BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 22.12.2022

Pronounced on : 07.06.2023

CORAM

THE HON'BLE MR.JUSTICE G.R.SWAMINATHAN

WP(MD)No.4658 of 2021
and
WMP(MD)Nos.3770 & 9268 of 2021

S.R.Trust rep.by its Trustee,
G.Sakthi Saravanan,
Meenakshi Mission Hospital &
Research Centre,
Lake Area, Melur Road,
Madurai – 625 107. ... Petitioner

v.

1.The Inspector General of Registration,
No.100, Santhome High Road,
Chennai – 600 028.

2.The District Registrar (Admn),
Deputy Inspector General of Registration,
Madurai North Regn.Dist, Madurai – 625 107.

3.The Sub Registrar,
Othakadai Sub Registrar Office,
TNAU Nagar, Rajakambeeram,
Y.Othakadai, Madurai – 625 107.

4.Sunmed Healthcare Pvt.Ltd.,
Plot No.39, 5/103D, VIP Garden, 5th Ward,
Narasingam, Opp.to High Court,
Madurai – 625 107. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus to call for the records of the first respondent in his proceeding No.31870/P1/2020 dated 01.12.2020 rejecting the appeal filed by the petitioner trust and confirming the order passed by the second respondent under Section 40(1)(b) of the Stamp Act in its proceeding No.922/B1/2020 dated 21.02.2020, quash the aforesaid proceedings of the first and second respondent and direct to release of the document Memorandum of Understanding executed between the petitioner trust and fourth respondent dated 27.04.2019 (pending document No.P.02 of 2019 dated 19.07.2019) after collecting the stamp duty in terms of Art.5(c) (ii) of the Schedule to the Indian Stamp Act, 1899, forthwith.

For Petitioner : Mr.K.Subramanian, Senior Counsel
for Mr.K.Prabakar

For Respondents : Mr.Veera Kathiravan,
Additional Advocate General assisted by
Mr.S.Shanmugavel,
Additional Government Pleader for R1 to R3

Mr.A.L.Kannan for R4

ORDER

The petitioner is a registered public trust. It is running a hospital in the name of Meenakshi Mission Hospital and Research Centre, Madurai. It entered into a Memorandum of Understanding with one Sunmed Healthcare Private Limited, Madurai which offered to build a new hospital in the land adjacent to the trust hospital. The Memorandum of Understanding dated 27.04.2019 was presented for registration before the Sub Registrar, Othakadai. After presenting the document for registration, the parties to the document had second thoughts and felt that the MoU did not require registration. They, therefore, called upon the Sub-Registrar, Othakadai to return the MoU which had been kept as a pending document. The registering authority after examining the pending document came to the conclusion that a sum of Rs.44,26,29,836/- was liable to be paid towards deficit stamp duty. The District Registrar (Administration), thereupon, issued notice dated 10.02.2020 calling upon the petitioner and Sunmed Healthcare Private Limited to offer their explanation as to why steps should not be taken for recovering the said deficit stamp duty. The District Registrar (Administration) subsequently issued proceedings dated 21.02.2020 directing the petitioner to pay the aforesaid amount towards deficit stamp duty. Aggrieved by the same, the petitioner appealed to the I.G of Registration to return the document as they were not pressing for registration. The I.G of Registration informed the petitioner vide communication dated 01.12.2020 that their request for return of document cannot be complied with. Challenging the said communications, the present writ petition has been filed.

2.The learned Senior Counsel appearing for the petitioner reiterated all the contentions set out in the affidavit filed in support of the writ petition. He also relied on a catena of case-laws in support of his contention that the MoU had been erroneously construed by the registering authority. He made it clear that since the stand of the appellate authority had been made clear before this Court, no purpose will be served by relegating the petitioner to go before the appellate authority. Though the petitioner originally wanted return of the document, since return of a document presented for registration is not permissible, the learned Senior Counsel called upon this Court to adjudicate the issue of levy of stamp duty on merits. His firm stand is that the impugned demand by the registering authority is illegal.

3.The respondents have filed counter affidavit. After taking me through the relevant provisions of the Indian Stamp Act, 1899, the learned Additional Advocate General contended that the document in question is very much a lease. He would further submit that the stamp duty had been correctly levied. He called upon this Court to bear in mind that in view of the incorporation of automatic renewal clause, the lease period is fifty years. He also wanted this Court to bear in mind the consideration involved in the transaction. He pressed for dismissal of the writ petition.

4.I carefully considered the rival contentions and went through the materials on record. The petitioner trust entered into a Memorandum of Understanding with Sunmed Healthcare Private Limited on 27.04.2019 with certain objectives. They are evident from the recitals found in the Memorandum of Understanding. In view of the notification dated 29.07.2016 issued by the Joint Director of Health Services (IRDA), it became necessary for the hospital run by the petitioner trust to obtain NABH accreditation. To obtain the same, certain parameters are needed to be fulfilled. That would be possible only by building a new hospital or by entering into a Memorandum of Understanding with another hospital. Sunmed Healthcare Private Limited offered to build a new hospital in the leased land. To access the same, a road or pathway had to be formed. To enable Sunmed Healthcare Private Limited to do so, Clause 3.4 was incorporated in the Memorandum of Understanding. It reads as follows :

> "3.4.The Parties agree and acknowledge the following in respect of lease of certain land parcels by the Trust to Sunmed :-
>
> (a) The Trust shall lease its property situated at Survey No. 161/1 (admeasuring 22.79 cents or 9927.32 square feet) and Survey No.171/2A1 (admeasuring 5.23 cents or 2278.18 square feet) in Madurai ("Lease Premises") to Sunmed for the purpose of forming a road or pathway to exit, for a period of 10 (ten) years at a time, which shall stand automatically renewed (five) times, up till a total period of 50 (fifty) years.

(b) In consideration for lease of the Lease Premises, Sunmed shall be required to pay the Trust, an amount of INR 1,05,075/- (Indian Rupees One Lakh Five Thousand and Seventy Five Only) per month as rent, which rent amount shall increase by 30% (thirty per cent) at the end of every 10(ten) year period of such lease. This rent can be paid by bank transfer OR can be deducted from the receivables of the Sunmed from the Trust.

(c) The Leased premises shall be used as a common pathway by each of the Trust and Sunmed, including as an additional fire exit for the Trust Hospital.

(d) The trust shall apply a no objection certificate from HDFC bank and Axis bank regarding the lease for land at Survey No.161/1 (admeasuring 22.79 cents or 9927.32 square feet) because that land is hypothecated to them as of today.

(e) If needed, the trust shall get all necessary approvals from governmental authority for executing this lease."

5.According to the respondents, this amounts to creation of lease attracting Article 35(b) of the Schedule I of the Indian Stamp Act, 1899. The stand of the petitioner is that Clause 3.4 only confers license on Sunmed and that it does not create any lease as such. The learned Senior Counsel appearing for the petitioner, no doubt, is right is his contention that the employment of the expression "lease" is not determinative of the issue. This is a well settled proposition. The Punjab and Haryana High Court (K.Kannan, J) in ***Madhu Behal v. Rishi Kumar (2009 SCC OnLine P&H 141)*** held as follows :

"It is never a nomenclature in the document that would govern the decision when the issue is put to test as to whether a document is 'lease' or a 'license'.

The distinction between "lease" and "license" is well settled. "Lease" has been defined in Section 105 of the Transfer of Property Act 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, 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......".

Section 52 of the Indian Easement Act, 1882 defines "license" as follows :

"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."

In several decisions, the distinction between the two has been highlighted. In ***Associated Hotels of India Ltd. v. R.N. Kapoor (*****AIR 1959 SC 1262),** it was held as follows :

"28.There is a marked distinction between a lease and a licence. Section 105 of the Transfer of Property Act defines a lease of immovable property as a transfer of a right to enjoy such property made for a certain time in consideration for a price paid or promised. Under Section 108 of the said Act, the lessee is entitled to be put in possession of the property. A lease is therefore a transfer of an interest in land. The interest transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. Whereas Section 52 of the Indian Easements Act defines a licence thus:

"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."

Under the aforesaid section, 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....."

In ***Rajbir Kaur v. S. Chokesiri and Co., [(1989) 1 SCC 19]***, it was held as follows :

> 28. ".............While the definition of "lease" in Section 105 of the Transfer of Property Act, 1882, envisages the transfer of a right to enjoy the property, on the other hand the definition of a "licence" under Section 52 of the Indian Easements Act, 1882, consistently with the above, excludes from its pale any transaction which otherwise, amounts to an "easement" or involves a transfer of an interest in the property, which is usually involved in the case of a transfer of right to enjoy it.............".

Now, the only point to probe is whether under clause 3.4 of the Memorandum of Understanding, an interest in the property has been created in favour of Sunmed Healthcare Private Limited. Clause 3.4 (a) of the Memorandum of Understanding itself states that the property is leased in favour of Sunmed Healthcare Private Limited for the purpose of forming a road or pathway to exist. Initially, the lease period is to be for ten years. There is an automatic renewal and the period may go up to fifty years. The consideration payable by Sunmed Healthcare Private Limited has been fixed at Rs.105075/- as rent. Of course, Clause 3.4 (c) states that the leased premises shall be used as common pathway by the petitioner as well as the Sunmed Healthcare Private Limited. Merely because Sunmed Healthcare Private Limited has not been given exclusive possession, that does not mean that the transaction is not a lease. Exclusive possession is not an essential or mandatory feature of lease. It is obvious that Sunmed will have joint possession. Even if I discount the employment of the expression “lease”, “leased premises” and “rent”, on a careful reading of the entire clause, one can easily come to the conclusion that an interest in the property has been created in favour of Sunmed Healthcare Private Limited. Of course, the leased premises will be used as common pathway as per the Memorandum of Understanding. It is not a mere permission which can be revoked at will. It is not a mere right to use alone. It is Sunmed Healthcare Private Limited that will be forming the road. If in future, the petitioner interferes with the rights of Sunmed Healthcare Private Limited, it can definitely go to court to enforce its rights to use the pathway. The clause 3.4 cannot be read in isolation. A hospital is to be built on the adjacent land by Sunmed and this pathway is to be laid by Sunmed to access the same. The right to use the pathway is based on the interest created in the property. The authority is justified in treating this transaction as one of lease and levying stamp duty under Article 35(b) of Schedule I of the Stamp Act.

6.However, the authority erred in levying stamp duty by treating the lease period as fifty years. It is true that there is a renewal clause. But then, the original lease period is only ten years and whether the lease would stand renewed or not rather lies in the realm of future. Such renewal clauses have been considered in quite a few decisions. In ***Gopal Swarup Chaturvedi v. State of U.P., (2006 SCC OnLine All 1157)***, it was held as follows :

> "15. The word 'renewed' has been used by the legislature in the provisions of section 116 of the Transfer of Property Act, 1882 and it had been interpreted by the Courts time and again as grant of fresh lease.
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> 17. Renewal has been given the meaning in various Dictionaries as to begin again, to repeat, to make again, to substitute new for, to acquire again, to restore, reestablish, to set up again, bring back into use or in existence, to take up again or recommence, to replace by some new or fresh thing of the same kind or a fresh supply. Thus, renewal of lease is nothing but a grant of lease for a fresh period."

Therefore, the authority erred in treating the lease period as fifty years. To this extent, the impugned order warrants interference. The authority is directed to revisit the issue and levy stamp duty by treating the lease period as one for ten years.

7.The Memorandum of Understanding provides for sharing of space in the new hospital. This expression has been defined in the MoU itself in the following terms :

> "Shared space shall mean the space shared in the new hospital which is 30% of the inpatient beds and common space in

> one lac square feet constructed area. The shared space will be the 30% of space in the constructed area which shall be measured from the ground floor to above till the constructed area reaches 1 lac square feet. Any space over and above the 1 lac square feet constructed area shall not be considered for the calculation of the shared space."

In consideration thereof, the petitioner has to pay Sunmed Healthcare Private Limited an amount of Rs.1.00 crore every month as license fee towards utilisation of shared space. This transaction has also been treated as one of lease by the registering authority. The legal principles as to whether a transaction is to be treated as lease or license have already been set out above. It is too obvious that no interest in the new hospital has been created in favour of the petitioner. Therefore, the arrangement is only license and not lease. The levy of stamp duty under this head for utilisation of shared space is set aside.

8.The authority also erred in levying stamp duty on security deposit. The Delhi High Court in ***Chief Controlling Revenue Authority v. Marshal Produce Brokers Co. Pvt. Ltd.*****, 1978 SCC OnLine Del 157** had held as follows :

> "**12.**In the result we are of the opinion that the duty is not chargeable under Article 35(c) of Schedule 1-A of the Indian Stamp Act, 1899 on the amount of security/deposit/advance, which is

refundable on determination of the lease, in addition to the duty paid on the rent reserved under Article 35(a) of the Schedule. It will not make any difference in the chargeability of duty. If such deposit/advance is adjustable in rent/other charges/dues payable under the lease. The amount of security deposit paid for the due performance of the contract of lease is chargeable under Article 57 of the Schedule read with Section 5 of the Act."

The Madras High Court in ***M/s.DLF Home Developers Limited vs. Chief Controlling Revenue Authority and Inspector General of Registration (CMA NO.2638 of 2012)*** had held as follows :

> "19.Thus, it is clear that for advance rental deposit or security deposit paid for monitoring proper performance of obligations of the parties, stamp duty need not be paid."

The levy of stamp duty under this head also is set aside. The order impugned in this writ petition is interfered with to the extent mentioned above. This writ petition is partly allowed. No costs. Connected miscellaneous petitions are closed.

07.06.2023

SKM

Note : Issue order today (08.06.2023)

To

1.The Inspector General of Registration,
No.100, Santhome High Road, Chennai – 600 028.

2.The District Registrar (Admn),
Deputy Inspector General of Registration,
Madurai North Regn.Dist, Madurai – 625 107.

3.The Sub Registrar,
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G.R.SWAMINATHAN, J.

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