

DELHI HIGH COURT

C. C. Rev. Authority

Vs.

Satyawati (Delhi)

Stamp Duty Reference No.2 of 1969.
(Hardayal Hardy, C.J., S. N. Shanker and V. S. Deshpande, J.)

20.12.1971

JUDGEMENT

V. S. Deshpande, J.

1. The main question on which our opinion is sought in this reference under Section 57(2) of the Indian Stamp Act, 1899, is whether the five identical letters dated 6th March 1961 written by Smt. Satya Wati to Jagdish Rai, Raman Kumar, Ajay Kumar, Satish Kumar and Sudershan Rani are liable to stamp duty under Article 35 of Schedule 1-A (Delhi) of the Stamp Act as being a 'lease' as defined in Section 2(16)(b) of the said Act.

2. The letters open with the following sentence:-

"With reference to the oral arrangements arrived at with you on 3rd March, 1961 we have to put on record the same as under".

The rest of the letters are supposed to be a record of the various terms of the lease, as many as seventeen, said to have been agreed between the parties orally on 3rd March 1961. Briefly, the arrangement was to be that a lease of a furnished cinema building was given to Satya Wati by the five addressees (lessors) from month to month with effect from 3rd March 1961 on a monthly rent of Rs. 2,700/-.

3. Under Section 107 of the Transfer of Property Act, it is only a lease of immovable property which is from year to year or which is for a term exceeding one year or which reserves a yearly rent that can be made only by a registered instrument. The second paragraph of Section 107 which is relevant is as follows:-

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

A lease from month to month can thus be made either by a registered instrument or by an oral agreement accompanied by delivery of possession. For the purposes of the Stamp Act, the chargeability of an instrument to duty has to be determined, as a rule, on the recitals made in the deed. The recital in the deed in question is that on 3rd March 1961 an oral arrangement was arrived at. Though a valid oral lease from month to month on a monthly rent could thus be given by the lessors to the lessee without involving any question of payment of stamp duty or registration, does this position change if the terms of the oral lease are recorded in writing? To answer this question, we have to look to the scheme of the relevant statutes.

4. Firstly, the first two paragraphs of Section 107 of the Transfer of Property Act lay down only two modes of making leases, namely, (1) by a registered instrument and (2) by an oral agreement accompanied by delivery of possession. Between these two, there is no half way house. That is to say, a lease cannot be made by an unregistered instrument only as distinct from an oral agreement accompanied by delivery of possession. It is to be noted that the proviso to Section 107 enables a State Government by notification in the official Gazette to direct that leases of immovable property, other than leases from year to year, or for any term exceeding one year, or reserving a yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession. These half way houses can constitute valid leases only if they are authorized by a notification by the State Government under the proviso to Section 107. Since no such notification is said to exist in Delhi, it is common ground that a valid lease in Delhi can be made only either by a registered instrument or by an oral agreement accompanied by delivery of possession. In the present case it is the second mode of making a lease, namely, by an oral agreement accompanied by delivery of possession which was adopted. What is contended on behalf of the Revenue is that the letters dated 6th March 1961 which reduced the terms of the oral lease to writing constitutes a part of the same transaction of lease and form the lease itself. They are, therefore, the half way house which is not authorized in Delhi by Section 107 of the Transfer of Property Act inasmuch as they are an unregistered instrument of lease. If the contention of the Revenue is correct, then the question of such a document being examined and impounded under Section 33 and being validated under Section 35 would arise. The question of the levy of a penalty by the Collector under Section 40 of the Stamp Act would also then have to be considered.

5. Next, we come to the scheme of the Stamp Act in this respect. Under Section 3 of

the Stamp Act only the instruments mentioned therein are chargeable with the stamp duties indicated in the Schedule to the Act. The definition of "instrument" in Section 2(14) is the most fundamental. It includes two distinct types of documents, namely:- (a) a document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished, and (b) a document by which any such right or liability is only recorded even though the document itself does not create such a right or liability. This definition is a key to the understanding of the whole of the Stamp Act. It shows the legislative intention to make a distinction between an Instrument which itself forms a legal transaction creating a right or liability and an instrument which does not itself form such a legal act but is only a subsequent record of an act-in-law. It is well known that while the Transfer of Property Act concerns itself primarily with transactions or acts-in-law, the Registration Act and the Stamp Act are concerned with documents or instruments only. Unless there is a document or an instrument, these two statutes do not arise for consideration. How does the distinction made in Section 2(14) enable us to construe the provisions of the Stamp Act? One way to use Section 2(14) in the construction of the Act would be to regard every instrument included in the Schedule to the Act as being chargeable to duty whether it creates a right or liability or whether it merely records subsequently the creation of such right or liability. Such an approach is not permissible for the following reasons : Firstly in respect of leases it would run contrary to the scheme of the relevant provisions of the Transfer of Property Act and the Registration Act explained above. If the intention of the Legislature under, those Acts was to regard an oral lease accompanied by delivery of possession as valid, it would follow that those two statutes would not regard the subsequent record of the terms of an oral lease as in any way superseding the previous oral lease. Such a subsequent record would not, therefore, amount to the making of a lease under those statutes. It could not be the intention of the Legislature, therefore, that such a subsequent record of a legal transaction of lease should nevertheless be chargeable with stamp duty. Secondly, this is why a subsequent record of a previous legal transaction is specifically made chargeable by the Stamp Act only in a couple of specified instances but not otherwise. The first instance is the definition of "settlement" in Section 2(24) which expressly, applies not only to an agreement in writing by which such a settlement is made but also to an instrument which merely records the previous making of such settlement. The second instance is Article 5 of the Schedule which expressly applies to agreement or memorandum of an agreement. This shows that it would apply not only to the written agreement which is contemporaneous with the act-in-law embodied therein but also to a mere subsequent

memorandum of an oral agreement constituting an act-in-law which has already taken place in the past. It is to be noted that under Article 5 it is expressly mentioned that "agreement to lease" would be governed not by Article 5 but by Article 35. This would mean that the scheme of Article 5 which makes chargeable not only a contemporaneous agreement but also a subsequent record of it to stamp duty is not applicable to an agreement to lease. We cannot, therefore, construe the entries in the Schedule to the Stamp Act to apply not only to the deeds which created a right or liability contemporaneously but also to the subsequent record of the oral creations of such rights or liabilities except when this is specifically stated in the Act such as in Section 2(24) and in Article 5 of the Schedule thereof.

6. The correct approach to the construction of the entries in the Schedule to the Stamp Act would, therefore, be to read those entries as they are or in the light of the definitions given in the Stamp Act. So read, those entries would apply only to the deeds which are contemporaneous with the creation of and intended to create the rights and liabilities but not to the deeds which merely record the previous creation of such rights and liabilities unless otherwise stated in the Act, e.g., in Section 2(24) and in Article 5 of the Schedule I.

7. The definition of "lease" in Section 2(16) of the Stamp Act reads as follows:-

"(16) "Lease" means a lease of immoveable property and includes 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 immoveable 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."

This definition is somewhat peculiarly worded. Firstly, the words "Lease means a lease of immoveable property" would have to be understood as affirming the existing meaning of the word "lease", namely, the one contained in Sections 105 and 107 of the Transfer of Property Act. Since a lease by registered Instrument has to be executed by both the lessor and the lessee under Section 107 of the Transfer of Property Act. Section 2(16) of the Stamp Act extends the concept of "lease" to the specified unilateral documents also. A patta is executed by the lessor alone while a kabuliyat or other undertaking in writing to pay rent is executed by the lessee alone. This is why Article 35 of Schedule I of the Stamp Act includes "any agreement to let," inter alia, in the title "lease" of that article, i.e., an agreement executed by the lessor alone.

8. In the present case, the letters are executed by the lessee in favour of the lessors. It is urged for the Revenue that these letters contain an undertaking to pay rent within the meaning of Section 2(16)(b) and, therefore, they are a "lease" being either a kabuliyat or an undertaking to pay rent and as such liable to stamp duty under Article 35. In reply to this argument, it is pointed out for Smt. Satyawati that the letters purport to put on record the oral arrangements arrived at on 3rd March 1961. It is argued for her that the oral lease was granted on 3rd March 1961 and not by the letters written on the 6th of March 1961. The letters are, therefore, only a "record" of the oral creation of the lease and are not, therefore, liable to stamp duty.

9. The question which of these two rival contentions is correct is to be decided on ascertaining the intention of the parties as reflected in the letters in question. We have to examine them to know whether the parties intended that the transaction of lease was to be an oral agreement accompanied by delivery of possession completed on 3rd March 1961 or whether it was to be these letters written on 6th March 1961.

10. In support of Smt. Satyawati it may be pointed out that the letters begin with the recitals that "the oral arrangements arrived at on 3rd March 1961" are being "put on record" thereby. In consonance with this preamble clauses 1 to 14 and 16 and 17 begin with the word "that" to show that they were recording the arrangements which were arrived at on 3rd March 1961. As against this, the following circumstances point to the letters themselves being the documents creating the lease:-

(1) Each of the seventeen paragraphs of the letters uses the future tense (paragraph 15 using the present and the future tenses both) to describe the undertakings of the lessee under this lease. The use of the present and future tenses favors the intention of the parties that the lease was to be created by the letters themselves. If the letters were intended only to record a past transaction then the recitals should have stated that on 3rd March 1961 parties agreed that the lessee was to do such and such thing and so on.

(2) Paragraph 15 does not refer to the past arrangement at all. It begins by saying "we further undertake" etc. The word "further" means that this additional undertaking was given on 6th March 1961 even if an oral arrangement was arrived at on 3rd March 1961. This would mean that the oral arrangement (even if there was any) was not complete. It became complete by the addition of paragraph 15 to it.

(3) In paragraph 17 the second sentence begins as follows: "It is provided that" etc. These words also mean that the provision is made by these letters.

Otherwise the words would have been "it was provided" or some other words of that meaning.

(4) Section 107 of the Transfer of Property Act allows monthly leases to be made by oral agreement accompanied by delivery of possession because such leases are simple transactions where the oral agreement means nothing much more than the amount of rent. All the rest of the terms of a lease are implied by law such as the month being a calendar month, the rent being payable according to the calendar month and the duties of the lessor and the lessee being in accordance with the provisions (such as Section 108) of the Transfer of Property Act and the provisions of the Delhi Rent Control Act, 1958. It is however open to the parties to agree to express terms. Each such express term has to be a result of an express agreement. The larger the number of these express terms and the more complex their nature the less suitable they become to be the subject of an oral agreement. The content of an oral agreement must be such as can be easily remembered by the parties. If the parties are likely to forget some of the terms or if some of the terms are likely to be miss-understood by them, then the parties are likely to intend that the lease should not be merely oral but the terms thereof should be reduced to writing. The letters in question have no less than seventeen paragraphs describing the terms of the lease. They are phrased in legal language. They are so precise that it would require a feat of memory for anyone to remember them exactly as they are worded. It is impossible for ordinary persons to remember all of them particularly because even a slight failure to remember the exact words would make a difference in the terms of the lease. It is impossible for us, therefore, to opine that these letters did not themselves form the lease between the lessor and the lessee. No reasonable person can believe that all these terms were arrived at by the parties to the lease orally and that the parties understood and remembered all of them by an oral agreement.

(5) Further, the number of lessors was five and some of them may be very young. This adds to the difficulty of believing that all these five lessors and the lessee together could be of the same mind (consensus ad idem) regarding the term of the lease by a purely oral agreement without the need of making the lease by a written document.

11. We are of the view, therefore, that even if the lessors had delivered possession of the premises to the lessee on 3rd March 1961 and had come to some oral understanding, the said arrangement was neither precise nor complete and the letters

dated 6th March 1961 formed a part of the same transaction which began with the oral agreement and was completed by the writing of the letters. (*Cohen and Moore v. Commrs. of Inland Revenue*).¹ The result is that the lease as such was created only by the culmination of the agreement into the letters of 6th March 1961 and was not created prior to that.

12. Secondly, it is well known that parties enter into oral agreements or informal agreements. But even if all the terms are so agreed, the parties intend to reduce the agreement to a formal document. If such is the intention of the parties then it is the formal document and not the anterior oral or informal agreements which would constitute the legal transaction or act-in-law. This again is to be found from the intention of the parties in a particular case. (*Union of India v N.K. (P.) Ltd.*, ILR (1971) I Delhi 355). In view of the numerous complicated precise terms of the lease with legal implications in the present case, we are of the view that the transaction of lease was entered into only by the letters in question and not by the previous oral agreement, if any.

13. In arriving at the above conclusion, we have not been unconscious of the legislative policy of the Transfer of Property Act and the Stamp Act not to affect oral leases accompanied by delivery of possession. But the object of the Legislature is to facilitate such informal transactions as are simple and straight forward. If, however, the parties intend to arrive at precise legal terms covering a large number of matters then it would be reasonable to think that the parties are adopting the alternative method of making a bilateral lease under Section 107 of the Transfer of Property Act or a unilateral written instrument which would have to be stamped under Article 35. It is certainly open for parties to avoid the incidence of stamp duty and avail themselves of the cheaper method of making a lease orally. To succeed in so avoiding the chargeability to stamp duty, however, the parties should either be content with an oral agreement or should make it clear that the terms of the oral agreement were merely being recorded subsequently, the intention being that the oral agreement and not the subsequent record constituted the transaction of lease. It would not be harsh to subject the writings containing the terms of the lease to a legal scrutiny with a view to decide whether the particular document is entitled to be exempt from stamp duty on the ground that it is a mere record of a previous oral agreement. Parties who stand to benefit by the avoidance of the stamp duty cannot complain if the method of avoidance is subjected to examination.

14. To the main question, therefore, referred to us, namely, "(1) Whether the

documents are lease deeds chargeable to stamp duty?, our answer is in the affirmative. These letters together constitute one "lease" within the meaning of Section 2(16)(b) of the Stamp Act and are chargeable to duty under Article 35 of Schedule I thereof.

15. Learned counsel for Suit Satyawati did not dispute that if the answer to the main question was against her then the answers to the other two subsidiary questions would also be against her. The other two questions are:-

"(2) Whether the documents are rightly produced before the E.T.O. within the meaning of Section 33 of the Indian Stamp Act, 1899? and

(3) Whether the impoundment by the E.T.O., as such is valid?"

16. On the second question, the finding of fact in the referring order is that the documents were voluntarily produced before the Entertainment Tax Officer and that they were not called by him. If so, they must be held to have been "produced" before the said officer within the meaning of Section 33 of the Indian Stamp Act, 1899, and we opine accordingly.

17. As for question No.3, the Entertainment Tax Officer was "a person in-charge of a public office" within the meaning of Section 33 of the Stamp Act. The instrument was produced before him or came before him in the performance of the functions. Therefore, if it appeared to him that such an instrument was not duly stamped, he had the power to impound the same according to the clear language of Section 33. We, therefore, answer question No.3 also in the affirmative.

18. Reference is answered accordingly without any order as to costs.

Reference answered accordingly.

Cases Referred.

1. (1933) 2 KB 126