Court No. - 19

Case :- WRIT - C No. - 1002960 of 2010

Petitioner :- Rakesh Verma And Another Objection Filed
Respondent :- State Of U.P. Through Principal Secy.Tax And Others
Counsel for Petitioner :- Ram Karan Agarwal,Vivek Kumar Divedi
Counsel for Respondent :- C.S.C.

Hon'ble Manish Mathur,J.

1. Heard learned counsel for petitioner and learned State Counsel for opposite parties.

2. Petition has been filed challenging order dated 23rd July, 2009 passed under Section 47-A/33/40 of the Indian Stamp Act as well as order dated 6th February, 2010 rejecting petitioner's appeal filed under section 56 of the Act.

3. Learned counsel for petitioner submits that entire dispute revolves around interpretation of affidavit dated 4th January, 2007 submitted by petitioner before Additional District Magistrate (Revenue), Barabanki in which the deponent has granted right to the petitioner to enter upon his property for the purposes of excavation of mud to be utilized in the manufacture of bricks.

4. Learned counsel for petitioner submits that by means of impugned orders, the aforesaid document has been treated to be a gift and stamp duty thereupon has been indicated in terms of Article 33 read with Article 23 under Schedule 1(B) of the Indian Stamp Act.

5. It is submitted that the authorities have clearly erred in treating the affidavit to be a gift and therefore to be imposed with stamp duty as conveyance whereas in fact the said affidavit would come within definition of a licence due to which the stamp duty not being indicated for such a licence

would therefore come within Article 5(c) of Schedule 1(B) of the Act.

6. Learned counsel has placed reliance on judgment rendered by Hon'ble Supreme Court in the case of **New Bus Stand Shop Owners Association versus Corporation of Kozhikode and another** (2009) 10 SCC 455 to buttress his submissions.

7. Learned State Counsel has refuted submissions advanced by learned counsel for petitioner with submission that as would be evident from the orders impugned, a right has been created in favour of petitioner with such document having been created voluntarily for benefit of petitioner with acceptance impliedly being given by petitioner and therefore fulfils all the conditions required as per definition of gift under Section 122 of the Transfer of Property Act. It is therefore submitted that stamp duty has been rightly imposed upon petitioner in terms of Article 33 read with Article 23 treating it to be a conveyance.

8. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, particularly statutory provisions, it is evident that a gift has been defined under Section 122 of the Transfer of Property Act as follows:-

"122. “Gift” defined.—“Gift” is the transfer of certain existing moveable or immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.Acceptance when to be made.—Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.If the donee dies before acceptance, the gift is void."

9. The term license has been defined in terms of Section 52 of the Easements Act 1882 as follows:-

"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."

10. Upon consideration of the aforesaid two provisions clearly delineating the definition of gift viz-a-viz licence, it would be evident that the basic difference between an instrument creating a gift or a licence would be the creation of interest in any immovable property. The nature of definition of gift as provided under Section 122 of the Transfer of Property Act clearly indicates transfer of ownership and possession over the property concerned. The gift once made is irrevocable. A gift by its very nature does not indicate retention of any interest by the doner and upon execution of such a deed, interest in the property would naturally devolve upon the donee.

11. In case of a licence, by very definition of the term indicated under Section 52 of the Easements Act, the permission so granted is only to 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. The definition itself indicates that such a right does not amount to an easement or an interest in the property.

12. In such circumstances, in the considered opinion of this Court, the basic difference between a gift and a licence would be transfer of interest on the immovable property.

13. On the said aspect, Supreme Court in the case of **New Bus Stand Shop Owners Association (supra)** has held as follows:-

*"21**.** Relying on those two decisions of the Court of Appeal, this Court in Associated Hotels of India Ltd. v. R.N. Kapoor [AIR*

1959 SC 1262 : (1960) 1 SCR 368] discussed this issue in very lucid terms. K. Subba Rao, J. who was in minority, discussed this question with a clarity which is often associated with His Lordship's opinion. The learned Judge referred to Section 105 of the Transfer of Property Act and then compared it with Section 52 of the Easements Act, 1882. After referring to those two sections and also after referring to the decision in Errington [(1952) 1 KB 290 : (1952) 1 All ER 149 (CA)] the learned Judge pointed out the distinction between the lease and the licence by expressly approving the tests laid down by Lord Denning and which may better be quoted: (Kapoor case [AIR 1959 SC 1262 : (1960) 1 SCR 368] , AIR pp. 1269-70, para 27)

"27. … The following propositions may, therefore, be taken as 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." (SCR pp. 384-85 of the Report)

22. If we apply the aforesaid principles in the facts of the case in hand, we are bound to hold that the agreement between the parties merely falls under the category of licence as the licensee is never given the exclusive possession. The Corporation retained the exclusive possession of the shops and this is clear from the conditions of the licence discussed above."

14. Although the aforesaid judgment is a proposition for a difference between a lease or a licence but in the considered opinion of this Court, the aforesaid differentiation would be applicable also in the case of interpretation of deed of gift viz-a-viz a deed of licence, particularly since the document in question does not grant exclusive possession to petitioner.

15. The impugned orders have placed reliance on Article 33 of Schedule 1(B) of the Indian Stamp Act to indicate the affidavit as coming within definition of gift. However it is noticeable that the term 'gift' has not been defined in the Indian Stamp Act and therefore to derive interpretation or definition of the said provision, necessary recourse has to be taken to Section 122 of the Transfer of Property Act.

16. Article 33 of the Indian Stamp Act merely provides that any instrument not being a settlement under Article 58 or will or a transfer under Article 62 of Schedule 1(B) would be a gift. Such an expansive definition can not be provided to any instrument for the purposes of indicating it to be a gift particularly since gift has already been defined in terms of Section 122 of the Transfer of Property Act which definition would govern all the instruments executed in pursuance thereof.

17. Upon applicability of aforesaid facts and circumstances in the present case, the affidavit dated 4th January, 2007, perusal of which, will clearly indicate that only a right has been granted to the petitioner to excavate mud from the immovable property of the deponent. The affidavit does not indicate any transfer of interest in the immovable property upon the petitioner.

18. In such circumstances, the instrument being the affidavit clearly fulfils the definition of licence as envisaged under Section 52 of the Easements Act.

19. Findings recorded to the contrary in the impugned orders

are therefore clearly erroneous.

20. In view of aforesaid, the impugned orders dated 23rd July, 2009 and 6th February, 2010 are hereby quashed by issuance of writ in the nature of Certiorari.

21.Resultantly the petition succeeds and is allowed. Parties to bear their own cost.

Order Date :- 10.12.2024
prabhat

Digitally signed by :-
PRABHAT KUMAR
High Court of Judicature at Allahabad,
Lucknow Bench