(16) of the Indian Stamp Act. It amounts to "license" as defined in Section 52 of the Indian Easements Act, 1882. They have submitted that there is simply an offer to lease the land in future. There is no demise of the land in praesenti as toll has to be recovered from a future date on successful completion of the construction of the road, exclusive possession has also not been taken. It cannot be deemed to be a lease. There is no demise in praesenti. It has also been submitted that it is the Union's subject to prescribe the rates of stamp duty as provided in Entry 91 of Ist List. In List I Ind, i.e., State List, Entry 63 provides the authority with respect to rates of stamp duty in respect of documents other than specified in List I. Entry 44 of II Ird List, i.e., concurrent list has also been referred which provides stamp duty other than duties or fees collected by means of judicial stamps, but not including the rates of stamp duty. Learned Counsel have submitted that by virtue of Article 254 of the Constitution the amendment which has been inserted in Article 33(c) of Stamp Act by M.P. Amendment is

void. It was also submitted by learned Counsel appearing for Petitioners that on 1-7-2002 the Cabinet had taken a decision not to impose any stamp duty on such transactions, later on amendment has been brought by the Legislature, the agreements have been executed subsequently. The date for chargeability should be the date of issuance of NIT or the date of acceptance of the bid.

Shri R.D. Jain, learned Advocate General appearing with Shri P.K. Kaurav, learned Deputy Advocate General for Respondent Nos. 1 and 2/State has submitted that the transaction amounts to lease u/s 105 of the T.P. Act. Right to collect toll has been given for fifteen years under the agreement. Section 3(26) of the General Clauses Act is applicable for the purpose of understanding the meaning of "immovable property". He has also referred to Section 3 of the T.P. Act. Learned Advocate General has also submitted that right to realize the benefit arising out of the land has been given under the agreement. The road is "immovable property", right to enjoy the property has been given for fifteen years. He has also referred to various clauses of the agreement. Consideration has been paid in advance then right has been given to recover by collection of toll. Construction of roads, operation and financing has to be done by the Concessionaire. The agreement cannot be said to be a license within the purview of Section 52 of the Easement Act. Successors are permitted to be substituted which is not the case in the "licence". Learned Counsel has also submitted that in case license is granted and construction is made, license become irrevocable u/s 60 of the Easement Act. In the Instant case, agreement itself provides for construction of road, it cannot be said to be a "license". Possession has been given and here is an obligation upon the Petitioners to give back the possession also. The transaction cannot be said to be a "license" as the licensee cannot enjoy through servant or agents. "License" is personal in nature. It cannot be said that another agreement was to be executed in future for recovery of the toll, that right has been given under the agreement in question itself. Thus, the transaction amounts to lease. It is open to the State to realize the stamp duty at an earlier date also with respect to the transaction which is concluded. No remission has been made by the State Government u/s 9. In case of reduction of stamp duty from a future date, the chargeability of the document in question is not affected. Petitioners have to pay as per the rates prevailing at the time of execution of the agreement.

Shri Ashok Agarwal and Shri Samdarshi Tiwari, learned Counsel appearing for MPRSNN have supported the submissions made by learned Advocate General that MPRSNN has right to deduct the tax payable.

The main question for consideration is that whether the agreement in question as per the terms contained in it can be said to be a "lease" or "license".

Before coming to the terms of the agreement, we refer to the legal provisions defining "lease" and "license". The lease has been defined in Section 105 of the T.P. Act thus:

Lease defined.-- 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.

It is apparent that in a lease (i) there is a transfer of a right to enjoy such property; (ii) it is made for a certain time, express or implied or in perpetuity, and (iii) there has to be consideration of a price paid or promised, or of money, a share of crops, service of any other things of value.

The Indian Stamp Act, Section 2(16) defines "lease". Section 2(16) is quoted below:

(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.

The definition is inclusive, it specifically includes, a patta, kabuliyat or other undertaking in writing, not being a counter part of a lease for the purposes enumerated in Section 2(16). Section 2(16)(c) provides that any instrument by which tolls of any description are let is a lease. Section 2(16)(d) provides any writing on an application for a lease intended to signify that the application is granted.

Section 52 of the Indian Easements Act, 1882 defines "license" thus:

"License" defined.-- 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 license.

Essence is that but for the right granted under the license act would be unlawful otherwise and such right does not amount to easement or an interest in the property. In case an interest in property is created, it cannot be said to be a license.

The "immovable property" has been defined in Section 3(26) of the General Clauses Act. The definition reads thus:

(26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to

the earth.

The benefit arising out of land is included in the immovable property. Collection of toll is one such benefit.

The Registration Act, 1908 u/s 2(7) defines "lease" thus:

(7) "lease" includes a counterpart, kabuliyat, and undertaking to cultivate or occupy, and an agreement to lease.

We come to question what constitute license, as a rule, a licence is personal both to the grantor as well as licensee (grantee). A licence is not annexed to the property in respect of which it is enjoyed and is so evanescent that it is neither transferable nor heritable as laid down in *Karselal v. Badriprasad*, AIR 1922 Nag. 162, *Chinnon v. Ranjithammal*, AIR 1931 Mad. 216 and *Alagiri Chetty and Another Vs. Muthuswami Chetty and Others*, Another essential of the licence is that it creates no duties and obligations upon the person making the grant and is, therefore, revocable except in certain circumstances expressly provided for in the Act itself is laid down in *Mohammed Khan Vs. Ramnarayan Misra and Others*, and in *Aninha D'Costa Vs. Parvatibai M. Thakur*, . It is also settled that a licence does not create an interest in the land as laid down in *Alagiri Chetty v. Muthaswami Chetty* (supra).

The words "an interest in the property" are presumably intended to cover cases where there might be a right in the property granted as a lease. It is also settled proposition that recitals in a document can never be conclusive. The substance of the term agreed upon and not the nomenclature given to the deed by the parties is material. All the terms and conditions have to be looked into. In *Burmah Shell Oil Storage and Distributing Co. of India Ltd.*, 1933 ALJ 749, the use and occupation of the land were transferred to the landlord company, they were to erect on the part of the land a building or other structure of the substantial and permanent character and when the transaction was to be terminated the Railway Administration had the right to re-enter upon, retake and absolutely retain the possession of the said land, use and occupation were certainly transferred to the Oil Company. Right of inspection was available with the Railways. It was held in the circumstances that it would not be mere licence within the scope of Section 52 of the Easement Act as a licence does not confer exclusive possession and enjoyment. The intention of the parties to an instrument must be gathered from the terms of the agreement examined in the light of the surrounding circumstances. A recital that agreement does not create a tenancy is not decisive. Crucial test is not the nomenclature of the document but whether instrument is intended to create or not to create an interest in the property. Transfer of right to enjoy the property is the test for determination whether disputed right is leasehold or merely a licence. The Apex Court in *Qudrat Ullah Vs. Municipal Board, Bareilly*, , has put it pithily, if an interest in immovable property, entitling the transferors to enjoyment, is created, it is a lease. If permission to use land without right to exclusive possession is alone granted, a

licence is the legal result as held in Associated Hotels of India Ltd. Vs. R.N. Kapoor,

In Puran Singh Sahni Vs. Sundari Bhagwandas Kripalani (Smt) and Others, relied upon by Shri Kishore Shrivastava, Sr. Advocate distinction between lease and license has been considered. It has been laid down that for the lease as defined in Section 105 of T.P. Act, the essential elements are (i) the parties, (ii) the subject matter, or immovable property, (iii) the demise, or partial transfer, (iv) the term or period, and (v) the consideration, or rent. When the agreement vests in the lessee a right of possession for a certain time it operates as a conveyance or transfer and is a lease. The section defines the lease as a partial transfer, that is, transfer of right of enjoyment for a certain time. The test of exclusive possession is not decisive. By mere use of the word lease or licence the correct categorization of an instrument under law cannot be affected. While interpreting the agreement Court has also to see that transpired before and after the agreement. *Ex praecedentibus et consequentibus optima bit interpretation*, i.e., the best interpretation is made from the context. If, in fact, it was intended to create an interest in the property, it would be a lease, if it did not, it would be a license. Interest for this purpose means a right to have the advantage accruing from the premises or a right in the nature of property in the premises but less than title.

The definition of "immovable property" given in Section 3(26) of General Clauses Act gathers importance while considering the lease as defined in Section 105 of T.P. Act. The Apex Court in Sri Tarkeshwar Sio Thakur Jiu Vs. Dar Dass Dey and Co. and Others, has observed that the definition given of the "immovable property" in Section 3(26) of General Clauses Act and not Section 3 of the T.P. Act will apply for interpretation of the expression "right to enjoy immovable property" used in Section 105 of the T.P. Act. Immovable property, thus, includes interest in our benefits arising out of immovable property. Grant of khas possession of the land for a certain period and for a fixed price payable on yearly basis or for raising and taking minerals from inside the land is a lease not a licence.

When we consider the agreement in question, it is apparent that Concessionaire/ Petitioner is entitled to make reconstruction, strengthening, widening and rehabilitation of a section of Road Project of considerable length and its operation and maintenance to be executed through a Concession on Build, Operate and Transfer (BOT) basis. Clause 2 of the Concession Agreement entered into on 31st July, 2003 provides that Concessionaire or Company include its successor and permitted substitutes whereas license is personal in nature. In Clause 2(a) the aforesaid works of reconstruction, strengthening, widening and rehabilitation Road Project and its operation and maintenance to be executed through a Concession of Build, Operate and Transfer (BOT) basis has been provided. Clause 2(e) provides for design, engineering, financing, procurement, construction, operation and maintenance of the Project Highway. The tender document Volume

v. (A) in Clause 1.1.41 provides for "Escrow Account", and the "Toll Escrow Account" has to remain under lien with the lenders, as the case may be, in accordance with the provisions of the agreement. However, notification for the purpose of recovery of toll charges is dealt with in Clause 1.1.45 of the definition as is issued under Indian Tolls Act, 1932. Levy and collection of the fees has to be as per rates prescribed under the notification issue under the aforesaid Act from time to time. Clause 2 of the tender document provides for scope of project which includes performance and execution by the Concessionaire of all detailed design, engineering, financing, procurement, construction, completion, operation, maintenance and transfer of the Project Highway under the agreement. It shall include reconstruction, strengthening and widening of the existing lane in accordance with the specifications and stands for the same and also operation and maintenance as per Specifications and Standards mentioned under the agreement. As provided in Clause 6.5 of the tender document, the fees collected by the Concessionaire or MPRSNN or MPRSNN's nominee pursuant to the agreement shall be deposited in the Toll Escrow Account and appropriated in accordance with the provisions of Clause 25.

The obligations of the Concessionaire are defined in Clause 9.1 of the tender document. Steps have been taken to clear the site and to save and indemnify and defend GOI, MPRSNN and GoMP from and against all proceedings, claims, demands, costs, expenses, losses and damages arising out of or relating to the securing of rights to use such real estate by the Concessionaire or any person claiming through or under the Concessionaire. Concessionaire be responsible for safety, soundness and durability of the Project Highway is provided in Clause 9.1(xxiii). The Clause 9.1(xxv) provides that after receiving "vacant possession" of the Site or part thereof, ensure that such Site remains free from all encroachments and take all steps necessary to remove encroachments, if any. Thus, vacant possession was handed over to the Concessionaire. Obligations of the MPRSNN are dealt with in Clause 10.1 of the tender document. It has required to hand over the physical possession of the Project Site and enable access to the Site, free from Encumbrances, in accordance with this agreement.

The agreement is for fifteen years. "Toll date" has been defined in Clause 1.1.103. The "toll date" means the Commercial Operations Date of the Project Highway from which date the Concessionaire is entitled to collect the toll/fee.

The agreement for collection of toll is for fifteen years is not disputed. It has to commence from the date of completion of the contract and that right has been given in the document itself, no separate agreement on a future date is required to be executed. On completion of construction of road, the document in question itself authorizes the Concessionaire to collect the toll of a period of fifteen years. The transaction is that of lease. In Smt. Juthika Muliek and another Vs. Dr. Mahendra Yashwant Bal and others, the Apex Court has laid down that one of the essential attributes of a lease is that transfer must be made for a certain time expressed or implied or in perpetuity. What is the meaning of "fixed period" has

also been discussed by the Apex Court in the aforesaid decision. Maxim "certum est quod certum reddi potest", i.e., sufficiently certain which can be made certain is applicable in such cases.

There is a price paid in every case, beside there is subsidy also. When we consider another perspective which shows the document to be a lease the price paid or promised, as per the agreement, the Concessionaire has promised to construct the road which is the consideration of the agreement. It is provided in Clause 14.4.5 of the tender that the Concessionaire shall provide at his own cost, all the site laboratory and testing equipments, facilities means of transport, conveyance, materials, reference Books standards and any tools, tackles, labour and manpower for carrying of all tests required for the project at site by MPRSNN or their Independent Consultants. Clause 15.1 of the agreement deals with the completion. When the Project shall be deemed to be complete and open to traffic only when the Completion Certificate or the Provisional Certificate is issued in accordance with the provisions of Clause 16. Clause 15.2 of the agreement provides Toll date of the Project shall be the date on which MPRSNN has issued the Completion Certificate or Provisional Certificate, as the case may be, under the agreement and the Concessionaire shall not levy and collect any Fee until it has received such Completion Certificate or the Provisional Certificate. It is clear that it is consideration to recover toll that investment is made by the Concessionaire in the road, he has to built it, he has to operate it and thereafter transfer it back after recovering the toll and the consideration or price promised is the money which he has invested in the Project as per agreement. Thus, investment of the money is made by the Concessionaire. He has corresponding right to enjoy the property, no doubt on successful completion of the construction of road. Right to enjoy the property clearly makes the transaction that of lease. The mere apprehension that there may not be successful completion will not come in the way of chargeability of the document as document provides for recovery of tolls for fifteen years and there is consideration also for that.

From the aforesaid, it is clear that there is clearly a transfer of right to enjoy the property under the Agreement for a period of fifteen years and collection of tolls is specifically provided to be a "lease" u/s 2(16) of the Indian Stamp Act. There is right to enjoy the property conferred on Concessionaire, consequently, document cannot be said to be a "license" at all but it is that of "lease".

When we consider the definition of lease given u/s 2(16) of the Indian Stamp Act, the definition is inclusive. The collection of tolls is clearly provided to be a lease, thus, the agreement fulfills the (sic) of Section 2(16) also and it has to be treated as lease not as a (sic) word "include" is very generally used in interpretation clauses in order (sic) the meaning of words or phrases. The words or phrases comprehend not only natural import but also the things which the interpretation clause declares that they shall include. Clause 1.1.45 provides that tolls has to be collected as prescribed under the Indian Tolls (MP) Amendment Act, 1932. u/s 2 of Indian tolls (MP) Amendment Act, 1932 toll collection is also a

lease. Section 2 of Indian Tolls (MP) Amendment Act, 1932 is quoted below:

Power of State Government to lease levy of tolls.-- It shall be lawful for the State Government to lease the levy of tolls at the rates prescribed u/s 2 of the Indian Tolls Act, 1851, as subsequently amended, upon any public road or bridge by public auction or private contract from year to year or for such longer period not exceeding fifteen years on such terms and conditions as the State Govt. may deem fit:

Provided that the lessee shall give security for the due fulfillment of such conditions, and that sums payable under the terms and conditions of the lease shall be recoverable as if they were arrears of land revenue.

In Mohammad Ali Vs. Board of Revenue, U.P., Allahabad and Others, and Uppalapati Durga Prasad Vs. Executive Engineer (R and B) N.H. Division, Srikakulam and others, , it is held that when agreement has been entered into for collection of toll, it is a lease not a license.

In Ishwarlal Vyas v. District Judge, Indore and Anr., 1990 MPLJ 579 and in R.P. Shrivastava v. Smt. Sheela Devi and Ors., 2007 (4) MPLJ 102, it is held that license is a personal right whereas lease creates interest in the property. The license is not transferable and even a servant cannot use the property as per Section 56 of the Easement Act. It is provided in Clause 1.1.106 that tolling contract means the contract, if any, entered into by the Concessionaire with the Tolling Contractor for operation of the Toll Plazas including collection of fees for and on behalf of the Concessionaire. Clause 1.1.107 defines "Tolling Contractor" means the person, if any, with whom the Concessionaire has entered into a Tolling Contract for operation of Toll Plazas and Collection of Fees for and on behalf of the Concessionaire. Clauses 1.1.106 and 1.1.107 are quoted below:

1.106. "Tolling Contract" means the contract, if any, entered into by Concessionaire with the Tolling Contractor for operation of the Toll Plazas including collection of Fees for and on behalf of the Concessionaire.

1.107. "Tolling Contractor" means the person, if any, with whom the Concessionaire has entered into a Tolling Contract for operation of Toll Plazas and collection of Fees for and on behalf of the Concessionaire.

Aforesaid clauses indicates that right to enjoy the property has been conferred on Concessionaire through Tolling Contractors, etc. and even the right of supervision is with the Concessionaire and whether agreement is being carried upon or not can be looked into by the Respondents. Conferral of such right indicates transaction is that of lease.

In the instant case, it is not the case of license but it is a lease, as clearly an interest in the property has been created. There is right of enjoyment of the immovable property given to Concessionaire in the manner in which the public road is capable of being possessed since it is used by the public at large, the total control of entry on the road after payment of toll will be with the

Concessionaire, it can safely be concluded that he is given the lease not the license. In license normally the right to use is given and possession continues with the owner which is absent in the instant case. Possession has to be given to Concessionaire, the possession will be retransferred back as provided in Clause 9.1(xxv), Clause 10.1(i) and (ii) and Clause 33.1(a) and (b) which are quoted below:

1. (xxv) after receiving vacant possession of the Site or part thereof, ensure that such Site remains free from all encroachments and take all steps necessary to remove encroachments, if any.

1. MPRSNN agrees to observe, comply and perform in addition to and not in derogation of its obligations elsewhere set out in this Agreement, the following:

(i) Hand over the physical possession of the Project Site and enable access to the Site, free from Encumbrances, in accordance with this Agreement;

(ii) Permit peaceful use of the Site by the Concessionaire under and in accordance with the provisions of this Agreement without any let or hindrance from MPRSNN or persons claiming through or under it.

1. Upon termination of this Agreement, the Concessionaire shall comply with the following:

(a) notify to MPRSNN forthwith the location and particulars of all Project Assets.

(b) deliver forthwith actual or constructive possession of the Project Highway free and clear of all Encumbrances and execute such deeds, writings and documents as may be required by the MPRSNN for fully and effectively divesting the Concessionaire of all the rights, title and interest of the Concessionaire in the Project Highways and conveying the Project Highway free of any charge or cost to MPRSNN.

Since construction of road, handing over of possession, as well as recovery of toll is provided hence the document falls within the definition of lease.

It was submitted by Shri R.D. Jain, learned Advocate General appearing for the Respondent Nos. 1 and 2 that in case construction of permanent nature is permitted then license becomes irrevocable u/s 60 of the Easement Act. He has relied upon a decision in Ganpat Rao v. Ashok Rao and Ors., 2004 (3) MPLJ 571. In our opinion, in the instant case, it is not the license which has been given, Section 60 is not attracted, however, u/s 60 of the Easement Act, in case permanent nature of construction is raised, the license becomes irrevocable. In the instant case, right to build road is given under the agreement coupled with right to enjoy the property by regulating entry for fifteen years after recovering toll is given, hence, it cannot be said to be license.

Shri Kishore Shrivastava, Sr. Advocate has relied upon Clause 1.1.44 that fee means the charge levied on and payable for a vehicle using the Project Highway in accordance with the Fee Notification and the agreement. Learned Counsel has

also relied upon Clause 1.1.103 of the tender document which provides that toll date commences from future date not in praesenti. In his submission, it is uncertain whether Concessionaire would be entitled to collect the toll as such as per definition of "toll date" given in Clause 1.1.103, hence, the Concessionaire cannot be asked to make payment of stamp duty on the fee. He has relied upon Clause 1.1.103, Clauses 2 and 6.5 which read thus:

1.103. "Toll date" means the Commercial Operations Date (COD) of the Project Highway from which date the Concessionaire is entitled to collect the toll/fee under the toll/fee notification and shall be the date notified so by MPRSNN upon completion of full/substantial completion of works of the Project Highway in accordance with this Agreement.

Scope of Project.-- The project shall be executed on the Site, described in this document. The scope of the Project shall include performance and execution by the Concessionaire of all detailed design, engineering, financing, procurement, construction, completion, operation, maintenance and transfer of the Project Highway of this Agreement. It shall include reconstruction, strengthening and widening of the existing lane in accordance with the Specifications and Standards for the same and also operation and maintenance as per the Specifications and Standards mentioned under this Agreement as well as details mentioned in the Scope of Project as per Schedule I annexed to this Agreement. It shall also include the performance and fulfillment of other obligations by the Concessionaire under this Agreement.

5. The Fees collected by the Concessionaire or MPRSNN or MPRSNN's nominee pursuant hereto shall be deposited in the Toll Escrow Account and appropriate in accordance with the provisions of Clause 25.

Learned Counsel has also relied upon Clause 25.4 of the Agreement which provides for disbursement from Toll Escrow Account which provides that toll collected by the Concessionaire has to be applied in the manner given provided under Clause 25.4.1(i) to 25.4.1(x), and as per Clause 25.4.1(i), all taxes due and payable statutory payments and insurance payable by the Concessionaire, thereafter liability is to wipe off, O & M expenses including fees collections expenses, etc. is provided in Clause 25.4.1(ii). It is provided in Clause 25.4.1(iii) that the whole or part of the expense on repair work including fees collection incurred by MPRSNN, then liability comes under Clause 25.4.1(iv) to meet all concession fees, costs and reimbursements, etc. and after exhausting payment as provided the remainder of toll has to be utilized by the Concessionaire.

We are not impressed by the aforesaid submission of learned Counsel based upon the clauses referred to by the Counsel. Considering Clauses 1.1.44 and 1.1.45, meaning of "fee" and "fee notification", it is clear that in essence it is the toll which has to be realized as fixed under the Tolls Act, 1932. On facts, it is submitted by Respondents' Counsel that toll has been increased by now. Whatever that may be, question of exigibility of the stamp duty is based upon

the approximate amount which is invested and same was minimum likely to be recovered as toll during the period of contract by the Concessionaire which appears to be just and appropriate. Merely by the fact that "toll date" is found on a future date as provided in Clause 1.1.103 of the tender document, the scenario is not changed as in the agreement itself in praesenti without any requirement of execution of any other document, the right has been given to realize the toll for a period of fifteen years and right of enjoyment of the property has been conferred. It is open to ask for stamp duty even before execution of formal document, in the instant case, document has been executed. When we consider scope of project, as mentioned in Clause 2 quoted above, it becomes clear that reconstruction, strengthening, widening, and maintenance, financing, engineering and transfer of the Project Highway is involved, thus, scope of project makes it clear that it is a lease. Toll has to be deposited in "Toll Escrow Account" as provided in Clause 6.5 of the tender document and as provided in Clause 25.4.1(i) to (x), the toll has to be utilized for the purposes enumerated in the aforesaid clause first and then remainder has to be retained by the Concessionaire. The liabilities have to be cleared by the Petitioner as per the agreement, thus, the remainder of the toll has to reach to him does not change the nature of the document. It cannot be said that he would not recover the toll and the part of same has to be utilized in the mode prescribed to meet expenditure part as agreed. Profit part has to be retained by the Concessionaire.

22. In W.P. No. 10366/07, Jaora-Nayagaon Toll Road Co. Pvt. Ltd. v. State of M.P. and Ors., Shri Kishore Shrivastava, learned Senior Counsel has in addition referred to Clause 3.1 of the Concession Agreement by which MPRDC has granted to the Concessionaire the Concession quoted therein including the exclusive right, license and authority during the subsistence of this agreement to construct, operate and maintain the Project Highway. He has also relied upon Clause 3.2.1 by which Concessionaire has been given access and license to the site to the extent conferred by the provisions of this agreement. He has also referred to Clause 3.2.7 under which Concessionaire cannot assign, transfer or sublet or create any lien or encumbrance on this agreement or the concession hereby granted or on the whole or any part of the project nor transfer, lease or part possession therewith save and except as expressly permitted by this agreement or the substitution agreement. Learned Senior Counsel has also relied upon Clause 8.2 by which MPRDC has granted to the Concessionaire for the Concession Period the right and licence to enter upon all real estate comprised in the Site and to survey design, engineer, procure, construct, operate and maintain the Project Highway including the Project Facilities in accordance with the provisions of this Agreement. He has also referred to Clause 8.3 which provides that it is expressly agreed that the licence granted hereunder shall terminate automatically and forthwith, without the need for any action to be taken by the MPRDC to terminate the licence, upon the termination of this agreement for any reasons whatsoever. Learned Counsel has also relied upon Clause 8.4 by which the Concessionaire appointed the MPRDC as lawful attorney, to surrender of licence granted. Under Clause 8.6 again there is reference of word "license" and

the right to use the Site shall granted for the purpose of carrying out the functions placed upon the Concessionaire under the Agreement and not for any other purposes. Clause 8.8 has also been relied upon by the Counsel which creates an embargo upon the Concessionaire for subletting whole or any part of the Site. Reference has also been made to Clause 9.1 with respect to procurement of site contained in Chapter IX which provides signing of the memorandum by the authorized representatives of the Parties shall be deemed to constitute a valid licence and right of way to the Concessionaire for free and unrestricted use and development of the vacant and unencumbered site during the concession period. Clause 9.2 provides for grant of vacant access and right of way. Reliance has also been placed on Clause 13.6 contained in Chapter XIII which provides that if the toll date does not occur within 12 months from the Scheduled Project Completion Date for any reason other than occurrence of Force Majeure or for reasons attributable to MPRDC or any Governmental Agency, MPRDC shall be entitled to terminate this Agreement in accordance with the provisions of Clause 29.3.4.

Learned Counsel has emphasized that word "license" has been used on several places in the aforesaid clauses. In our opinion, the use of the word "license" is not determinative of the nature of the agreement. License which has been granted for various purposes, the word has different connotation at different places. Considering the other terms and conditions being similar in the instant case with the other clauses which we have referred to in various other writ petitions, merely, use of the word "license" at different places would not change the nature of the agreement. Even if word "lease" is mentioned or word "license" is mentioned is not determinative of the nature of document. What is contemplated and conferred under the agreement is right to construct and enjoy the property which is the crux of the matter. Thus, we find no force in the additional submission raised by Shri Shrivastava in W.P. No. 10366/2007.

Shri Kishore Shrivastava, learned Senior Counsel has relied upon Clause 6.8 of the tender document, same reads thus:

8. In case of any levy or increase therein of any Stamp Duty or Cess on fees/toll collected by the Concessionaire during the Concession Period becomes payable, the same shall be borne by MPRSNN.

It is clearly provided that in case of any levy or increase of the Stamp Duty or cess on fees/toll collected by the Concessionaire during the Concession Period becomes payable, the same shall be borne by MPRSNN. In case any new levy or increase in the stamp duty during the Concession period, then MPRSNN is liable not otherwise. The "Concession Period" has been defined in Clause 1.1.20 to mean the period beginning from the Commencement Date or any valid extension granted thereof by MPRSNN or the Termination Date whichever is earlier. The Physical Possession is to be delivered by MPRSNN after the date of execution of this agreement, thus, Clause 6.8 is not applicable, as on the date of execution of the agreement. The liability under the law is that of the lessee to bear the

expenses of Stamp Duty as provided in Section 29(c) of the Indian Stamp Act. Submission based of Clause 6.8, thus, fails.

Shri Kishore Shrivastava, Sr. Counsel has submitted that in praesenti there is no document which can be said to be lease, he has also relied upon a decision of Apex Court in Tolaram Relumal and Another Vs. The State of Bombay, in which distinction of lease and agreement to lease has been considered. It has been held that an instrument is usually construed as a lease if it contains words of present demise and where certain things have to be done by the lessor before the lease is granted, such as the completion of repair or improvement of the premises. It was held on facts of the case that agreement between the parties did not constitute a lease, it amounted to an agreement. In the instant case, no document has to be executed in future, thus, reliance on aforesaid decision is of no use. Shri Shrivastava has also referred to decision of Apex Court in V.B. Dharmyat (Deceased) through Lrs. Vs. Shree Jagadguru Tontadrya and Others, , wherein the Apex Court has laid down that agreement to lease u/s 2(7) of the Registration Act must be a document which effects an actual demise and operates as a lease. An agreement between two parties which entitles one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not an agreement to lease within the meaning of Section 2(7) of the Act. In the instant case, there is actual demise and the Agreement (P-1) operates as a lease. Learned Senior Counsel has also placed reliance on a decision in State of Maharashtra and Others Vs. Atur India Pvt. Ltd., , wherein the Apex Court, in the context of Bombay Stamp Act, 1956, has laid down that lease does not include agreement to lease executable at a future date without immediately bringing into effect a lessor-lessee relationship and actual demise. In case offer is accepted without effecting actual demise, it was an "agreement to lease" not "an agreement of lease". The stipulation debarring transfer or assignment of lease rights was not enforced, it was held that transaction is not covered by the definition of lease u/s 2(n). In the instant case, in our opinion, considering the nature of agreement there is a lease in praesenti to enjoy the property. Right and interest in the property has been created. Learned Senior Counsel has also relied upon a decision of Apex Court in ICICI Vs. State of Maharashtra and Others, in which the Bombay Stamp Act again came for consideration and the deed putting the prospective lessee in possession of land as licensee for a specific period of three years only for the purpose of construction of buildings and postulating that after the completion of construction a lease deed of that land would be executed and that the said deed should not itself be construed as demising any interest in the land, deed was held not to be a lease. In the instant case, it is not the license which has been executed, but lease has been executed in praesenti authorizing the construction and investment in the road, obtain the finance, etc., possession has also been handed over, thus, decision has no application. Learned Senior Counsel has also referred to decision in The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd., , in which it was laid down that on a future sale tax cannot be

levied. When it has not resulted in the passing of the property in the goods to the purchaser, thus, Entry 48 cannot be construed in its popular sense but must be interpreted in its legal sense. The decision is of no help in the instant case as there is demise in praesenti. It is not a case of deeming fiction being created.

Coming to submission whether Entry 33 of Schedule 1-A as amended in the Indian Stamp (M.P. Amendment) Act, 2002, is ultra vires or repugnant to provision of the main Stamp Act. Entry is quoted below:

Lease, including an under lease, or sub- lease and any agreement to let or sub-let or any renewal of lease:

(a)

*** **

*** **

(b)

*** **

*** **

(c)

Where the lease is granted for a fine or premium or for money advanced or to be advanced in addition to rent fixed

The same duty as conveyance (No. 22) for a market value equal to the amount or value of such fine or premium or advance as set forth in the lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance has been paid or delivered:

Provided that where the lease purports to be for a term exceeding thirty years or in perpetuity or does not purport to be for a definite period, the duty on such lease shall be chargeable as a conveyance (No. 22) on the market value of the property leased:

Provided also that--

(a) *** **

(b) *** **

(c) an agreement to lease where the right to collect tolls is given in lieu of the amount spent by the lessee in construction of roads, bridge etc. under the Build, Operate and Transfer (BOT) Scheme, shall be chargeable at the rate of two per cent on the amount likely to be spent under the agreement by the lessee.

The aforesaid entry is inserted by the Indian Stamp (Madhya Pradesh Amendment) Act, 2002 as per Petitioners is ultra vires. We are unable to accept the submissions as firstly we have held that transaction is a lease as

contemplated u/s 105 of T.P. Act read with Section 2(16)(c) of the Indian Stamp Act, question of applying the aforesaid entry so as to constitute transaction as a lease does not arise. Purpose of aforesaid entry in Schedule 1 -A is to provide the Stamp Duty which is chargeable on a particular transaction, under the aforesaid entry as amended in State of M.P., the stamp duty is specifically provided for the kind of transaction which is a lease u/s 2(16)(c) of Stamp Act read with Section 105 of the T.P. Act. Entry 33 by itself cannot be said to be a provision defining lease, it only provides for charging rates, with precision. The transaction in question has been mentioned by which it cannot be taken that the Entry 33 of Schedule 1 -A define the lease, but it provides rate of stamp duty for the kind of lease.

So as to render aforesaid Article 33 of Stamp Act as amended in M.P. as ultra vires of Constitution, Shri Kishore Shrivastava, learned Senior Counsel has referred to Ist List, Entry 91 of 7th Schedule of Constitution which provides that Union Government can prescribe the rates of Stamp Duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letter of credit, policies of insurance, transfer of shares, debentures, proxies and receipts. In List I of 7th Schedule, the State is empowered to prescribe rates of stamp duty in respect of instruments other than those specified in List I. In our opinion, the document in question is not the one which is covered under Entry 91, thus, the State was competent to prescribe the rates of Stamp Duty as the document is other than those specified in provisions of List I of Entry 91 with regard to rates of Stamp Duty. Entry 44 of II Ird List of 7th Schedule which is concurrent list provides for stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of Stamp Duty. Considering the aforesaid entries of Lists I and II of 7th Schedule, the State is competent to prescribe the rates as mentioned in Entry 33 of Schedule 1-A of Indian Stamp Act as amended in Madhya Pradesh. The said entry cannot be said to be repugnant to Section 105 of T.P. Act or Section 2(16) of Stamp Act.

Learned Senior Counsel has also submitted that the instrument should be liable to the Stamp Duty in fact only then it can be imposed not otherwise. Under the law Stamp Duty cannot be imposed on a transaction which is not a lease. He has also relied upon decision of Apex Court in J.K. Jute Mills Co. Ltd. Vs. The State of Uttar Pradesh and Another, wherein Entry 54 in List 2 of 7th Schedule of the Constitution came for consideration which confers on the State Authority to enact a law with respect to tax on sale of goods. Considering what is the extent of that authority ?, there must be in fact a sale as recognized by law, it is only then that a tax could be imposed. But, if the transaction sought to be taxed is not a sale, a law which seeks to tax it, treating it as a sale will be ultra vires. There is no dispute with the aforesaid proposition. In the instant case, the transaction has been found to be a lease, thus, there is no question of Schedule 1-A Entry 33 as amended in M.P. being ultra vires as the transaction is covered within the ambit of lease as defined in Section 105 of T.P. Act read with Section 2(16)(c) of Indian Stamp Act.

Shri Kishore Shrivastava, learned Senior Counsel has also relied upon decision of Apex Court in Bhopal Sugar Industries Ltd., Madhya Pradesh and Another Vs. D.B. Dube, Sales Tax Officer, Bhopal Region, Bhopal and Another, , wherein the Apex Court considered the meaning of "retail sale". It has been laid down that consumption by retail dealer himself for his own use falls within definition of "retail sale". By extending the meaning, the transaction cannot be taxed. Clause including the transaction by extending the meaning was held to be ultra vires. We have held that Entry 33 (c) of Schedule I of Stamp Act is not extending the meaning of lease, but only prescribes the rate on a particular kind of lease as mentioned therein.

Learned Senior Counsel has also relied upon decision of Apex Court in R.M.D.C. (Mysore) Private Ltd. Vs. The State of Mysore, , in which the Apex Court considered inconsistency between the Central Act, Prize Competitions Act (1955) and the Mysore Lotteries and Prize Competitions Control and Tax Act and held that Mysore Act deals with taxes in respect of prize competitions for which a licence had been obtained u/s 8 might be said to have become void and not the rest. Reliance has also been placed on decision in M. Karunanidhi Vs. Union of India and Another, , wherein the Apex Court has laid down that where there is direct collision between the provisions made by State and that made by Parliament with respect to one of the matters enumerated in the concurrent list, then subject to the provisions of Clause (2) of Article 254, the State law should be void to the extent of repugnancy. This only means that where the law passed by the State comes into collision with a law passed by Parliament contemplated by the concurrent list then the State Act shall prevail to the extent of the repugnancy and the provisions of Central Act would become void provided the State Act has been passed in accordance with Clause (2) of Article 254. So far as the matters in 2nd list, that is, State list are concerned, the State Legislature alone is competent. We do not find that the aforesaid decision is of any help to Petitioners as Article 33(c) of Schedule 1 -A of Stamp Act, is charging provision, in any case, in our view, it does not enlarge the scope of definition of lease as provided in Section 2(16)(c) of Stamp Act or definition of lease as provided in Section 105 of T.P. Act, thus, Article 33(c) of Schedule 1-A as inserted by M.P. Amendment Act cannot be said to be creating any repugnancy with the aforesaid provisions and State is empowered to Legislate such a provision.

Learned Senior Counsel has also submitted that at the time when Cabinet took the decision and letter of acceptance of offer was issued, the Stamp Duty was not in existence. In our view, as agreements have been entered into after Article 33(c) of Schedule 1-A as amended in the Indian Stamp (M.P. Amendment) Act, 2002 came into force in Madhya Pradesh. Thus, the duty as per the rate prevailing on the date of agreement is payable.

We find equally futile the submission raised by learned Senior Counsel that now the stamp duty has been reduced, hence it is a case of discrimination. In our opinion, it cannot be said to be a case of discrimination. It is open to the State to

prescribe the Stamp Duty payable time to time on such transactions, the plea of discrimination cannot be raised with respect to Legislative provision in force at different point of time.

Resultantly, the transactions in question are that of lease u/s 105 of T.P. Act read with Section 2(16)(c) of Stamp Act. The Proviso (c) of Article 33-C of Schedule I-A of Stamp Act as amended in Madhya Pradesh vide the Indian Stamp (M.P. Amendment) Act, 2002 is not ultra vires. We find no merits in the writ petitions, same deserve dismissal and are hereby dismissed. No costs.