

(2019) 11 BOM CK 0044

In the Bombay High Court

Case No : Letters Patent Appeal No. 166 Of 2013, 21 Of 2017 In Writ Petition No. 6623, 7643 Of 2007, Civil Application No. 260 Of 2013, 59 Of 2017

State Of Maharashtra And Ors

APPELLANT

Vs

M/s. Jasubhai Business Services Pvt. Ltd. (Formerly Excel Realtors Ltd.) A Private limited And Ors

RESPONDENT

Date of Decision : 14-11-2019

Acts Referred:

Bombay Stamp Act, 1958 — Section 2(n)
Maharashtra Regional And Town Planning Act, 1966 — Section 113
Transfer Of Property Act, 1882 — Section 105
Indian Easements Act, 1882 — Section 52
Indian Stamp Act, 1899 — Section 4
Bombay Stamp Act, 1958 — Article 36

Citation : (2019) 11 BOM CK 0044

Hon'ble Judges : Pradeep Nandrajog, CJ; Bharati Dangre, J

Bench : Division Bench

Advocate : A.I. Patel, K.S. Thorat, Chirag Balsara, Anirban Sen, G.S. Hegde, C.M. Lokesh

Judgement

Pradeep Nandrajog, CJ

1. Heard learned Counsel for the parties for final disposal.
2. Since a common question of law arises for consideration in the two Appeals they are being disposed of by a singular order for the reason two writ petitions have been decided in favour of Respondent No.1 by the learned Single Judge vide impugned decision dated 14th December, 2011.
3. Learned Counsel for the parties concede that in view of fussiness in the concluding paragraph of the impugned decision, meaning thereto has to be found from the factual backdrop which led to the filing of two writ petitions by the respondent No.1 in each appeal.

4. Two Indentures, identically worded both dated 2nd November, 1995, executed by CIDCO in favour of the two writ petitioners titled as 'Agreement to Sell' were executed on a stamp paper charged to stamp duty in sum of ₹ 20/-. This is the stamp duty payable on agreements under the Bombay Stamp Act, 1958 as in force on the date of the execution of the Indentures i.e. 2nd November, 1995. For reasons which we need not record, the Indentures came to be noticed by the Collector of Stamps who proceeded to issue a notice to the respondent No.1 on 7th March, 1998 calling upon them to show cause as to why stamp duty not be paid on the Indentures treating the same to be exigible to stamp duty under Article 36 of the Bombay Stamp Act, 1958.

5. The respondent No.1 questioned the basis of the show cause notice, pleading that the Indentures were not a lease and were simply an agreement where right of the respondent No.1 as licensee with a further right to have a lease executed after performing obligations as a licensee under the Indentures and this being the reason to caption the Indentures as an 'Agreement to Lease' and not an 'Agreement for Lease'.

6. On 6th October, 1998 the Collector of Stamps decided that the Indentures were exigible to stamp duty under Article 36 and thus not only called upon the petitioners to deposit the stamp duty determined but even pay penalty and interest. The said decision dated 6th October, 1998 passed by the Collector of Stamps was challenged in Appeals before the Chief Controlling Revenue Authority. The appeals were dismissed on 9th March, 2007. This propelled the respondent No.1 to challenge the appellate decision by and under two writ petitions which have been allowed vide impugned order dated 14th December, 2011. The State of Maharashtra as also the Chief Controlling Revenue Authority and the Collector of Stamps are in appeals before us.

7. Since the issue relates to imparting legal colour to the Indenture(s) in question both, identical and dated 2nd November, 1995 in the context of Article 36 of the Bombay Stamp Act, 1958, we begin our journey to pen the opinion by noting the definition of the word 'Lease' in the Bombay Stamp Act, 1958 as it existed when the Indentures were executed.

8. Vide Clause (n) of Section 2 of the Bombay Stamp Act, 1958 a Lease was defined as under:-

"(n) "lease" means a lease of immoveable [or moveable (or both)] property, and includes also,-

(i) a Patta;

(ii) a Kabulayat or other undertaking in writing not being a counterpart of a lease to cultivate, occupy or pay or deliver rent for immoveable property;

(iii) any instrument by which tolls of any description are let;

(iv) any writing on an application for a lease intended to signify that the

application is granted;

(v) a decree or final order of any Civil Court in respect of a lease:"

9. Article 36, as it existed as of 2nd November, 1995, read as under :-

"36. LEASE, including an under-lease or sub-lease and any agreement to let or sub-let or any renewal of lease -

[(a) where by such lease, the rent is fixed and no premium is paid or delivered -

(i) where the lease purports to be for a term not exceeding 3 years.

(ii) where the lease purports to be for a period in excess of 3 years but not more than 10 years.

(iii) where the lease purports to be in excess of 10 years but not more than 29 years without a renewal clause contingent or otherwise.

(iv) where the lease purports to be for a period in excess of 29 years, or in perpetuity, or does not purport to be for any definite period, or for leases for a period in excess of 10 years, with a renewal clause contingent or otherwise.

(b) where the lease is granted for fine or premium or money advanced or to be advanced and where no rent is fixed;

(c) where the lease is granted for a fine or premium or money advanced or to be advanced in addition to rent fixed.

Explanation I.- Rent paid in advance shall be deemed to be premium or money advanced within the meaning of this article even if there is provision to set it off towards any instalment or instalments of rent.

Explanation II.- When a lessee undertakes to pay any recurring charge such as Government revenue, landlord's share of cesses, of the owner's share of municipal rates or taxes, which is by law recoverable from the lessor, the amount so agreed to be paid by the lessee, shall be deemed to be part of the rent."

10. Since it would be relevant for our opinion it needs to be noted that Explanations III and IV after Explanations I and II under Article 36 which were deleted on 1st September, 1995 and 1st May, 1994 respectively, read as under:-

"Explanation III.- An agreement of lease shall not be chargeable as a lease unless there is an immediate and present demise.

Explanation IV.- For the purposes of sub-clause (iv) of clause (a), where duty is paid on true market value of the property while executing the original lease deed, then the duty payable on the renewal thereof shall be ten rupees and nothing in clause (c) shall apply to such a lease or renewal thereof."

11. The view taken by the Revenue Authorities was that the effect of deletion of Explanation III would mean that before the deletion of the Explanation, an

Agreement to Lease was not be chargeable as a lease unless there is an immediate and present demise. The legislative intent imputed on account of the deletion of the Explanation was that if the Indenture envisaged a futuristic demise of a possessory interest, the same would become exigible for stamp duty under Article 36.

12. This reasoning has been found to be absurd and perverse by the learned Single Judge.

13. The impugned decision shows that the learned Single Judge has proceeded to construe the two Indentures and needles to state construction of an Indenture to construe it is a question of law.

14. This takes us to the language of the Indentures in question which, as noted above, captions the Indentures as an 'Agreement to Lease'

15. But it being settled law that it is the contents of a document and not its form or a caption which determines the nature and character of the document, we proceed to appreciate the covenants, recitals etc. of the document.

16. CIDCO has been described as 'The Corporation' and respondent No.1 has been referred to as 'Licensee'. The recitals record that the Corporation is the New Town Development Authority declared for the area designated as a site for the New Town of New Bombay by the Government of Maharashtra in exercise of powers conferred by Section 113 of the Maharashtra Regional and Town Planning Act, 1966. The recitals further record that the State Government has acquired vast lands and have vested said lands in the Corporation for development and disposal. The recital further records that by an application dated 5th July, 1995 the Licensee has requested the Corporation to grant a lease of a piece or parcel of land so acquired and vested in the Corporation by the State Government and that the Corporation has consented to grant to the Licensee a lease of the parcel of land measuring 2456.20 Sq.mtrs. or thereabout for the purpose of constructing building or buildings to be used for residential-cum-commercial use having bank, offices, hotels, shops etc. It is further recorded in the recital that the Licensee has paid to the Corporation the sum mentioned in the recital. (The sums are different in the two Indentures).

17. After recording aforesaid recitals, the covenant under which the interest is proposed to be transferred under the Indentures are set out. The first covenant records that for a period of four years commencing from the execution of the Indenture the Licensee has a license and authority to enter upon the said land for erecting a building or buildings. It is recorded that 'until the grant of lease as provided hereinafter, the Licensee shall be deemed to be mere Licensee of the land at the same rent and subject to the same terms including the liability for payment of service charges'. Covenant 2 is a negative covenant and proclaims that 'Nothing in these presents contained shall be construed as a demise in law of the said land hereby agreed to be demised or any part thereof so as to give to the Licensee any legal interest therein until the lease hereby provided shall be

executed and registered'. It further proclaims positively that the Licensee shall only have a license to enter upon the said land for the purposes of permitting this Agreement to be taken forward. Covenant 3 obliges the Licensee to get the building plans approved from the Corporation and thereafter commence construction of the buildings.

18. Under the caption `Grant of Lease', Covenant 7 of the Indenture stipulates as under :-

"7. As soon as the Town Planning Officer has certified that the buildings and works have been erected in accordance with the terms hereof and if the Licensee shall have observed all the stipulations and conditions hereinbefore contained, the Corporation will grant and the Licensee will accept a lease (which shall be executed by the parties in duplicate) of the said land and the building erected thereon for the term of 60 years from the date hereof at the yearly rent of Rupees One Hundred Only."

19. Under caption `Form of Lease', Indenture 8 reads as under:-

"8. The lease shall be prepared in duplicate in accordance with the annexed form of lease with such modifications and additions thereto as may be determined by the Corporation and all costs, charges and expenses of and incidental to the execution of this Agreement and its duplicate shall be borne and paid by the Licensee wholly and exclusively."

20. The format of the Lease Deed required to be executed in terms of covenants 7 and 8 forms part of the Indenture and a perusal thereof would reveal that after the Town Planning Officer certifies that the buildings and the works have been erected in accordance with law, transfer of leasehold rights in favour of the writ petitioners in respect of the land in question as also the buildings erected thereon is to demise for a period of 60 years.

21. Section 105 of the Transfer of Property Act, 1882 reads as under:-

"105. 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."

22. As held in the decision reported as AIR 2012 SC 3325 Mangal Amusement Park Ltd. vs. State of Madhya Pradesh & Ors., a lease is not a mere contract but envisages and transfers possessory interest in the demised property by creating a right in favour of lessee in rem.

23. The Indian Easements Act, 1882 defines a license vide Section 52 thereof as under:-

"52. "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."

24. Thus, a license only makes an action lawful which without it would be unlawful but does not transfer any interest in favour of the Licensee in respect of the property. A license is therefore treated as a privilege to do something in a property, otherwise not permissible. A cardinal distinction and important feature of a leasehold right is right to possess and enjoy the demised immovable property to the exclusion of the lessor.

25. Tested on the anvil of the definition of a lease and a license in the Transfer of Property Act, 1882 and the Indian Easement Act, 1882, a perusal of the two Indentures would show that the respondent No.1 were given a right under the Indentures to occupy the parcel of land referred to in the two Indentures and after obtaining sanction from the competent authorities and the grantor to construct buildings and expressly recorded in the Indentures is that no interest would be treated as having been transferred to the respondent No.1. The Indentures clearly record that upon fulfillment of the obligations under the Indentures after completing the building and other works, duly certified by the Town Planning Authority, a lease would be executed qua the land and the buildings for a term of 60 years. The format of the lease has been agreed upon and forms part of the Indentures. Thus, the Indentures in question are a license and not a lease as per the definition of lease under the Transfer of Property Act and license under the Indian Easement Act.

26. This has been so held by the learned Single Judge.

27. We concur.

28. Since it is permissible in law to create a dictionary by a statute, meaning thereby a word can be ascribed a different meaning in a statute, we need now to turn our attention to the Bombay Stamp Act, 1958.

29. As noted above, it defines lease to be a lease of immovable property and expands thereupon by including Indentures which would fall under Clauses (i) to (iv) thereof. A Patta; a Kabulayat; any instrument by which tolls of any description are let and any writing on an application for a lease intended to signify that the application is granted the exclusive right to possess to the exclusion of the lessor are also leases.

30. Thus, the argument of learned Counsel for the Appellants that the two Indentures in question refer in the recitals that the Lessee has by his application dated 5th July, 1995 requested the Corporation to grant a lease of a piece or parcel of land so acquired and vested in the Corporation would bring the Indentures within the trappings of Clause (iv) is rejected by us on account of the fact that the writing or an application for a lease intended to signify that the

application is granted would apply to a situation where through a series of documents a transfer of interest takes place. For example, "A" writes to "B" a letter containing terms on which "A" is willing to convey leasehold interest in his property to "B" and by a letter in response "B" signifies the acceptance of the offer. The two letters read together would amount to a lease. This would be in conformity with Section 4 of the Indian Stamp Act, 1899 which envisages sale, mortgage or settlements fructifying where several instruments are employed for completing the transaction, requiring the principal instrument only to be chargeable for stamp duty.

31. The second arrow in the quiver of the Appellants shot at the respondent No.1 is by referring to the provisions of the New Bombay Disposal of Land Regulations, 1975 which state the manner in which the Corporation can dispose of property placed at its disposal by the Government of Maharashtra and envisages lease to be the only manner under which the Corporation can transfer its interest in the land placed at its disposal by the State of Maharashtra.

32. Suffice it to state in response to the argument, that a license creates no interest in a property. Thus the Indentures in question by granting a license to the respondent No.1, to enter upon the land, develop the same and construct buildings thereon and execute works of a permanent nature are not in the nature of a Lessee. The Indentures recognize that the Corporation can transfer interest in the land only by way of a lease and as so specifically it is stipulated in the Indentures, with the format of the lease to be executed, in futuro pre-agreed.

33. For the reasons above recorded, we concur with the view taken by the learned Single Judge that the Indentures are a license and is not a lease. They envisage lease deeds to be executed upon the respondent No.1 complying with the obligations under the Indentures and reaching the stage where the right to have the lease executed is triggered. In conformity with its caption: 'Agreement to Lease', the Indenture is a license with features of Agreement to Lease. It is not an Agreement for Lease. The distinctions between the two is that in an Agreement for Lease the transaction is completed and possessory interest is transferred in favour of the lessee to the exclusion of the lessor and an Agreement to Lease requires an Agreement for Lease to be executed. No right, title or interest passes under an Agreement to Lease.

34. The Appeals are dismissed.

35. Costs made easy.

36. Pending Civil Applications, if any, are disposed of.