(1994) 08 MP CK 0045

In the Madhya Pradesh High Court

Case No : L.P.A. No. 21 of 1994

State of M.P. APPELLANT

Vs

Santosh Jayaswal RESPONDENT

Date of Decision : 26-08-1994

Acts Referred:

Madhya Pradesh General Clauses Act, 1957 — Section 3(23)
Stamp Act, 1899 — Article 35

Citation : (1995) 1 MPJR 274

Hon'ble Judges : U.L. Bhat, C.J;M.V. Tamaskar, J

Bench : Division Bench

Advocate : A. Choudhary, Add. A.G, for the Appellant; N.C. Jain and A. Agarwal, for the Respondent

Final Decision : Allowed

Judgement

M.V. Tamaskar, J.

The Madhya Pradesh Rajya Matsya Vikas Nigam Bhpal Published auction notice inviting persons to participate in auction proceedings for gram of Hashing rights and sale of fish in reservoirs under the control of the State Government. After following the procedure as given in the auction notice. the date of auction was fixed at Bargi reservoir in district Jabalpur. The respondent Santosh Jaiswal was the highest bidder with Rs 67 (sic). 101/- which was knocked down in his lavour. He was informed by letter dated 5.8.1993 acceptance of his hid and was required to deposit instalment of security, bank guarantee on or before 16.8.1993 at Head Office. Bhopal. On depositing the said amount, he was required to execute the agreement for grant of fishing rights. He was required to produce the stamp worth Rs. 2, 68. 044/- . the sum required under Article 35 of Schedule I-A of the Stamp Act at the rate of 4%. The said stamp was duly produced and produced by the respondent and the respondent was given work order. Subsequently, he made a representation to the State, that, he should be exempted from entering into agreement on payment of 4% of stamp duty on the bid amount. The State did not agree to the said request.

The respondent filed M. P. No. 4260/93 before this Court. The said miscellaneous petition was allowed by order dated 9.3.1994 by the Single Judge of this Court. The learned Single Judge look the view that fishing right acquired by respondent was in the nature of licence and as such the demand of 4% which was applicable in relation to the lease, was not justified.

Relying on the judgment of the Supreme Court in Ananda Behera and Another Vs. The State of Orissa and Another, it was held that right of fishing is a licence to enter the sheet of water concerned, coupled with a grant to catch and carry away the fish and that it amounts to profit a prendre and was not a lease. Therefore, levy of stamp duly at the rate of 4% was illegal. The submission on behalf of the Revenue was that right to catch and carry away fish for a period of more than one year required a registered instrument and it was an acquisition of right in an immovable property by lease.

Since the learned Single Judge allowed the petition this Letters Patent Appeal has been filed by the State. In the other case (LP.A No. 22/94). the respondent''s bid for Rs. 46. 05. 000/- was accepted and he was directed to produce stamp worth Rs. 1. 84. 000/- at the rate of 4% under Article (sic)5 of Schedule 1-A of the Slump Act. On the similar reasoning given in other ease. M. P. No. 4483 of 1993 was allowed. As such, this Letters Patent Appeal.

The Learned Counsel for the Stale submitted that the stamp duty under Article 35 of Schedule I-A of the Stamp Act was rightly demanded as the transaction was a grant in respect of immovable property and benefit arising out of land.

Article 35 (a) of Schedule I-A. clauses (1) to (3) of the Stamp Act are as under.

(1) (2) (3) (4) (5) (6) (7) (8) (9)

Lease. including an under-lease or sub lease and any agreement to (sic) or sub-let-

(a) When by sub lease the rent is fixed and no premium is paid or delivered.-

Articles

(i) Where the Same as in columns The same stamp duly in Bond lease purports (2) to (5) but read Article 15) for the whole amount to be for a term here Art. 12 instead payable or deliverable under such of not less than of Art. 15 lease one year.

(ii) Where the 3. The same stamp lease purports duly as in bond (Art. to be for a term 15) for the amount of not less than or value of the one year, but average annual rent not more than reserved. five years:

(iii) Where the 4, The stamp duty as The same duty as in lease purports in conveyance (Art. conveyance (Art. 23) for a to be for a term 23) for market value equal to the exceeding live consideration equal amount or value of one and years but not to the amount or half limes the average annual exceeding ten value of one and rent reserved. years. half times the average annual rent reserved.

The Stamp Act defines lease under Se. 216) us under : "(16) Lease -"Lease means a lease of immovable property, and includes also -.

(a) a patta :

(b) a kabuliyat or other undertaking in writing, not being a counter or-part of a lest, 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 intend to signify that the application is granted."

There is no definition of immovable property in the Stamp Act. Under the Indian Registration Act. ''immovable property'' is defined in Section 2(6) as under.

"(6) immovable property" includes lands, buildings, heridatory allowances, rights to ways, lights, ferries fishries or any other benefit to airse out of land, and thing attached to the earth, but not standing timber, growing crops nor grass."

Section 2. sub-section (7) defines lease as under:

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

M. P. General Clauses Act u/s 2(18) defined immovable property thus:

"(18)" Immovable property" includes land, benefits, to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth."

Under the Transfer of Property Act, immovable property does not include standing timber, growing crops, or grass, Section 3 of the said Act is quoted below :

"3. In this Act, unless there is something repugnant in the subject or context, - "immovable property" does not include standing timber, growing crops, or grass."

The question therefore for consideration is whether the grant in favour of the respondent was in the nature or lease of licence .

The direct case dealing with the fishing rights is of Ananda Behra vs.

State of Orissa A. I.R. 1456 S.C. 17, where in the Supreme Court stated thus :

''''The sale of a right to catch and carry away fish in specific portions of the take over a specified future period amounts to a license 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. Firm Chhotabhai Jethabai Patel and Co. and Others

Vs. The State of Madhya Pradesh,

The same very case considers whether the same would be profit a prendre i. e. right to catch fish in a lake which is immovable property of the value of more than hundred reupees requiring witting and registration u/s 54 of the Transfer of Property Act.

Under the law relating to immovable property in England as well as in India, the right is regarded as a benefit that arises out of the land and as such in an immovable property. Reference has been made to Section 3 Sub-Section (23) of the M. P. General Clauses Act, which has been quoted earlier. After referring to the definition, the Supreme Court held fish do not come under the category mentioned in General Clause Act. It will be useful to refer to Firm Chhotabhai Jethabai Patel and Co. and Others Vs. The State of Madhya Pradesh, where in the Supreme Court was considering the right derived under an agreement to pluck and carry away tendu leaves. The only kind of leaves that can be plucked were those growing on trees and there must be a fresh crop at period intervals. It was pointed out that growing crop is expressly exempted from the definition of immovable property in the Transfer of Property Act.

As such, the decision in Firm Chhotabhai Jethabai Patel and Co. and Others Vs. The State of Madhya Pradesh, was distinguished.

The matter again came before the Supreme Court in The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others, wherein the Supreme Court considered the question whether a lease in respect of fishing rights was an immovable property as defined in Section 2(6) of the Registration Act and required registration u/s 17(1)(d) of the Indian Registration Act 1908. Relying on Ananda Behera and Another Vs. The State of Orissa and Another, it was held that the right to catch and carry away fish was in the nature of profit a prendre and it should be by means of a registered instrument. The right being for a term exceeding one year, it compulsorily required registration.

It will be useful to refer decision of the Supreme Court in Board of Revenue and Others Vs. A.M. Ansari and Others, where in the Supreme Court was considering whether a right to pluck, cut, carry away and appropriate forest produce was in the nature of licence or a lease attracting Schedule 1-A. Article 35 (c) or Article 31 (c) of the Stamp Act. It was held thus :

"It is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential therefore to look to the substance and essence of the agreement and not to its form. Associated Hotels of India Ltd. Vs. R.N. Kapoor, and Kauri Timber Company Ltd. vs. Commr. of Taxes (1913) A. C 771." (Rel. on)

The real question therefore to he considered is what was the essence of the agreement and not its form. The Supreme Court considered the various shades in relation to licence and lease and held that if an interest in property is created, it would amount to lease, that is to say, it involves transfer of right of property.

In State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, the Supreme Court considered a contract of sale of goods in respect of bamboos by the State of Orissa. In the said case, the Supreme Court analysed the right as under:

"98. The meaning and nature of a profit a prendre have been thus described in Halsubury''s laws of England, Fourth Edition, Volume 14, paragraphs 240 to 242 at pages 115 to 117 : " 240. Meaning of ''profit a prendre''

A profit a prendre is a right to take something off another person''s land. It may be more fully defined as a right to enter another''s land and to take some profit of the soil, or a portion of the soil itself, for the use of the owner of the right. The term, ''profit a prendre'' is used in contradistinction to the term ''profit a prendre", which signified a benefit which had to be rendered by the possessor of land after it had come into his possession A profit a prendre is a servitude.

"241. Profit a prendre as an interest in land.

A profit a prendre is an interest in land, and for this reason any disposition of it must be in writing. A profit it a prendre which gives a right to participate in a portion only of some specified produce of the land is just as much an interest in the land as a right to take the whole of that produce.

What may be taken as a profits prendre. The subject matter of a profit a prendre, namely the substance which the owner of the right is by virtue of the right entitled to take, may consist of animals. including fish and fowl, which are on the land, or of vegetable matter growing or deposited on the land by some agency other than that of man, or of any part of the soil itself, including mineral accretions to the soil by natural forces. The right may extend to the taking of the whole of such animal or vegetable matters or merely a part of them. Rights have been established as profits a prende to take acorns and beech mast, brakes, form, heather and litter, thorns, turf and peat houghs and branches of growing trees, rushes, fresh water fish, stone. sand and shingle from the seashore and ice from a canal: also the right of pasture and of shooting pheasants. There is. however, no right to lake sea coal from the foreshore. The right to take animals laree natures while they are upon the soil belongs to the owner of the suit, who may grant to others as a profit a prendre a right to come and take them by a grant of hunting, shooting, lowing and so forth.

A profit a prendre is a servitude for (sic) burdens the land or rather a person''s owner-ship of land by separating from the rest certain portions or fragments of the right of ownership to be enjoyed by persons other than the owner of the things itself see Jowitt''s Dictionary of English Law, Second Edition. Volume 2, page 1640. under the heading Servitude). "Servitude" is a wider term and includes both easements and profits a prendre (see Halsubury''s Laws of England. Fourth Edition. Volume 14. paragraph 3. page 4). The distinction between a profit a prendre and an easement has been thus stated in Halsubury''s Laws of England, Fourth Edition, paragraph 43 at pages 21 to 22 :

''''The chief distinction between an easement and a profit a prendre is that whereas an easement only confers a right to utilise the servant tenement in a particular manner or to prevent the commission of some act on that tenement, a profit a prendre confers a right to take from the servant tenement some pan of the soil of that tenement or minerals under it or some part of it''s natural produce or the animals lerae nature existing upon it What is taken must he capable of ownership, for otherwise the right amounts to a mere easement." In Indian law an easement is defined by S. 4 of the Easements Act. 1882 (Act No. v of 1882) as being "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon. or in respect of certain other land not his own. " A profit a prendre when granted in fravour of the owner of a dominant heritage for the beneficial enjoyment of such heritage would, therefore. be an easement but it would not he so if the grant was not for the beneficial enjoyment of the grantee''s heritage. 100. Clause (26) of S. 3 of the General Clauses Act, 1897. define "immovable property" as including infer alia "benefit to airse out of land. The definition of "immovable property"'' in clause (f) of S 2 of the Registration Act. 1908 illustrates a benefit to arise out of land by stating that immovable properly includes rights to ways. lights, terries, fisheries or any other benefit to arise out of land. As we have seen earlier, the Transfer of Property Act. 1882. does not give any definition of ''immovable properly'' ''except negatively by slating that immovable property does not include standing timber. growing, crops, or grass. The Transfer of Property Act was enacted about fifteen years prior to the General Clauses Act. However, by S. 4 of the General Clauses Act. the definitions of certain words and expressions, including "immovable property" and "movable property" given in S. 3 of that Act are directed to apply also. unless there is anything repugnant in the subject or context, to all Central Acts made after Jan. 3, 1968. and the definitions of these two terms, therefore, apply when they occur in the Transfer of Property Act. In Ananda Behera and Another Vs. The State of Orissa and Another, this Court has held that a profit a prendre is a benefit arising out of land and that in view of Cl. (26) of S.3 of the General Clauses Act. it is immovable property within the meaning of the Transfer of Property Act."

In the said case, the Supreme Court held that the decision in Firm Chhotahhai Jethabai Patel and Company and others vs. State of M. P. (supra) was considerably shaken if not eroded by subsequent pronouncement of the Supreme Court. It also pointed out that contracts which are for short term would be treated in a different way than the on so for a period of one year or more. Further, it was pointed out that growing crop was express excluded in the definition of the immovable property and the fishing did not come under the category of property excluded from the detention of immovable property and. it. property being Rs. 100/- in value, the document creating much a right require to he registered.

The decision of the Privy Council in M/s Mohan Lal Hargovind vs. Commissioner of Income Tax AIR 1049. P. C. 311 was decided on the facts of the case as the only question, to be decided in the case was the nature of the rights of the petitioner which were contractual.

Shri Choudhary. Addl. Advocate General, argued relying on these cases that the grant in favour of the respondent was in the nature of lease being for a period of more than one year and as such a transaction creating interest in property as such was a lease and was liable to he charged under Art. 35, Schedule 1-A of the Stamp Act.

The Learned Counsel for the respondent on the other hand strongly relied on the judgment reported in Firm Chhotahhai Jethabai Patel and Company and others vs. State of M. P. (supra) and Anada Behra v. State of Orissa (supra) various other judgments in relation to grant of right to pluck tendu leaves and forest produce. He also relied on Mahadeo Vs. The State of Bombay, and Associated Hotels of India Ltd. Vs. R.N. Kapoor,

The crock of the matter therefore is weedier the right conferred under the agreement or the grant was merely a profit a prendre or was a lease, of immovable property.

Shri N. C. Jain, Learned Counsel for the respondent. strongly canvassed that the matter is clearly covered by Ananda Behra vs. State of Orissa (supra) and C. E. Fernandes v. Myria 1875 CPD 35 . The right conferred therefore does not fail within the definition of lease under Article 35 of Schedule I-A. Number of other decisions were cited including Firm Chhotabhai Jethabai Patel and Company and others vs. State of M. P. (supra). Associated Hotels of India Ltd. vs. R. N. Kappor (2) Cyril E. Fernandes Vs. Sr. Maria Lydia and Others, Shantabai v. State of Bombay A. I. R. 1959 S.C. 1262. Board of Revenue, etc. vs. A. M. Ansari A. I. R. 1977 S.C. 2145 and M/s Mohan Lal Hargovind vs. Commissioner of Income Tax A. I. R. 1958 S.C. 532. We have already made reference to these cases earlier. At the risk of the repetition we may only refer to proposition stated by the Supreme Court in para 10 Board of Revenue, etc. vs. A. M. Ansari (supra) which laid down crucial tests as under:

The following propositions may therefore be taken as well-established (1) to ascertain whether a document creates a licence or lease. the form (2) the real (sic)est is the intention of the parties-whether they intended to create a lease or a licence: (3) if the document creates an interest in the property. It is a lease: but, it is only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence: and (4) it under the document a party gets exclusive possession of the property, ''prima facie'' be is considered to be a tenant, but circumstances may he established which negative the intention to create a lease."

Para 11 of the said judgment is also quoted below :

The crucial lasts to be employed in cases of the present nature can be gathered from the observations made by Lord Shaw while delivering the judgment of the Board in Board of Revenue and Others Vs. A.M. Ansari and Others, According to those observations, in order that an agreement can be said to partake of the character of lease, it is necessary that the guarantee should have obtained an interest in and possession of land. If the contract does not create an interest in land then to use the words of Lord Coleridge. C. J. in Marshall, vs. Crein (1875) 1 C.P.C. 35. The land would be considered as a more warehouse of the thing sold and the contract would be a contract for goods.'' Applying these tests, what is the right conferred in favour of the respondents. For exercising the said right, the respondents are required to operate on the column of the water in the reservior without there being any Minster of title in the reservoir or the land beneath the column of water. The right was also to carry away fish existing and future. during the pendency of the period for which the grant was made. The grant in L. P. A. No. 21/94 is for the period of nine months and in L P. A. No. 22/94 is for the period of more than one year: The Privy Council case was in respect of a right to pluck tendu leaves from the Milgujari forests which was for a limited period of much less than one year. In those circumstances. the Privy Council held that it was only a profit a predre and not a right in immovable property which could he termed as lease: It the period is longer or more. the transaction would amount to a right to enjoyment of property i. e. right to (sic) and benefit arising out of the column of water stored over the specified land. Keeping in view the definition u/s 2(6) of the Registration Act and Section 2(8) of the M.P. General Clauses Act. it must follow that the right conferred in a right in immovable property amounting to lease and as such covered by Article 35 of Schedule 1-A of the Stamp Act. The stamp duty demanded under the said Article is just and proper. The learned Single Judge was in error in holding that the right was not in respect of any immovable property or lease under Article 35 of Schedule l-A of the Stamp Act.

The intention as gathered from the various circumstances was to confer an interest in immovable property and the transaction is a lease not a mere licence. The impugned orders are set-aside. The direction for refund of stamp duty is vacated.

The further submission made by the learned Additional Advocate General is that the respondents ought to have approached the authority under the Stump Act under Sections 31 and 45(2). However, since the matter was deeded in writ petition and the present L. P. S. arise out of the same, we do not consider it proper to examine the said contention.

The appeals are allowed. The order of Single Judge is set aside. There shall be no order as to costs.

