

(1997) 04 AHC CK 0070

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 6325 of 1993

Smt. Guddi

APPELLANT

Vs

State of Uttar Pradesh and others

RESPONDENT

Date of Decision : 01-04-1997

Acts Referred:

General Clauses Act, 1897 — Section 3(26)
Mines and Minerals (Development and Regulation) Act, 1957 — Section 3
Registration Act, 1908 — Section 17(1)
Stamp Act, 1899 — Article 35, 5, 2(16), 33, 56
Transfer of Property Act, 1882 — Section 105, 107, 54

Citation : AIR 1997 All 396 : (1997) 2 AWC 1311 : (1998) RD 361 : (1997) 2 UPLBEC 872

Hon'ble Judges : D.P. Mohapatra, C.J.; R.A. Sharma, J.; R. Dayal, J.; D.S. Sinha, J.; B.M. Lal, J

Bench : Full Bench

Advocate : S.K. Kulshrestha, for the Appellant; Standing Counsel, for the Respondent

Judgement

D.P. Mohapatra, C.J.—On a reference made by a learned single Judge to place the matter before a larger Bench to decide the controversy, this case has been placed before us for deciding the questions formulated in the reference order.

The following question have been formulated for decision:

"1. Whether three Judges Special Bench decision in Board of Revenue v. Mulkhraj 1984 all LJ 321 (SB) has correctly construed the Supreme Court decisions, in Ananda Behera and Another Vs. The State of Orissa and Another, and in Sri Tarkeshwar Sio Thakur Jiu Vs. Dar Dass Dey and Co. and Others,

2. Whether the right, created under instrument in question, of catching the fish, in favour of the petitioner from Pachaura Tank reservoir for a period of five years on payment of premium is a lease within the meaning of Section 2(16) of the Act, chargeable to stamp duty in accordance with Article 35 of Schedule 1-B of

the Stamp Act in the light of the pronouncement of the Supreme Court referred to hereinbefore or it is a licence chargeable to stamp duty under Article 5(c) of Schedule 1-B of the Act as held by the Three Judge Bench of this Court in, Board of Revenue v. Mulakharaj (supra)?

2. The factual backdrop of the case necessary for appreciating the points raised may be stated thus:

On the basis of an auction held on 21-9-1988 by the Irrigation Branch of the Public Works Department of the Government of Uttar Pradesh, the petitioner Smt. guddi was given the right to catch and carry away fish from pachaura Tank reservoir during the period, 1-10-1988 to 15-6-1993 for consideration of Rs. 61,000/-. When the instrument entered into between the petitioner and the State Government was presented for registration before the Sub Registrar. Mau Ranipur, Jhansi on 9-3-1989 he referred the matter to the District Registrar/ additional District Magistrate (finance and Revenue) Jhansi u/s 33 of the Indian Stamp Act, 1899 hereinafter referred to as the Act). The Additional District Magistrate by his order dated 27-2-1989 held that the instrument was a lease within the meaning of Section 2(16) of the Act and, therefore, liable to stamp duty in accordance with Article 35(b) of Schedule I-B. On the basis of the said finding the Additional District Magistrate (finance and Revenue). Jhansi, found deficiency in the stamp duty to the extent of Rs. 8,502 and levied a penalty of Rs. 700/-. The petitioner assailed the order in revision before the Commissioner, Jhansi Division u/s 56 of the Act. The Commissioner by his order dated 27-9-1992 stayed recovery of penalty but declined to suspend recovery of deficiency in the stamp duty. Consequently. a citation for recovery of the said amount was issued on the 30th of May, 1992. Feeling aggrieved the petitioner filed the present writ petition seeking a writ of mandamus directing the respondents to refrain from the realising deficiency in stamp duty from her in pursuance of the aforementioned orders.

3. On the factual backdrop of the case as discussed above, the core question that was raised before the learned single Judge was whether the instrument dated 22-2-1989 (annexure 3 to the writ petition) whereunder the petitioner was given the right to catch and carry away fish from the pachra Tank Reservoir was lease and, therefore, chargeable to stamp duty under Article 35(b) of Schedule I-B of the Act or an agreement chargeable under Article 5(c) of Schedule I-B. As discussions in the reference order show, the learned single Judge was of the view that the document in question was a lease inasmuch as it created a right to catch fish which, as held by the Supreme court j the case of, Ananda Behera and Another Vs. The State of Orissa and Another, . was a profit a prendre: but he was confronted with the decision of the Three Judge Bench of this Court in the case of, Board of Revenue v. Mulak Raj 1984 All LJ 331 (SB), in which a contrary view was taken. Therefore, he formulated the questions set out earlier and made a reference to a larger Bench.

4. Before taking up the merit of the case, it would be convenient to notice a few

statutory provisions relevant for decisions on the points. Section 2(16) of the Act defines 'lease' as follows:

2(16) 'lease' means a lease of immovable property, and include 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:

(e) any instrument by which mining lease is granted in respect of minor minerals as defined in Clause (e) 40 of Section 3 of the Mines and Minerals (Regulations and Development) Act. 1957.

The Indian Stamp Act does not define the term immovable property. In Section 3 of the General Clauses Act. 1897 it is laid down that in this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context- '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.

In Section 3 of the Transfer of Property Act, 1882 (T.P. Act of short) it is laid down that in this act. unless there is something repugnant in the subject or context, 'Immovable property' does not include standing timber, growing crops or grass, Section 105 of the T.P. Act. which defines 'lease.' provides that a lease of immovable property is transfer of a right to enjoy such property, made for a certain time, express or implied. or perpetuity, in consideration of a price paid or promised, or of money, 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. Section 107 of the T.P. Act makes provision how leases are to be made. It is laid down herein that a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument. All other lease of immovable property may be made either by a registered agreement or by oral agreement accompanied by delivery of possession. Section 107 of the T.P. Act as amended in the State of U.P. reads as follows:

"107, Lease how made.- A lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by registered instrument.

All other leases of immovable property may be made either by a registered instrument or , by an agreement oral or accompanied by delivery of possession."

5. The Supreme Court in the case of, Sewa Singh and Others Vs. Jangir Singh

and Others, ruled that the sale of a right to catch and carry away fish in specific portions of the lake over a specified future period amounts to a licence to enter on the land coupled with a grant to catch and carry away the fish, that is to say, it is a profit a prendre, which is regarded in India as a benefit that arises out of the land as such is immovable property. It was further held that a case of a profit 'a prendre' (a right to catch fish in a lake) which is immovable property, of the value of more than hundred rupees requires writing and registration u/s 54 of the T.P. Act, An oral sale in such a case does not pass any title or interest in the vendee. Referring to 11 Halsbury's Laws of England (Hailsham Editions) pages 382 and 383, the Court observed:

In England this is regarded as an interest in land (11 Halsbury's Laws of England page 387) because it is right to take some profit of the soil for the use of the owner of the right (page 382). In India it is regarded as profit that arises out of the land and as such is immovable property.

Construing the definition of immovable property in Section 3(26) of the General Clauses Act, the Court held as fish do not come under that category the definition in the General Clauses Act applies and as a profit a prendre" is regarded as a benefit arising out of land it follows that it is immovable property within the meaning of the T.P. Act.

6. The above decision was noticed with approval by the supreme Court in the case of The State of West Bengal Vs. Shebait of Iswar Sri Saradia Thakurani and Others, . In paragraph () of judgment the Court considering the facts of the case observed that in the absence of any registered deed there can be no valid lease of the tank for a period of 9 years as was the case for the appellant State and no right, either in the sub-soil of the tank or its embarkment, was acquired by the Sahas: that the only interest, therefore they could have acquired was in the fish in the tank: that the materials on record show that their interest was confined to the fish they would catch from the tank in consideration of which they had agreed to pay Rs. 60/- per year and in addition they were under the obligation to clean the tank and keep it cleansed. The Court took the view that such an arrangement would not mean a lease within the meaning of the proviso to Section 6(2) of the West Bengal Estate Acquisition Act, 1954, but only constitutes a licence under which, for the consideration above stated, they became entitled to fish yielded by and caught by them from the tank. Referring to the case of Ananda Behera and Another Vs. The State of Orissa and Another, it was observed in paragraph 10 of the judgment that in the case in hand there was no legally enforceable lease of the tank in favour of the Sahas immediately before the date of vesting, so as to attract the proviso to Section 6(2) and therefore, it was the deity through the respondent who was entitled u/s 6(2) read with Section 6(1) to become the tenant of the State and not the said Sahas. It is relevant to mention here that in that case no document was produced before the Court.

7. In the case of, The Bihar Eastern Gangetic Fishermen Co-operative Society

Ltd. Vs. Sipahi Singh and Others, placing reliance on the decision of Ananda Behera and Another Vs. The State of Orissa and Another, the Supreme Court held that the settlement of Jalkar with respondent No. 1 was not valid and enforceable for the reason that the right to catch and carry away fish being a 'profit a prendre' i.e., a profit or benefit arising out of the land it has to be regarded as immovable property within the meaning of the Transfer of Property act read in the light of section 3(26) of the General Clauses Act, that if a 'profit a prendre' is tangible immovable property, its sale to be by means of a registered instrument in case its value exceeds Rs. 100/- because of Section 54 of the T.P. Act: if it is intangible, its sale is required to be effected by a registered instrument whatever its value: therefore, in either of the two situations, the grant of a 'profit a prendre' has to be by means of a registered instrument and, accordingly, the transaction of sale of the right to catch and carry away the fish if not effected by means of a registered instrument would pass no title or interest. Discussing the facts of that case the Court observed that even if the settlement of Jalkar with respondent No.1 is regarded as a lease as described in Annexure-2 to the writ petition. it would not make any difference because leave of fishery which is immovable property as defined by Section 2(6) of the Registration Act if it is for any term exceeding one year or reserves a yearly rent has also to be registered as required by Section 17(1)(d) of the T.P. Act: as in the instant case, the transfer of the 'profit a prendre' in favour of respondent No. was admitted for two years reserving a yearly rent and was not evidenced by a registered instrument, he had no right, title or interest which could be enforced by him.

8. In the case of, Sri Tarkeshwar Sio Thakur Jiu Vs. Dar Dass Dey and Co. and Others, a right to carry on mining operation in hand to extract a specified mineral and to remove and appropriate that mineral was held to be a 'right to enjoy immovable property' within the meaning of Section 105 T.P. Act: more so. when-as in the instant case - it is coupled with a right to be in its exclusive khas possession for a specified period. The Court further held that the "right to enjoy property" spoken of in Section 105, means the right to enjoy the property in the manner in which that property can be enjoyed: if the subject-matter of the lease is mineral land or a sand-mine as in the case in hand, it can only be enjoyed and occupied by the lessee by working it, as indicated in Section 108. T.P. Act. which regulates the rights and liabilities of lessors of lessor and lessees of immovable property.

9. In a recent decision. Santosh Jayaswal and another Vs. State of M.P. and others, the Apex Court ruled: (Para 6):

"Since the definition of 'immovable property' in M.P. General Clauses Act includes benefits to arise out of land and things attached to the earth, the question is whether the right to catch fish is a benefit to arise out of the land. It cannot be controverted that catching fish from the tank would be a benefit arising out of the land. Therefore, it is an immovable property. Even though it is profit a prendre, since it is a benefit to arise from the land it is an immovable

property. if its value is more than Rs. 100/- or the lease is on year to year basis, it is compulsorily registerable instrument u/s 17(1)(c) of the Indian Registration Act. It is instrument under Article 35(a) of schedule 1-A. Clauses (1) to (3) of the Stamp Act. There fore, it requires to be engrossed with required stamp duty and registered u/s 17(1)(d) of the Indian Registration Act.

10. From the conspectus of views taken in the aforementioned decisions of the Supreme court, the position that emerges is that right to catch and carry away fish from a tank/reservoir for a specified period for consideration is immovable property as defined in Section 3(26) of the General Clauses Act and if the period for which the benefit is given is from year to year or for any period exceeding one year, it can be made only by registered instrument u/s 107 of the T.P.Act and as such requires stamp duty under Article 35 (B) of Schedule I-B of the Indian Stamp Act.

11. Coming to the question of correctness or otherwise of the three Judge decision of this Court in, Board of Revenue, v Mulak Raj. 1984 LJ 331 (SB) it is our considered view that though the decision of the Supreme Court in, Ananda Behera and Another Vs. The State of Orissa and Another, , 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 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 a 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 nature of profit a prendre, took the view that the land itself was not the subject-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 intension 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 a licence, i.e., away the produce of the land. As discussed earlier, the Supreme Court has categorically held that a profit a prendre coupled with permission to sue 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. mulk Raj.. (1984 All LJ 331 (SB)) cannot be taken to be good law.

The above decision was followed by a Division Bench of this Court in the case of, Mohd. Ismail v. Collector Etawah. (1986 RDP 110 (sic).

It is relevant to note here that a Special Bench of this Court in the case of Haji Sukhan Beg Vs. Board of Revenue, construing an agreement for three years conferring the right to take out by digging of manure and rubbish accumulated in trenches and drains within the municipal area and selling it, held that the right amounts to a benefit arising out of land and as such it is immovable property and, therefore, chargeable to stamp duty under Article 35(a)(ii) of Schedule I-B(U.P.) of the Act. It appears that this decision was not brought to the notice of the Bench in, Board of Revenue v. Mulak raj (supra).

12. On the analysis and the discussion in the foregoing paragraphs, our answers to the two questions formulated by the learned single judge are as follows:

1. In the decision in Board of Revenue v. Mulak Raj 1984 All LJ 331 (SB), the decision of the Supreme Court in. Ananda Behera and Another Vs. The State of Orissa and Another, , Sri Tarkeshwar Sio Thakur Jiu Vs. Dar Dass Dey and Co. and Others, , have not been correctly appreciated and, therefore, the decision in, Board of Revenue v. Mulak Raj 1984 all LJ 331 (SB) and the Division Bench decision in, Mohd. Ismail's case do not lay down the correct law. The question is answered accordingly.

2. The right created under the instrument in question of catching the fish in favour of the petitioner from Pachaura tank reservoir for a period of five years on payment of premium is lease within the meaning of section 2(16) of the Indian Stamp Act and it is chargeable to stamp duty in accordance with Article 35 (b) Schedule I-B of the said Act in the light of the pronouncement of the Supreme Court in Ananda Behera v. State of Orissa (supra), decisions noted earlier. The question is answered accordingly.

The case will be placed before the appropriate Bench for being disposed of in the light of the answers to the questions formulated and in accordance with law. D/1-4-1997.

13. Order accordingly.