Board of Revenue and Others

Vs

A. M. Ansari and Others

Civil Appeal Nos. 67 to 122 and 238 of 1969

(CJI A.N. Ray, M.H. Beg, Jaswant Singh JJ)

17.03.1976

JUDGMENT

JASWANT SINGH, J. -

1. This bunch of Civil Appeal Nos. 67-122 and 238 of 1969 by certificate granted under Article 133(1)(b) of the Constitution by the High Court of Judicature of Andhra Pradesh at Hyderabad by its order dated June 28, 1968 against its common judgment and order dated August 21, 1967 passed in Writ Petition Nos. 489, 491, 573 to 541, 635, 684, 685, 687, 688, 830 to 832, 561, 1219, 715 to 719, 812, 813, 1216, 677, 683, 639, 695, 853 to 856, 636, 687, 870, 1146, 1285, 1260, 1261, 1284, 1292, 1293, 1294, 1309, 1310, 1340, 1447, 1697 and 1265 of 1967 which raise interesting questions of law relating to the interpretation of some of the provisions of the Indian Stamp Act, 1899 and the Andhra Pradesh General Sales Tax Act, 1957 shall be disposed of by this judgment.

2. The facts giving rise to these appeals are : The Forest Department of the Government of Andhra Pradesh after giving a sale notice held, in accordance with the terms and conditions thereof an auction in 1967 in respect of various items of forest produce viz. timber, fuel, bamboos, minor forest produce, beedi leaves, tanning barks, parks mohwa, etc. Clause (23) of the notice inter alia required the contractors to pay within 10 days of the receipt of the confirmation orders of the competent authority : (a) the balance of the first instalment amount, as might be fixed by the Divisional forest Officer; (b) 6 1/4% of the bid amount as security deposit; (c) sales tax on the bid amount at the rates current at the time of the sale. Clause 60 of the notice provided that the contractors would at all times comply with the provisions of the Indian Stamp (Andhra Pradesh Extension and Amendment) Act XIX of 1959, and the Andhra Pradesh Court Fees and Suits Valuation Act, 1956, and all the rules that might, from time to time, be in force thereunder.

3. The respondents herein being the highest bidders in respect of some items of the forest produce were called upon to pay in terms of the abovenoted conditions the stamp duty on the agreements to be executed by them as if they were leases of immovable property falling under Article 31(c) of the Indian Stamp Act, 1899. They were also called upon to pay sales tax on the bid amount in terms of clause (23) of the sale notice. They were further called upon to pay stamp duty on the deposits made by them by way of security as mortgages, falling within Article 35(c) of the Stamp Act. Aggrieved by the said notices, the respondents filed the aforesaid petitions under Article 226 of the Constitution for issue of appropriate writs, etc. declaring the aforesaid demand notices as illegal and void and restraining the appellants from enforcing or taking any proceeding for the levy and recovery of the amounts mentioned therein. The respondents contended before the High Court that as the right to pluck, collect and take away beedi leaves and to cut and carry away bamboos, standing timber, etc. was not a right or interest in immovable property so as to attract Article 31(c)

of the Stamp Act, there could be no question of payment by them of the stamp duty. The respondents also challenged the demand made from them for payment of sales tax on the bid amount on the ground that as the Government did not carry on any business of sale, the demand was illegal. They further challenged the demand of stamp duty under Article 35(c) of the Stamp Act pleading that the security deposits were not mortgages so as to attract the provisions of the said article of the Stamp Act.

4. The petitions were contested by the appellants herein who contended inter alia that pursuant to clause (6) of the terms and conditions of the sale notice, the respondents were bound to pay the stamp duties that were chargeable in view of the extension of the Indian Stamp Act to the whole of the State of Andhra Pradesh by the Indian Stamp (Andhra Pradesh Extension and Amendment) Act XIX of 1959 with effect from April 1, 1959, and repeal of the Hyderabad Stamp Act, and the rules, notifications, instructions, etc. made or issued thereunder; that the right acquired by the respondents was not merely a right to collect appropriate and sell beedi leaves that had already grown but also the right to collect, use and sell beedi leaves that would subsequently grow on the standing trees and their branches taking nourishment from the land during the period of lease which showed that the respondents obtained under the agreements an interest in immovable property. The appellants further contended that the respondents were, according to the sale notice, liable to pay sales tax on the bid amount as also the stamp duty on security deposits which fell within the definition of mortgages as contemplated by the Stamp Act.

5. On a careful consideration of the respective stands of the parties, the High Court negatived the contentions of the appellants and allowed the petitions. Aggrieved by the judgment and order of the High Court, the appellants applied for certificate under Article 133(1)(b) of the Constitution which, as already stated was granted to them. This is how the appeals are before us.

6. Three questions fall for consideration in these appeals. The first question that we are called upon to determine in whether the agreements which the respondents were called upon to execute in respect of the aforesaid rights relating to forest produce were in the nature of lease or licences.

7. It is necessary in this connection to notice at the outset the distinction between a lease and a licence by reference to the relevant Acts. Section 2(16) of the Stamp Act defines the lease as meaning a lease of immovable property but this definition, it would be noted, is neither exhaustive nor self-explanatory. We are, therefore, driven to find out the true meaning of the term by turning to the Transfer of Property Act. Section 105 of the said Act defines 'lease' as follows :

> 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.

8. 'Licence' is defined in Section 52 of the Easement Act, 1882 as under :

> 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 licence.

9. The expression 'immovable property' is not defined in the Stamp Act but is defined in Section 3 of the Transfer of Property Act, Section 2(6) of the Registration Act and Section 3(26) of the

General Clauses Act. An idea as to the meaning of the expression can also be gleaned from Section 2(7) of the Sale of Goods Act. According to learned Counsel for the appellants, it is the definition of 'immovable property' as given in Section 3(26) of the General Clauses Act that has to be applied in determining whether the agreements in question fall within the definition of 'lease' or not. It would be useful at this stage to set out in juxtaposition the definitions of 'immovable property' as contained in the aforesaid Acts, as also the definition of goods as given in the Sale of Goods Act :

(See the Table on p. 517)

10. A close study of the above definitions shows that 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.

#Section 3(26) of Section 3 of Transfer Section 2(6) Section 2(7) ofGeneral Clauses of Property Registration Act Sale of Goods Act Act Act In this Act, unless"Immovable property" In this Act, unless "Immovable property" there is anythingshall include land, there is something includes land, repugnant in thebenefits to arise out repugnant in the buildings, hereditary subject or contextof land, and things subject or context, allowances, rights "goods" means everyattached to the earth, "immovable property" to ways, lights, kind of movableor permanently fastened does not include ferries or any other property otherto anything attached standing timber, benefit to arise than actionableto the earth. growing crops out of land, and claims and money, or grass. things attached to and includes stock the earth, permanently and shares, growing fastened to anything which is attached to crops, grass and the earth, but not things attached to standing timber, or forming part of growing crops nor the land which are grass. agreed to be severed before sale or under the contract of sale.##

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. We are fortified in this view by the decision of this Court in Associated Hotels of India Ltd. v. R. N. Kapoor (AIR 1959 SC 1262 : (1960) 1 SCR 368) where Subba Rao, J. (with whom Das, J. agreed) observed :

> If a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was though that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in Errington v. Errington ((1952) 1 All ER 149), wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p. 155 :
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> The result of all these cases is that, although a person who is let into exclusive

possession is, prima facie, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.

The Court of Appeal again in Cobb v. Lane ((1952) 1 All ER 1199), considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At p. 1201, Somervell, L.J. stated :

... the solution that would seem to have been found is, as one would expect, that it must depend on the intention of the parties.

Denning, L.J. said much to the same effect at p. 1202 :

The question in all these cases is one of intention : Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land ?

The following propositions may, therefore, be taken a well-established : (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test 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, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, 'prima facie' he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease.

11. The crucial tests 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 Kauri Timber Company Limited v. Commissioner of Taxes (1913 AC 771, 776 : 109 LT 22). According to those observations, in order that an agreement can be said to partake of the character of lease, it is necessary that the grantee 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 v. Green ((1875) 1 CPD 35 : 45 LJQB 153 : 33 LT 404) the land would be considered as a mere warehouse of the thing sold and the contract for goods.

12. For the purpose, therefore, of ascertaining the intention of the parties and finding out the character of the agreements in question, it is necessary to notice the salient features of the agreements. The first salient feature of the agreement is that the were for a short duration of nine to ten months. The second important feature of the agreements is that they did not create any estate or interest in land. The third salient feature of the agreements is that the respondents were not granted exclusive possession and control of the land but were merely granted the right to pluck, cut, carry away and appropriate the forest produce that might have been existing at the time of the contract or which might have come into existence during the short period of the currency of the agreements. The right to go on the land was only ancillary to the real purpose of the contract. Thus the acquisition by the respondents not being an interest in the soil but merely a right to cut the fructus naturalis, we were clearly of the view that the agreements in question possessed the characteristics of licences and did not amount to leases so as to attract the applicability of Article 31(c) of the Stamp Act.

13. The conclusion arrived at by us gains strength from the judgment of this Court in Firm Chhotabhai Jethabai Patel and Co. v. State of Madhya Pradesh (1953 SCR 476 : AIR 1953 SC 108) where contracts and agreements entered into by persons with the previous proprietors of certain estates and mahals in the State under which they acquired the right to pluck, collect and carry away tendu leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos were held in essence and effect to be licences.

14. There is, of course, a judgment of this Court is Mahadeo v. State of Bombay where seemingly a somewhat different view was expressed but the facts of that case were quite distinguishable. In that case apart from the bare right to take the leaves of tendu trees, there were further benefits including the right to occupy the land, to erect buildings and to take away other forest produce not necessarily standing timber, growing crop or grass and the rights were spread over many years.

15. For the foregoing reasons, the first question has to be decided in favour of the respondents.

16. The second question that falls for consideration is whether the respondents could be validly called upon to pay the sales tax. For the decision of this question, it is necessary to examine a few provisions of the Andhra Pradesh General Sales Tax Act, 1957. The charging section is Section 5 which in so far as it is relevant for the purpose of these appeals runs thus :

> 5. Levy of tax on Sales or Purchases of Goods. - (1) Every dealer (other than a casual trader and an agent of a non-resident dealer) whose total turnover for a year is not less than Rs. 25,000 and every agent of a non-resident dealer whatever be his turnover for the year, shall pay a tax for each year, at the rate of four paise on every rupee of his turnover;
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> Every casual trader shall pay a tax at the rate of four paise on every rupee of his turnover :
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> Provided that a dealer in jaggery shall pay a tax at the rate of two paise of every rupee on and from the 1st April, 1966, of his turnover irrespective of the quantum of turnover.

17. The term 'dealer' has been defined in Section 2(e) of the Act as follows :

> "Dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes (i) the Central Government, a State Government, local authority, a company, a Hindu undivided family or any society (including a co-operative society), club, firm or association which carries on such business ....

18. The term 'business' has been defined in Section 2(bbb) of the Act as follows :

> "Business" includes - (i) any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture whether or not such trade, commerce, manufacture, adventure or concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom; and

(ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern.

19. 'Sale' is defined in Section 2(n) thus :

'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration, and includes any transfer of materials for money consideration in the execution of a works contract provided that the contract for the transfer of such materials can be separated from the contract for the services and the work done, although the two contracts are embodied in a single document or in the supply or distribution of goods by a society (including a cooperative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on, goods.

20. In order that the sales tax should be payable by the respondents in accordance with the obligation imposed on them by clause (23) of the sale notice, it is necessary that the Government of Andhra Pradesh should have been carrying on the business of selling the forest produce. It State of Gujarat v. Raipur Manufacturing Co. Ltd. ((1967) 19 STC 1 : AIR 1967 SC 1066 : (1967) 1 SCR 618) this Court while examining the term 'business' in another context observed that whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive. The Court further went on to observe that when a subsidiary product is turned out in the factory of the assess regularly and continuously and its being sold from time to time, an intention to carry on business in such product may be reasonably attributed to the assessee. As the consideration of profit motive cannot be regarded as an essential constituent of the term 'business in view of the amendment introduced in the definition of the term 'dealer' in 1966, what we are left to consider is whether the other ingredients of the term 'business' viz. volume, frequency. Continuity and regularity of transactions of sale and purchase are satisfied in the instant cases. The auctions of the forest produce by the Government of Andhra Pradesh are admittedly carried on only annually and not at frequent intervals. Thus the important element of frequency being lacking in the instant cases, it cannot be held that the said Government was carrying on the business of sale of forest produce. In P. T. C. C. S. Merchants Union v. State of A. P. ((1958) 2 Andh WR 100 : (1958) 9 STC 723) where a person who grew agricultural products and incidentally sold the same, it was held that no sales tax was payable as it could not be said that the person carried on business. A similar view was expressed in Raja Bhairabendra v. Superintendent of Taxes ((1958) 9 STC 60 (Ass)) where standing sal trees grown spontaneously in his Zamindari were sold by the Zamindar by auction and the purchasers were permitted to fell the trees and sell them after sawing and other processes.

21. In orient Paper Mills Ltd. v. State of Madhya Pradesh ((1971) 28 STC 532 (MP)) it was held that the State Government or the forest department could not, merely by selling the forest produce grown on their land, be regarded as carrying on any business of buying, selling, supplying or distributing goods, and therefore in respect of mere sales of forest produce, neither the State Government nor the forest department was a dealer within the meaning of the definition in Section 2(d) of the M.P. General Sales Tax Act, 1958. In Deputy Commissioner of Agricultural Income-tax and Sales Tax, Quilon v. Travancore Rubber and Tea Co. ((1967) 20 STC 520 (SC)) and Deputy Commissioner of Agricultural Income-tax and Sales Tax, Quilon v. Midland Rubber and Produce Co. Ltd. ((1970) 25 STC 57 (SC)) where the only facts established were that the assessee converted the latex lapped from its rubber trees into sheets and effected a sale of these to its customers and the

conversion of latex into sheets was a process essential for the transport and marketing of the produce, it was held that the department had not been able to discharge the onus of proving that the assessee was carrying on business and was, therefore, a dealer within the meaning of Section 2(b) of the Central Sales Tax Act, 1956. In Ramakrishna Deo v. Collector of Sales Tax, Orissa ((1955) 6 STC 674 (Ori)) where the Maharaja of Jeypore had sold the sal trees from his forest for preparing sleepers, it was held that he was not a dealer within the meaning of the Orissa Act because he was not carrying on the business of selling or supplying the goods for the reason that the element of purchase, one of the necessary ingredients of the business was absent.

22. In view of the foregoing discussion, we find ourselves unable to hold that the Government of Andhra Pradesh by holding auction of forest produce carried on business in the sale of that class of goods. As such, the respondents could not be made liable to pay the sales tax.

23. There now remains for consideration only the last question as to whether the security deposits made by the respondents were in the nature of mortgages so as to make the respondents liable to pay the stamp duty under Article 35(c) of the Stamp Act. For the determination of this question, it is necessary to scrutinize the definition of 'mortgage deed' as contained in Section 2(17) of the Act which runs thus :

> 2. (17) Mortgage deed includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates to, or in favour of, another, a right over or in respect of specified property.

24. A bare perusal of the above definition makes it clear that in order that an instrument should fall within the above definition, it is necessary that the instrument should satisfy the essential conditions by creating a right over or in respect of a specified property of another person.

25. Bearing in mind the abovementioned essential requisites of a deed of mortgage let us examine clause (17) of the sale notice to which alone our attention has been invited. Clause (17) runs thus :

> Earnest money deposit to be returned. - The earnest money deposits of all bidders except those of the successful bidders collected at the time of sale according the sales provided that the officer conducting the sale, may, if he considers it advisable, retain the deposits of any bidders.

26. There is nothing in the above clause to indicate that any right over or in the security deposits was created in favour of the State Government.

27. In Reference under Stamp Act, Section 46 (ILR 15 Mad 134) where a license issued to an arrack renter expressly required as one of its conditions that the licensee should deposit a sum equal to three months rental as a security for the due performance of the contract and the licensee executed a muchalka stating that he agreed to all the terms and conditions mentioned in the license, it was held that neither the licence nor the muchalka taken separately or together fulfilled the conditions of a mortgage as defined in the Stamp Act i.e. neither thereby actually created an interest in the deposit in favour of the Government.

28. In Rishidev Sondhi v. Dhampur Sugar Mills (AIR 1947 All 190 : ILR 1947 ALL 7) it was held that an instrument in which specific sums have been offered as security is not a mortgage deed within the meaning of Section 2(17) as money is not 'specified property'.

29. In view of the above we have no manner of doubt that the respondents could not be called upon to pay the stamp duty under Article 35(c) of the Stamp Act.

30. In the result the appeals fail and are hereby dismissed with costs limited to one set.

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