(2007) 09 CAL CK 0025

In the Calcutta High Court

Case No : M.A.T. 3168, 3169 and 3170 of 2003

State of West Bengal and Others APPELLANT

Vs

Gautam Sur etc. RESPONDENT

Date of Decision : 21-09-2007

Acts Referred:

Constitution of India, 1950 — Article 23, 300A, 35, 48, 63
Land Acquisition Act, 1894 — Section 23
Pondicherry Stamp (Prevention of Under Valuation of Instruments) Rules, 1970 — Rule 5
Stamp Act, 1899 — Section 2(16B), 27(1), 27(2), 47A, 47A(1)
Transfer of Property Act, 1882 — Section 105
West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001 — Rule 3, 3(1), 3(2)

Citation : AIR 2008 Cal 1 : (2008) 2 CHN 18 : 112 CWN 747

Hon'ble Judges : Kalyan Jyoti Sengupta, J;Arun Kumar Bhattacharya, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Kalyan Jyoti Sengupta, J.—I have had the benefit of going through a draft judgment of my learned Brother. While agreeing with His Lordship''s findings and decision I want to add few words of my own which are as follows:

In this case what should be the stamp duty payable on a conveyance for a transfer of unexpired period of leasehold interest is to be adjudged. Here, is a case of assignment and not by way of underlease. Under the provision of the amended provision of the Act, the market value of the property, as rightly submitted by Mr. Sakti Nath Mukherjee, learned Amicus Curiae in this case, should be the value of the right to enjoy unexpired period of leasehold interest, as opposed to absolute ownership of the property. It would be unfair to equate the proprietary interest of a property with a right to enjoy unexpired period of leasehold interest for imposition of the stamp duty. It should be adjudged on the market valuation of unexpired period of leasehold interest acquired by the assignee lessee meaning thereby, the Collector has to adopt the methodology akin to the procedure of Section 23 of the Land Acquisition Act, 1894 for valuation, because no prescribed methodology is to be found in the Act.

Arun Kumar Bhattacharya, J.

2. The sole common question involved in the present appeals against the judgment and order dated 8-7-2003 passed by the learned Single Judge in W.P. 8360 (W) of 2003, W. P. 8377 (W) of 2003 and W.P. 8378 (W) of 2003 is whether the appellants/petitioners are liable to pay stamp duty on the basis of market value of the leasehold property at Kalyani, Nadia for assignment of the lease to them by the original lessees.

3. The facts leading to the writ petitions are that the lease was originally granted by the Government of West Bengal in 1953 in favour of the lessees for a period of 999 years at a fixed rent per year on some terms and conditions viz. (i) there will be no transfer without permission, (ii) construction on the leasehold land is to be completed within the specified period, (iii) forfeiture clause will be application etc. The lessees transferred their leasehold interest for the unexpired period in favour of the petitioners who paid stamp duty along with fees on the basis of consideration amount as mentioned in the deed of transfer.

4. Being aggrieved by the inaction of and/ or withholding release of the deed of transfer by the registering authority on the plea of payment of stamp duty on the basis of market value, the petitioners moved before this Court, and the learned Single Judge by the impugned judgment and orders disposed of the writ petitions with a direction to the registering authority not to demand stamp duty on the basis of market price of the property and to register the same on the basis of stamp duty paid according to the consideration amount for such transfer as mentioned In the deed.

Being dissatisfied with the said order, the appellant/petitioners have come up before this Court.

5. Mr. Chakraborty, learned advocate for me State, on referring to Articles 63 and 23 of Schedule IA, definition of "market value" as embodied in Section 2(16B) of the Indian Stamp Act, 1899, as amended and Rule 3(2) of the West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001 assailed the impugned judgment and order contending that the case of Sunil Kumar Dey v. State of West Bengal reported in 2002 (2) CHN 160, relying upon which the judgment was passed by the learned Single Judge, was delivered on 19-5-2000 which is long before the West Bengal Amendment Act, 1998 amending Article 63 of Schedule IA and some other provisions, coming into force from 15-3-2001, and as such on the face of the specific provision of Article 63, as amended, there is no scope for registration of the document unless proper stamp duty as found due after ascertainment of the market value is paid. In support of his contention Mr. Chakraborty relied upon an unreported Single Bench decision of this Court in W.P. Nos. 14235-14236 (W) of 2003 (Jhuma Sardar v. State of West Bengal) delivered on 5-12-2003 (Reported in 2004 CWN 243).

6. Mr. Basu, learned advocate for the respondent, on the other hand, on referring the cases of Raghuram Rao and Others Vs. Eric P. Mathias and Others, , Bhilwara Spinners Ltd., Bhilwara and Another Vs. Collector (Stamps) Bhilwara and Others, , Bajaj Hindustan Limited and Others Vs. State of Rajasthan and Others, and AIR 1930 59 (Privy Council) canvassed that lease is a transfer of right to enjoy property made for a certain time in consideration of a price paid or promised and since the documents created only leasehold right in favour of new lessees for the remaining period of lease out of 999 years, it is purely and simply a sub-lease for a limited period with option of transfer with the permission of Government, and as there is no transfer of ownership but only a transfer of right or enjoyment of leasehold property, it is covered under Article 35(vii) of the Stamp Act and not under Article 63, as amended.

7. Mr. Mukherjee, learned senior advocate who was invited as an amicus curiae, submitted that since it is a case of transfer by way of assignment of the balance period of leasehold interest and not transfer of ownership and all the incidents of lease are applicable and that tenancy is a property within the meaning of Article 300A of the Constitution, such leasehold interest for the unexpired period can be valued, the procedure for such valuation being the same as applicable in case of assessment of compensation under the Land Acquisition Act.

8. The provisions relating to Articles. 63 and 23 of Schedule IA of the Indian Stamp Act, 1899, as amended, are reproduced below:

Description of Instruments Proper Stamp Duty "63. Transfer of lease by way of The same duty as a assignment, and not by way of Conveyance under-lease (No. 23) for the mar- ket value of the propert Exemption Transfer of any lease exempt from Duty. 23. Conveyance (as defined by Section (a) Six per centum of 2(10), not being a transfer charged or the market value exempted u/s 62. when the property is situated in the areas within the jurisdiction of any Municipal Corporation or Exemptions Municipality or a no- (a) Assignment of copyright by entry tilled area; made under the Copyright Act, 1957 (14 of 1957), Section 18,

(b) Co-partnership Deed. See Partner- (b) five per centum of Ship (No. 46) the market value when the property is situated in the areas other than those in- cluded in Clause(a).

9. The object of the said provision of Article 63 is to make the instrument chargeable with higher duty prescribed for conveyance in the State. The Article provides for transfer of lease by way of assignment and not by way of underlease which is provided in Article 35.

10. A lease of immovable property, as defined in Section 105 of the Transfer of Property Act, 1882, 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.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

11. A lease contemplates, as observed in Byramjee Jeejeebhoy (P) Ltd. Vs. State of Maharashtra, , "a demise or a transfer of a right to enjoy land for a term or in perpetuity in consideration of a price paid or promised or services or other things of value to be rendered periodically or on specified occasions to the transferror." The words "transfer of a right to enjoy such property" indicate that all rights of ownership are not transferred. The significance of those words as indicative of the limited estate transferred is apparent if contrasted with those in Section 54 where a sale is defined as a "transfer of ownership in exchange for a price."

12. An underlease is a grant by a lessee to another of part of his whole interest under the original lease reserving to himself a reversion: it differs from an assignment, which conveys the lessee''s whole interest and passes to the assignee the right and liability to sue and be sued upon the covenants in the original lease (Wharton''s Law Lexicon). In the case on hand, the lessee''s whole interest having been assigned without reserving a reversion, the question of calling the impugned transfer an underlease or sub-lease, as contended by the learned advocate for the respondent, is out of the way.

13. Sub-sections (1) & (2) of Section 47A of the Act which was introduced by the West Bengal Amendment Act, 1990, effective from 31-1-94 and deals with the procedure of valuation of instrument of conveyance etc. undervalued run as follows:

47A--Instruments of conveyance, etc., undervalued, how to be dealt with.--(1) Where the registering officer appointed under the Registration Act, 1908 (16 of 1908), has, while registering any instrument of-

(a) agreement or memorandum of an agreement relating to a sale or lease-cum-sale of immovable property,

(b) Conveyance,

(c) Exchange of property

(d) Gift,

(e) Partition,

(f) Power-of-attorney

(i) when given for consideration to sell any immovable property, or

(ii) in such other cases referred to in Article 48 of Schedule IA.

Where proper stamp duty is payable on the basis of market value,

(g) settlement,

(h) transfer of lease by way of assignment, reason to believe that the market value of the property which is the subject-matter of any such instrument has not been truly set forth in the instrument presented for registration, he may, after receiving such instrument, ascertain the market value of the property which is the subject-matter of such instrument in the manner presented and compute the proper stamp duty chargeable on the market value so ascertained and thereafter he shall, notwithstanding anything to the contrary contained in the Registration Act, 1908, insofar as it relates to registration, keep registration of such instrument in abeyance till the condition referred to in Sub-section (2) or Sub-section (7), as the case may be, is fulfilled by the concerned person.

(2) Where the market value of the property which is the subject-matter of an instrument has been ascertained and the proper duty chargeable thereon has been computed under Sub-section (1), the registering officer shall, in the manner prescribed, send to the concerned person a notice calling upon him to make payment of the deficit amount of stamp duty within such time as may be prescribed, and if such person makes payment of such deficit amount of stamp duty in the prescribed manner, the registering officer shall register the instrument.

The "market value", as provided in Section 2(16B) of the Act means, in relation to any property which is the subject-matter of an instrument, the price which such property would have fetched or would fetch if sold in open market on the date of execution of such instrument as determined in such manner and by such authority as may be prescribed by rules made under this Act or the consideration stated in the instrument, whichever is higher;

14. Sub-rules (1) and (2) of Rule 3 of the west Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001, hereinafter referred to as the said Rules, coming into force with effect from 15-3-2001, are set out as follows:

(3) Manner of determination of market value and furnishing of particulars relating to any property--(1) The market value within the meaning of Clause (16(b)) of Section 2 in relation to any land or any land with building shall, after taking to consideration the particulars referred to in Sub-rule (2), be determined on the basis of the highest price for which sale of any land or any land with building, of similar nature and areas and in the same locality or in a comparable locality, has been negotiated and settled during the five consecutive years immediately proceeding the date of executing of any instrument setting forth such market value, or on the basis of any Court decision after hearing by State Government, or on the basis of information, report or record that may be available from any Court or any officer or authority of the Central Government or the State Government or any local authority or local body, or on the basis of consideration stated in such instrument for such land or land with building, whichever is greater.

(2) Any person executing an instrument of agreement of memorandum of an agreement relating to a sale or lease-cum-sale of immovable property, conveyance, exchange of property, gift, partition, power-of-attorney where proper stamp duty is payable on the basis of market value, settlement, transfer of lease by way of assignment, shall furnish to the registering officer, in addition to the particulars referred to in Sub-section (1) and Sub-section (2) of Section 27, such particulars in respect of the property as may be applicable to that property and as specified in a statement in Form 1, in case of land with building is situated in an urban area, in Form II, in case the land with building is situated in a rural area, in Form III, in case the land is situated in urban area, and in Form IV, in case the land is situated in rural area.

15. Here, since the leasehold interest of the lessees for the unexpired period was transferred by assignment, the market value of such transfer as applicable to conveyance in terms of Article 23 of Schedule IA is to be assessed. Though there is no indication in the said rules as to how the market value is to be assessed, some guidelines have been provided in Rule 5 of the Pondicherry Stamp (Prevention of Undervaluation of Instruments) Rules, 1970 as under:

Rule 5. Principles for determination of market value.-The Collector shall, as far as possible, have also regard to the following points in arriving at the provisional market value-

(a) In the case of lands-

(i) classification of the lands as dry, manavari, wet and the like;

(ii) classification under various classes in the settlement register and accounts;

(iii) the rate of revenue assessment for each classification;

(iv) other factors which influence the valuation of the land in question;

(v) points, if any, mentioned by the parties to the instrument or any other person which require special consideration;

(vi) value of adjacent land or lands in the vicinity;

(vii) average yield from the lands, nearness to road and market, distance from village site, level of land, transport facilities, facilities available for irrigation, such as tank, wells and pump sets; and

(viii) the nature of crops raised on the land.

(b) In the case of house sites-

(i) the general, value of house sites in the locality;

(ii) nearness to roads, railway station, bus route;

(iii) nearness to market, shops and the like;

(iv) amenities available in the place like public office, hospitals and educational institutions;

(v) development activities, industrial improvements in the vicinity;

(vi) land tax and valuation of sites with reference to taxation records of the revenue Department;

(vii) any other features having a special bearing on the valuation of the site; and

(viii) any special feature of the case represented by the parties.

(c) In the case of buildings-

(i) type and structure;

(ii) locality in which constructed;

(iii) plinth area;

(iv) year of construction;

(v) kind of materials used;

(vi) rate of depreciation;

(vii) fluctuation in rates;

(viii) any other features that have a bearing on the value;

(ix) property tax with reference to taxation records of the Revenue Department;

(x) the purpose for which the building is being used and the income, if any by way of rent per annum secured on the building; and

(xi) any special feature of the case represented by the parties.

16. In addition to the above there are certain plus--minus factors which are as under:

Plus factors Minus factors (i) smallness of size (i) largeness of area (ii) proximity to a road (ii) situation in the interior at a distance from the road (iii) frontage on a road (iii) narrow strip of land with very small frontage compared to depth (iv) nearness to developed (iv) lower level requiring the area depressed portion to be filled up (v) regular shape (v) remoteness from devel- oped locality (vi) level vis-a-vis land (vi) some special disadvanta- under acquisition geous factors which would deter a purchaser (vii) special value for an owner of an adjoining pro- perty to whom it may have some very special advantage.

The expression "market value" apparently means the value of the land in a hypothetical market which a willing purchaser may in the prevailing conditions pay to a willing vendor in that situation. In determining the disposition, the purchaser would normally take into consideration the advantage of the situation and the potentialities of the land for the market value of land which depend upon its situation, special adaptability, advantages and inherent potentiality in the light of demand for land. In assessing the market value recent instances of sale in the same or adjacent areas, the average rental of the land and of similar adjacent lands are relevant for valuation. In this connection, reference may be made to the case of Mathura Prasad Rajgharia and Others Vs. State of West Bengal, .

17. The facts and circumstances of the case of Raghuram Rao (supra) which speaks of perpetual lease being quite different, the ratio has no application here, so also the case of M/s. Bhilwara Spinners Ltd. (supra). The case of Hunsraj (supra) deals with sublease which is not, as discussed earlier, involved in the present case. Similar is the fate in respect of Bajaj Hindustan Ltd. (supra) where there was no assignment of lease nor any document was executed by the erstwhile lessee in favour of the writ petitioner.

18. It is not permissible to a Court under the garb of interpretation of a statute to insert by implication any matter thought to be erroneously left out by the legislature, as that would not be construing a statute but altering or amending it. Where the meaning of the words of a statute is clear, that has to be given effect to irrespective of consequence. The science of interpretation of statutes, in fact, reaches its vanishing point where the words of a statute admit of no ambiguity. Here, when the aforesaid Articles 63 and 23 of Schedule 1A of the Act are clear and unambiguous and so also the procedure laid down in the said Sections 47A read with Section 2(16B) and Rule 3 of the said Rules, it is obligatory on the part of the petitioners to pay the balance stamp duty as found due by the registering authority after ascertainment.

Since a considerable period has relapsed from the time of deposit of the deeds for registration, it is expected that the registering authority will communicate the balance stamp duty to be paid by the petitioners as expeditiously as possible, preferably within a period of three months from date followed by payment of the due stamp duty by the petitioners, completion of registration by the registering authority and making over the deeds to the petitioners within a reasonable time thereafter.

19. With the background observation, the present appeals be allowed. The impugned judgment and orders of the learned Single Judge are set aside.

20. We make no order as to costs.

21. Urgent xerox certified copy of this judgment, if applied for, be supplied to the parties with utmost expedition.

21-9-2007.

Later

Today, in the list, cause titles of the other two appeals (F.M.A. 653 of 2005 and F.M. A. 629 of 2005) have not been published; only the number of the aforesaid appeals have been published. By this judgment, all the three appeals have been disposed of. Therefore, cause titles of the said two appeals being State of West Bengal and Ors. v. Gautam Sur and State of West Bengal and Ors. v. Amit Chakraborty, are treated to have been published in today''s list.

Urgent Xerox certified copy of this order, if applied for, be supplied to the applicants.

Arun Kumar Bhattacharya, J.

22. I agree.

