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EMPEROR v. JAGDAMBA PRASAD

Bangaru Asari v. *Emperor* (1) by a Bench of the Madras High Court, in which the decision of STRAIGHT, J., in *Empress of India* v. *Kallu* (2) was followed and approved. I have not been referred to any decision of a Bench of the Allahabad High Court on the exact point raised in the present case, but the preponderance of authority both of the High Courts of Calcutta and Madras is strongly in favour of the present appellants, and though single Judges of this Court have not always followed the decision of STRAIGHT, J., in *Empress of India* v. *Kallu* (2), I feel that I am fully justified in holding that it may be considered still to be good law.

The appeal is, therefore, allowed on this legal ground, and it is unnecessary for me to consider the facts of the case. I set aside the order of conviction and the sentences passed by the Additional Sessions Judge, and direct that the appellants be acquitted and released. As they are on bail, their sureties may be discharged.

FULL BENCH

Before Sir Shah Muhammad Sulaiman, Chief Justice, Justice Sir Lal Gopal Mukerji and Mr. Justice King

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IN THE MATTER OF BURMAH SHELL OIL STORAGE AND DISTRIBUTING COMPANY OF INDIA, LIMITED*

Stamp Act (II of 1899), section 2(16) and article 35(a)(iv)—"Lease"—Undertaking in writing to occupy immovable property—Construction of document—Lease or license—Whether exclusive possession and enjoyment given.

Under a bilateral agreement in writing, called an agreement of license, between the Secretary of State for India and the Burmah Shell Oil Storage Company the company was to have the use and occupation of certain railway land belonging to the State, for the purpose of constructing a petroleum storage installation. The company had to pay a certain amount

*Miscellaneous Case No. 124 of 1933.

(1) (1903) I.L.R., 27 Mad., 61. (2) (1882) I.L.R., 5 All., 233.

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monthly for the use of the plot, without any right of transfer or subletting. The company was to erect certain substantial constructions of a permanent character on the land, and allow certain officials of the railway access to the land at any time for inspection of the condition of the buildings. In case of breach of any of the conditions by the company the "license" could be determined by giving seven days' notice; also either party was at liberty to determine it by giving three months' notice at any time. The deed expressly provided that nothing contained in it should be construed to create a tenancy. The question arose whether the deed was chargeable with stamp duty as a lease or was exempt from stamp duty as creating a mere license.

Held that the document in question was a lease within the definition in section 2 (16), clause (*b*) of the Stamp Act, as it was an undertaking in writing to occupy immovable property and was not a counterpart of a lease, and was therefore chargeable with stamp duty under article 35(*a*)(*iv*) of schedule I of the Stamp Act.

The definition of "lease" as contained in the Stamp Act is wider and more comprehensive than the definition in the Transfer of Property Act and includes transactions which may not amount to a lease under the latter Act.

Per SULAIMAN, C. J.—So long as the transaction remained in force the Oil Company had exclusive possession and enjoyment of the land, the only restriction being that it was bound to allow the railway officers to inspect the premises. This was obvious from the fact that the company was to put up a substantial building of a permanent character, and after the construction of the building the actual possession of the land could not remain with the railway administration, only their officer was allowed access for purposes of inspection. The transaction, therefore, was not a mere license as defined in section 52 of the Easements Act, as a license does not confer exclusive possession and enjoyment. The document, therefore, was not exempt from stamp duty as being a license.

Per MUKERJI, J.—If the document comes within the definition of the word "lease" contained in the Stamp Act, it must be held chargeable with stamp duty as a lease, although it may also be held that the transaction would be a license within the meaning of section 52 of the Easements Act.

Mr. *Muhammad Ismail* (Government Advocate), for the Crown.

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Mr. *Ladli Prasad Zutshi*, for the Company.

SULAIMAN, C. J. :—This is a reference by the Board of Revenue under section 57 of the Indian Stamp Act (Act II of 1899) for the expression of an opinion as to whether the document in question is chargeable as a lease under article 35(*a*)(*iv*), schedule I, of the Stamp Act or an indemnity bond or an agreement chargeable with less duty.

It appears that an agreement was executed on a blank paper on behalf of the Secretary of State which was also signed by the representative of the Burmah Shell Oil Storage and Distributing Company of India, Limited, and was dated the 7th of September, 1931. Under this document the Oil Company, which is called the licensee throughout, was to have the temporary use or occupation of a piece of land at Roorkee, solely and entirely for the purpose of constructing and maintaining thereon a petroleum installation for the storage of petroleum, etc.; the Company was forthwith to erect on part of the said land a petroleum installation at its own cost capable of holding, in the case of existing installation, not less than 5,000 gallons, and in the case of new installations not less than 6,500 gallons, of petroleum in bulk; the company was, however, bound, before proceeding to construct any building or other structure or works in connection with the said land, to supply detailed plans and specifications to the railway authorities for approval, but after such approval the company had forthwith to proceed with the erection and construction of the said petroleum installation or other works as sanctioned. The company was however bound to allow the Divisional Superintendent or any other authorised officer of the railway administration free access at all times to the said land and to the pet- rebuild, replace or repair buildings and other works, etc. and was bound, whenever so requested by such officer, to rebuild, replace or repair buildings and other works, etc. which were considered by him to be improperly situated

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or to be of defective design or construction or in want of repair. The company was to pay to the railway administration a sum of Rs.214-8, at the rate of Rs.2-8 per thousand square feet, every month or part thereof in return for the use of the plot of land occupied by the company; such payment was considered to be due and payable each and every year in advance within the first week of that year and the company was also to pay all local cesses, rates and taxes which might be payable in respect of the land and the installation buildings and works, etc. There was a provision that the company shall not transfer or sublet or in any way part with the privileges conferred upon the company; and then there were also provisions regulating the sale of petroleum, its carriage and storage, with which we are not concerned. Paragraph 11 provided that in the event of the company being guilty of breach of any of the provisions of the document it would be lawful for the railway administration to determine and cancel the license upon seven clear days' written notice and at the expiration of the period of such notice the license was to be determined and cancelled unless the notice was previously revoked. Paragraph 12 provided that these privileges were granted on the express understanding that either party would be at liberty to determine and put an end to this transaction by giving to the other of them at any time three months' notice.

Paragraph 13, on which great reliance is placed on behalf of the company, stated that nothing contained in the document should be construed to create a tenancy in favour of the company or to prejudice or affect the rights and powers of the railway administration in and over and in relation to the said land and the use and enjoyment thereof and the exercise by the licensee of the liberties and licenses thereby granted. It then proceeded to state that the railway administration would have full and absolute power from time to time to direct in what manner such liberties and licenses should be exercised and

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enjoyed and that the company would not be at liberty to exercise the said liberties and licenses otherwise than in such manner as the administration shall from time to time direct. It then provided that on the determination of the license the railway administration would re-enter upon and re-take and absolutely retain possession of the land. The company was at all times to keep the administration indemnified against and to reimburse to the administration all claims, demands, damages, etc., which the administration may have to sustain or incur.

Last of all the document provided that the company was to pay the cost of the preparation, stamping, execution and registration.

As pointed out above, the document was never stamped but was presented for registration. The sole question for consideration before us is whether this document created a mere license in favour of the Oil Company, so as to be exempt from stamp duty.

There is no doubt that we have to consider the provisions of the Stamp Act for the purpose of answering this question. License is not defined in the Stamp Act at all, but it is defined in section 52 of the Easements Act as follows: "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." It is obvious that in the absence of any other definition of "license", the definition of it as contained in the Easements Act might well be adopted. *Prima facie*, a license merely grants a right to do or permit to do something, which would otherwise be unlawful, upon an immovable property. Obviously it is not a transfer of any interest in immovable property, nor *prima facie* is it a transfer of a right to exclusive possession over that property. It is equally clear that a right

cannot amount to a license if it falls under the definition of an easement or amounts to an interest in the immovable property itself.

"Lease" is defined both in the Transfer of Property Act and in the Stamp Act. Under section 105 of the Transfer of Property Act a lease is a transfer of a right to enjoy immovable property made for a certain time, express or implied, or in perpetuity in consideration of a price paid or promised, etc. If we had to go entirely by the definition of "lease" as contained in section 105, it may be difficult to hold that a transaction amounts to a lease when there is no transfer of a right to enjoy the property for a certain time. But section 2, sub-section (16) of the Indian Stamp Act, while presumably borrowing the definition of "lease" as contained in the Transfer of Property Act, adds thereto a provision that "lease" shall include also, among other things, a qabuliat or other undertaking in writing (not being a counterpart of a lease), to cultivate, occupy or pay or deliver rent for, immovable property.

The use of the words "include also" obviously implies that the definition of "lease" as contained in the Stamp Act is wider and more comprehensive than the definition of it in section 105 of the Transfer of Property Act. It would follow that even if a transaction does not amount to a lease under section 105 of the latter Act, it may nevertheless be a lease for the purposes of the Stamp Act.

No doubt the parties call this document an agreement by way of license, and throughout that document the same phraseology has been used and the parties are called licensor and licensee. There is also a clear statement that this deed should not be construed to create a tenancy in favour of the Oil Company. It is, however, clear that such recitals in a document can never be conclusive, and we have to look to the substance of the terms agreed upon and not to the nomenclature given to the deed by the parties.

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In many cases the distinction between a license and a lease is a very narrow and thin one and there may be considerable difficulty in deciding whether a transaction amounts to a lease or a license. There are many points which make this transaction resemble a lease. On the other hand, there are others which make it resemble a license. We have already noticed that there is no right to transfer or sublet or in any way part with the privileges conferred by this document and that the transaction was to be determined and cancelled at very short notice and there was to be a right of free access for all time to the land in favour of the Divisional Superintendent or any other authorised officer of the railway administration. On the other hand, there is no doubt that the use and occupation of the land during the period when this transaction was to remain in force were transferred to the Oil Company, and they were forthwith to erect on a part of the land a building or other structure of a substantial and permanent character, and when the transaction was to be terminated the railway administration had the right to re-enter upon, re-take and absolutely retain the possession of the said land. The provision in paragraph 13 is *prima facie* inconsistent with the provision in paragraph 1 of the agreement; but on comparison of the different phraseologies used at the two places it seems that they are not necessarily contradictory. While temporary use and occupation were handed over to the Oil Company, the railway administration retained their rights and powers in and over and in relation to the use and enjoyment of the land and full and absolute power to give directions in what manner the liberties and privileges would be exercised, that is to say, the control was retained by the railway administration but the use and occupation were certainly transferred to the Oil Company. This is obvious from the fact that the company was to put up a substantial building of a permanent character and after the construction of the building the actual possession of the land could not

remain with the railway administration, only their officer was allowed access to the land for the purposes of inspection.

In view of these provisions it is quite clear that so long as the transaction remained in force and was not terminated and the Oil Company was not ejected and the railway administration did not re-enter, the former had exclusive possession and enjoyment of the land for the time being, the only restriction being that they were bound to allow the railway officers to inspect the premises. On this view of the terms of the document alone the transaction would not be a mere license within the scope of section 52 of the Indian Easements Act, as a license does not confer exclusive possession and enjoyment.

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As pointed out above, the definition of "lease" in the Stamp Act, which does not contain any definition of "license" at all, is wide enough to include the present transaction. If there was an undertaking on the part of the Oil Company in writing, which was not a counterpart of a lease, and the undertaking was to occupy or pay or deliver rent for immovable property, the document would be a lease of an immovable property within the meaning of the Stamp Act and would therefore be liable to stamp duty. The learned advocate for the company has urged that section 2, sub-section (16), sub-clause (*b*) contemplates a case where there is not a composite agreement signed by both the lessor and the lessee, but only a unilateral agreement signed by the lessee in the form of qabuliat or a counterpart of a lease. This contention cannot be accepted because the undertaking referred to therein has to be other than a counterpart of a lease and it need not necessarily be the qabuliat which is expressly mentioned. It is also obvious that the mere fact that the lessor also is a party to the same document and has signed it would not take it outside the scope of the sub-clause.

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In the present case the Oil Company which had the use and occupation of the land was bound forthwith to erect on a part of the said land a petroleum installation and to maintain the building and the structures in proper condition and take necessary precautions and safeguards. Even if they did not actually occupy the land, they were liable to make periodical payments. It is therefore very difficult to say that this document did not amount to an undertaking in writing to occupy an immovable property.

Great reliance has been placed on the Full Bench case of *Board of Revenue* v. *South Indian Railway Company* (1) in which the agreement was somewhat similar. But there the right given by the railway company to the municipal council was for the purpose of storing coal imported by the municipality on the land in the possession of the company. It also appears that the railway company had no authority whatsoever to grant a lease of the land and could grant only a license for it. The municipal council was not to put up any construction of a permanent character on the land, although there was a fixed amount called rent which was payable by the municipal council. The case came under the Stamp Act, apparently amended by a Local Act of the Madras Presidency. Unfortunately the amended Act is not before us, and it is not possible to verify the references to the various sections in it, which do not exactly tally with the Stamp Act which we have to consider. But the learned CHIEF JUSTICE, with whose view the other learned Judges agreed, laid emphasis on the circumstance that the railway company was prohibited by orders of the Government of India from executing leases of land in their possession and considered that circumstance important for the purpose of understanding the intention of the framers of the document.

KRISHNAN, J., in addition also thought that the case would not fall under section 2(16) of the Stamp Act as it

(1) (1924) I.L.R., 48 Mad. 368.

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could not be said that there was an undertaking in writing to occupy or pay or deliver rent for the immovable property. The learned Judges considered that the use of the word "rent" in the document before them was unfortunate and unhappy and the word was not used in the same sense as it was used in the statute itself.

A right to store coal on a piece of land without a right to put up a building thereon is very much in the nature of a mere license, and it may well be said that there is no right to occupy the land in the sense of retaining exclusive possession over it but it is a mere right to use the land for that purpose. That case is therefore clearly distinguishable from the case before us. Here the use and occupation were transferred and there could not be a simultaneous possession exercised by the railway administration when a substantial building was put up on the land. There was also an undertaking by the Oil Company to occupy the land and make payments in the nature of rent.

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In my opinion, therefore, the document in question is a lease within the definition of that term under section 2, sub-section (16), clause (*b*) and is therefore chargeable as a lease under article 35(*a*)(*iv*) of schedule I.

MUKERJI, J. :—I entirely agree that the document in question is a lease within the definition of that term to be found in the Indian Stamp Act, 1899, section 2(16) and should have been stamped in accordance with schedule I, article 35, clause (*a*), sub-clause (*iv*).

The language of the agreement has been noticed at length by the learned CHIEF JUSTICE and I do not feel called upon to re-state the purport of the same. Briefly, a company dealing with petroleum and enjoying a very big name, obtained land from a railway administration for the purpose of storing on it petroleum. The company agreed to pay a certain sum of money, monthly, for the benefit derived, namely use and occupation of the land. The question is whether an agreement like this

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should be at all stamped, and if so, under what rule of law.

In my opinion the answer to the question should be looked for in the Stamp Act, and the Stamp Act alone. It is true that the term "lease" has been defined in the Transfer of Property Act and that the term "license", as defined in the Indian Easements Act, finds no place in the Stamp Act. It is not for me to find out the reason why different definitions have been provided in the Stamp Act and in the Transfer of Property Act for the term "lease" and why the word "license" has not found any place in the Stamp Act. It may be that for the purposes of levying duty the legislature thought it necessary to charge certain documents and not to charge certain others. We have to read the mind of the legislature only through the language employed by it and not by speculation.

If we read the Stamp Act and if we find that the document comes within the definition of the word "lease", we must hold that the document is chargeable with duty even if we should also hold that the transaction would be a license within the meaning of section 52 of the Indian Easements Act. It is possible, nay it is probable, that it was in the mind of the legislature to levy a duty where a transaction, which was a mere license under the Easements Act, was reduced to writing, and that therefore it did not think it necessary to define the word "license". The transaction fell within the widened definition of the word "lease".

In the Stamp Act the term "lease" is described in several ways. First of all, it is said that lease means a lease of immovable property, and this, presumably, means a lease which is a lease within the meaning of the Transfer of Property Act. Then the Act says that it includes "patta", a term which is not again defined. Then it says that a lease includes ". . . . . undertaking in writing . . . . . .to . . . .occupy . . .

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immovable property." We need not go further, for in my opinion the agreement before us comes clearly within the language quoted above. This is a document by which the Petroleum Company gave an undertaking in writing to occupy immovable property. Now this document is not a counterpart of a lease, because there is no separate lease. The reason why counterparts of a lease have been exempted from the definition is that counterparts are separately provided for, where the original or the principal document is properly stamped; *vide* Stamp Act, schedule I, article 25. The document before us has been signed both by the grantor and the grantee (I am using expressions which cannot be taken exception to). There being no patta or a lease, the document is not a counterpart of a lease. It is simply an undertaking in writing to occupy an immovable property. In this view, whether the transaction is a mere license within the meaning of section 52 of the Indian Easements Act or whether it is a lease within the meaning of the Transfer of Property Act, for purposes of stamp duty, it is chargeable. As it is not for any definite term, the duty chargeable is the duty laid down in schedule I, article 35, clause (*a*), sub-clause (*iv*).

The learned counsel for the company has strongly relied on a Madras decision, namely *Board of Revenue* v. *South Indian Railway Company* (1). The decision is certainly in conflict with the opinion expressed above and I would, with the greatest respect, dissent from that judgment. A difficulty has arisen in interpreting that judgment because of the reference to some Act which is not before us. The Stamp Act which we have got before us does not mention a "lease" in schedule I, article 30. Two of the learned Judges did not consider the definition of "lease" to be found in the Indian Stamp Act and the learned third Judge seems to hold that the word "lease" as stated in the Stamp Act must be a lease as defined in the Transfer of Property Act, and a license for the

(1) (1924) I.L.R., 48 Mad., 368.

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purposes of stamp duty must be the license as defined in the Easements Act. In my view we should not look into either the Transfer of Property Act or the Easements Act. We should confine our attention to the definition given in the Stamp Act and the Stamp Act alone.

For the reasons given above I concur in the opinion expressed by the learned CHIEF JUSTICE.

KING, J. :—I also agree. In my opinion the document in question is clearly an undertaking in writing to occupy immovable property, and is not a counterpart of a lease, and must therefore be treated as a lease for the purposes of the Indian Stamp Act.

BY THE COURT :—The document in question is a lease and is chargeable with duty under article 35(*a*)(*iv*) of schedule I.

REVISIONAL CRIMINAL

Before Mr. Justice Kendall

1933
July, 18

DHONDHA KANDOO *v.* SITARAM AND OTHERS*

Criminal Procedure Code, sections 258(1), 366 *and* 367—*Magistrate acquitting the accused without writing a judgment except a note on the order sheet—Judgment written a month later—Irregularity—No miscarriage of justice—Criminal Procedure Code, section* 537.

In a case under section 325 of the Indian Penal Code the trying Magistrate acquitted the accused, without writing and delivering any judgment, but merely recording an informal order of acquittal on the order sheet. On an application in revision being made to the District Magistrate, he directed the trying Magistrate to write and pronounce a judgment; and thereupon the latter wrote a judgment of acquittal, reviewing the facts of the case and discussing the evidence; this was done about a month after the accused had been acquitted. *Held* that the procedure of the Magistrate in directing the accused to be acquitted without writing a judgment was undoubtedly

*Criminal Revision No. 222 of 1933, from an order of Faiyaz Husain Rizwi, Magistrate, second class, of Azamgarh, dated the 19th of January, 1933.