

**In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 512 of 2019

Atma Ram Saraf

Vs.

The State of West Bengal and 4 others

For the petitioner : Mr. Aniruddha Mitra,
Mr. Rajdeep Bhattacharya,
Mr. D. Mitra,
Mr. Arindam Banerjee

For respondents : Mr. Ayan Banerjee

Hearing concluded on : 14.01.2021

Judgment on : 21.01.2021

The Court:

1. The Governor of West Bengal granted lease of plot no. AC-137, Sector-I, Bidhannagar, Kolkata – 700 064 in favour of one Adhir Kumar Ganguly for 999 years, by a registered deed of lease dated January 11, 1972. Adhir Kumar Ganguly, by a registered deed of transfer dated November 11, 1987, transferred his leasehold right in the plot to Atma Ram Saraf and Kishan Kumar Saraf. The transferees obtained a sanctioned plan, subsequently revised, for construction of a three-storied building on the said plot and had their names mutated in the records of the Urban Development Department, Government of West Bengal. Subsequently, Atma Ram Saraf (present petitioner), executed a gift deed of his undivided half share in the leasehold property to his brother Gouri Shankar Saraf (respondent no.5). The said deed was presented for registration before the Additional Registrar of Assurances-II, Kolkata. The petitioner made a query for assessment of

stamp duty and registration charges for the said deed. Such query was answered by assessing the stamp duty at Rs.2,41,713/-. The petitioner deposited the said stamp duty and registration charges on July 2, 2019 through the GRIPS System. The query and assessed market value were valid for 30 days (that is, upto July 26, 2019) from the date of e-payment.

- 2.** However, subsequently, the Registering Authority refused to complete the registration process on the ground that stamp duty would be payable on the gift deed as per market value of the property, that is, at the rate of 6 per cent of the market value, and not half per cent of the market value which is charged for gift deeds between blood relations. The petitioner has preferred the writ petition challenging such assessment and consequential inaction of the respondent-authorities in refusing to register the gift deed unless the balance stamp duty was paid.
- 3.** Learned counsel for the petitioner argues that the original lease in favour of Adhir Kumar Ganguly was granted for 999 years. It was mentioned in Clause 2(2) of the said deed that it was one of the duties of the lessee to pay all rates and taxes and other impositions in respect of the demised land and structure as assessed to be payable by the “owner” or the occupier thereof. Hence, it is argued that the transfer-in-question pertained to rights in the property, which was, for all practical purposes, akin to ownership rights in view of the long period of the lease. Thus, counsel submits, stamp duty payable on the deed of gift ought to have been assessed at half of one per centum of

the market value as per Article 33(i) of Schedule IA of the Indian Stamp Act, as applicable in West Bengal, which governs gift deeds.

4. In this context, learned counsel for the petitioner places reliance on Section 5 of the Transfer of Property Act, 1882, which defines “transfer of property”. As per the said definition, transfer of property is an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself. Section 6 of the said Act stipulates that property of any kind may be transferred, subject to the exceptions enumerated in clauses (a) to (i) of Section 6.
5. As per Black’s Law Dictionary (9th Edition), “property’ is the right to possess, use and enjoy a determinate thing; the right of ownership; bundle of rights. The expression “property”, as per Salmond’s Jurisprudence (Glanville William’s 10th Edition, 1947), in its widest sense, includes a person’s legal rights, of whatever description, that is, a man’s property is of that is his in law. This usage, however, is obsolete at the present day, though it is common enough in the older books. In a second and narrower sense, property includes not all a person’s rights, but only that which is proprietary, as opposed to personal rights. The former constitutes his assets or property, while the latter constitutes his status or personal condition. In this sense a man’s land, chattels, shares and debts due to him are his property; but not his life, liberty or reputation. In a third application, which was adopted there, the term includes not even all proprietary rights, but only those which are both proprietary and in rem. The law of property is the law of proprietary rights in rem, the law of proprietary

rights in personam being distinguished from it as the law of obligations. According to this usage, a freehold or leasehold asset in land, or a patent or copyright, is property; but a debt or benefit of a contract is not. Finally, in the narrowest use of the term, it includes nothing more than corporeal property – that is to say, the right of ownership in a material object, or that object itself.

6. Section 3(26) of the General Clauses Act, 1897 defines immovable property to include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.
7. Placing reliance on *Umrao Singh vs. Khacheru Singh and others*, reported at *AIR 1939 All 415 (FB)*, learned counsel for the petitioner submits that the word 'property' may be used in the objective sense of the concrete thing which is the subject of ownership or other rights, or it may be used in the sense of the rights and interests of the ownership of the owner or other persons in that property. The Full Bench of the Allahabad High Court held that it is in the latter sense that the term is used in the Transfer of Property Act.
8. Transfer means, according to the petitioner, any mode of disposing of or parting with an asset or an interest in an asset, including a gift, payment of money, release or creation of a lien or other encumbrance. Transfer is disposing of or parting with property or an interest in property.
9. Section 7 of the Transfer of Property Act, it is argued, allows a person to transfer a property if he satisfies the conditions of having

competence to enter into contracts with other persons and has title to the property or authority to transfer it if he is not the real owner of the property. Section 11 of the Indian Contract Act specifies the category of persons competent to transfer.

- 10.** Learned counsel further argues that Section 8 of the Transfer of Property Act expresses the concept of operation of transfer. In the absence of a contrary intention to hold back, all the interest of the transferor along with legal incidents in the property is transferred. In the present case, it is argued, the petitioner as donor intends to transfer by way of gift his right, title and interest in the land along with the building standing thereon. Leasehold right of the petitioner is his property. In *S.N. Mathur vs. Board of Revenue and others*, reported at (2009) 13 SCC 301, cited by the respondent, the Supreme Court, it is argued by counsel for the petitioner in reply, was dealing with a deed of trust and deed of settlement. It was held that, merely because an instrument answers the definition of a trust deed, it does not cease to be a settlement deed for the purpose of stamp duty, if it answers the definition of settlement also. It is argued that the fact of the case in hand is not similar, since a deed of gift cannot be equated with a deed of assignment.
- 11.** It is further argued that, since the petitioner made the gift of his one half share in the property to his own brother, who is a member of the family of the petitioner, Article 33(i) is applicable, as opposed to Article 63, which covers transfer of lease by way of assignment. The transfer, being on the footing of a transfer of ownership of the property in view

of the prolonged period of lease, cannot be classified under Article 63 of Schedule IA.

- 12.** Learned counsel for the petitioner further submits that, even as per the answer of the respondent-authorities to the query, dated June 26, 2019, the stamp duty was assessed according to Article 33(i). Subsequent refusal of registration on the ground of enhanced stamp duty, in the light of Article 63 of Schedule IA, is contrary to the stand taken by the Registering Authority itself on June 26, 2019.
- 13.** Learned counsel for the petitioner next relies on *Pran Krishna Dey and others vs. State of West Bengal and others*, reported at (2018) 5 CHN 328, wherein a co-ordinate Bench of this court held that a deed of gift might also cover transfer of a leasehold property. It was further held by the learned Single Judge that one has to simply examine whether the transfer-in-question was being made to a member of a family as defined in the Explanation to Article 33 of Schedule IA of the Indian Stamp Act, as amended in West Bengal.
- 14.** Thus, the petitioner contends that the Registering Authorities ought to be directed to register the gift deed as per the stamp duty initially assessed and deposited by the petitioner long back, without insisting on enhanced stamp duty at the rate of 6 per cent of the market value of the property.
- 15.** Learned counsel for the respondent-authorities, on the other hand, argues that gift of movable/immovable property is defined in Section 122 of the Transfer of Property Act. Leasehold rights do not fall within the purview of such definition.

16. In the present case, what was assigned was a lease, irrespective of the tenure of the same, thus, attracting Article 63 and not Article 33(i) of Schedule IA of the Stamp Act.
17. Section 6 of the Indian Stamp Act, 1899, it is argued by the respondent-authorities, provides that when an instrument comes within two or more of the descriptions in Schedule I (or in Schedule I-A as per the West Bengal Amendment), where the duties chargeable thereunder are different, the instrument shall be chargeable only with the highest of such duties. Learned counsel contends that, pursuant to Section 6, even if both Articles 33(i) and 63 of Schedule IA cover the documents, the higher duty of the two, that is, 6 per cent of the market value as chargeable under Article 63 has to be paid.
18. Learned counsel relies on *S.N. Mathur (supra)*, wherein the aforesaid principle was reiterated.
19. Learned counsel argues that the Stamp Act, being a fiscal statute, has to be construed strictly, adopting the plain, clear and direct grammatical meaning of the concerned provisions.
20. Learned counsel for the respondent-authorities hands up a copy of a Government Order (G.O.) bearing No. 884-F.T. FT/0/2E-22/10 dated June 15, 2010, whereby the Governor of West Bengal, in exercise of power conferred by Section 9(1)(a) of the Indian Stamp Act, remitted the difference between the proper stamp duty under Article 63 and Article 33(i) of Schedule IA of the Act, chargeable on the market value of the property for transferring the leasehold right of an immovable property obtained from the Government of West Bengal on lease, when

such transfer is made in favour of the members of a family, as explained under the head 'proper stamp duty' of Article 33 of Schedule IA, with prior permission of the concerned authority. However, such remission of stamp duty is not allowed for any transfer of the said leasehold property, as per the G.O., to any person other than the members of the family of the original lessee, even when it is made with prior permission of the concerned authority.

- 21.** By placing reliance on the language of the G.O. dated June 15, 2010, learned counsel for the respondent-authorities submits that such remission of stamp duty is only applicable when the transfer of leasehold right is in favour of a member of family of the original lessee. Since, in the present case, the transfer is in favour of a family member of a subsequent transferee and not the original lessee, such remission is not permissible.
- 22.** Section 105 of the Transfer of Property Act, it is argued, contemplates a transfer of 'right' and not property. Therefore, the present transfer is an assignment of leasehold right and not a transfer of ownership. In this context, learned counsel points out the expression "Assignor" used in Clause 2 of the transfer deed dated November 11, 1987 between the original lessee and the petitioner and his other brother, namely, Kishan Kumar Saraf. Such usage of expression, according to the respondent-authorities, sufficiently indicates that the transfer comes within the purview of Article 63 of Schedule IA, which governs transfers of lease by way of assignment.

- 23.** For deciding the question as to which Article of Schedule IA of the Stamp Act is applicable to the present transfer, the following Articles of the Schedule IA of the Stamp Act are relevant:

Description of instruments	Proper Stamp-duty
<p>33. Gift. – <i>Instrument of, not being a Settlement (No.58) or Will or Transfer (No.62) –</i></p> <p>(i) <i>when made to a member of a family;</i></p> <p>(ii) <i>when made to any other person.</i></p> <p>Hiring agreement or agreement for service – <i>See Agreement (No.5)</i></p>	<p><i>One half of one per centum of the market value of the property which is the subject-matter of the Gift.</i></p> <p><i>The same duty as a Conveyance (No.23) on the market value of the property which is the subject-matter of the Gift.</i></p> <p><i>Explanation.- For the purpose of this Article, member of a family shall mean parent, spouse, son, daughter (married, unmarried, widowed or divorcee), son's wife, grandson, grand-daughter, brother or sister (married, unmarried, widowed or divorcee).</i></p>
<p>35. Lease, <i>including an under-lease or sub-lease and any agreement to let or sub-let –</i></p> <p>(a) <i>where by such lease the rent is fixed and no premium is paid or delivered –</i></p> <p>(i) <i>where the lease purports to be for a term not exceeding one year;</i></p> <p>(ii) <i>where the lease purports to be for a term exceeding one year but not exceeding ten years;</i></p> <p>(iii) <i>where the lease purports to be for a term exceeding ten years but not</i></p>	<p><i>The same duty as a Bottomry Bond (No.16) for the whole amount paid, payable or deliverable under such lease.</i></p> <p><i>The same duty as a Conveyance (No.23) for a consideration equal to twice the amount or value of the average annual rent reserved.</i></p> <p><i>The same duty as a Conveyance (No.23) for a consideration equal to three times the amount or value of the</i></p>

exceeding thirty years;

(iv) where the lease purports to be for a term exceeding thirty years and for any term renewed.

(b) where such lease is granted for a fine or premium, or for money advanced, or for security charges advanced, and where no rent is reserved –

(i) where the lease purports to be for a term not exceeding thirty years;

(ii) where the lease purports to be for a term exceeding thirty years and for any term renewed or in perpetuity or where no term is mentioned.

(c) where such lease is granted for a fine or premium, or for money advanced, or for development charges advanced, or for security charges advanced, in addition to rent reserved –

(i) where the lease purports to be for a term not exceeding thirty years;

(ii) where the lease purports to be for a term exceeding thirty years and for any term renewed or in perpetuity or where no term is mentioned.

average annual rent reserved.

The same duty as a Conveyance (No.23) on the market value of the property which is the subject-matter of the lease.

The same duty as a Conveyance (No.23) for a consideration equal to the amount or the value of such fine or premium or money advanced, or security charges advanced, as set forth in the lease.

The same duty as a Conveyance (No.23) on the market value of the property which is the subject-matter of the lease.

The same duty as a Conveyance (No. 23) for a consideration equal to the amount or value of such fine or premium or advanced as set forth in such lease, in addition to the duty which would have been payable on such lease, if no fine or premium or advance had been paid or delivered.

The stamp-duty as Conveyance (No. 23) on the market value of the property which is the subject-matter of the lease, or an aggregate of stamp-duties as a Conveyance (No. 23) on rent (three times of the average annual rent) and premium or money advanced or security charges advanced, whichever is higher:

Provided that in any case, when an agreement for a lease is stamped or a lease in pursuance of such agreement is subsequently executed, the duty on

such lease shall not exceed rupees ten.

Exemptions:

(a) Lease, executed in the case of a cultivator and for the purposes of cultivation (including a lease of trees for the production of food or drink), without the payment or delivery of any fine or premium, when a definite term is expressed and such term does not exceed one year, or when the average annual rent reserved does not exceed one hundred rupees.

In this exemption, a lease for the purposes of cultivation shall include a lease of lands for cultivation together with a homestead or tank.

(b)

Explanation I. – When a lessee undertakes to pay any recurring charge, such as Government revenue, the landlord’s share of cesses or the owner’s share of municipal rates or taxes which is by law recoverable from the lessor, the amount so agreed to be paid by the lessee shall be deemed to be part of the rent.

Explanation II. – The expressions “the lease purports to be for a term” and “for any term renewed” referred to in items (a)(iv) or (b)(ii) or (c)(ii), shall include not only the period stated in the lease document but shall also be deemed to be the sum of such stated period and all previous or subsequent periods immediately preceding or succeeding the stated period respectively without any break for which the lessee, and the lessor remained the same.

Explanation III. – The stamp-duty chargeable on market value of the lessee for a term exceeding thirty years, and for any term renewed, shall be the amount of stamp-duty less stamp-duty already paid for all

<p><i>previous period immediately preceding the stated period without a break for which the lessee and lessor remained the same.</i></p> <p>Explanation IV. – <i>The expression “or for security charges advanced” referred to in items (b) and (c) of article 35, shall mean non-refundable security charges or deposits only.</i></p>	
<p>63. Transfer of lease <i>by way of assignment, and not by way of under-lease</i></p> <p style="text-align: center;">Exemption:</p> <p><i>Transfer of any lease exempt from duty.</i></p>	<p><i>The same duty as a Conveyance (No.23) for the market value of the property.</i></p> <p><i>Provided that in any case when an agreement relating to assignment or lease-cum-sale is executed and registered with the ad valorem stamp-duty required under the proviso to article 5(d) and in furtherance of such agreement –</i></p> <p>(a) <i>if the final assignment or lease-cum-sale is made, within four years from the date of agreement or within two years from the date of completion or occupancy certificate issued by appropriate authority or from the date of procurement of electric connection whichever is earlier, in favour of the original purchaser or in favour of the member(s) of his or her family, the market value of the property as assessed at the time of registration of such agreement shall be treated as the market value of the property for the purpose of determination of chargeability at the time of registration of the final assignment or lease-cum-sale and the stamp-duty to be paid on such assignment or lease-cum-sale, shall be difference between the duty payable and the duty already paid under the proviso to article 5(d) at the time of registration of the agreement or rupees ten, whichever is greater.</i></p> <p>(b) <i>if the final assignment or lease-cum-sale is made beyond the</i></p>

	<p><i>time limit as specified in clause (a), in favour of the original purchaser or in favour of the member(s) of his/her family, the market value of the property shall be reassessed at the time of registration of such assignment or lease-cum-sale and the stamp-duty to be paid on such assignment or lease-cum-sale, shall be the difference between the duty payable and the duty already paid under the proviso to article 5(d) at the time of registration of the agreement or rupees ten, whichever is greater:</i></p> <p><i>Provided further that the above provisions shall not be applicable if final assignment or lease-cum-sale is made in favour of any person or persons other than those specified therein.</i></p> <p><i>Explanation. – For the purpose of this article, the expression “member of a family” shall have the same meaning as defined in article 33.</i></p>
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- 24.** As enumerated above, Article 33(i) of Schedule IA governs gifts, when made to a member of a family. Since, admittedly, the donee (respondent no.5) is a member of the donor’s (petitioner) family, in the event Article 33 is applicable, half per cent of the market value of the property, which is the subject-matter of the gift, has to be assessed as stamp duty in terms of Article 33(i).
- 25.** However, in the event it is deemed that the transaction-in-question is a transfer of lease by way of assignment, the same duty as a convenience (6 per cent of market value of the property) would be chargeable as stamp duty as per Article 63 of Schedule IA.

- 26.** In the present case, the admitted position is that the original lease was granted to Adhir Kumar Ganguly for 999 years. All subsequent transfers, including the transfer at hand, thus, pertain to leasehold rights and not to ownership of property. Contrary to the arguments of the petitioner, a lease, for whatever period, cannot be elevated to the plane of 'property' as envisaged in Section 122 of the Transfer of Property Act, which governs gifts. In the absence of any definition of 'gift' in the Stamp Act itself, the definition as provided in the Transfer of Property Act, which is the general statute governing transfers of property, has to be taken as a guide. A 'lease', as defined in Section 105 of the Transfer of Property Act, on the other hand, is a transfer of a 'right to enjoy' such property, made for a certain time, as opposed to the transfer of the property itself. Even transfers of such right in perpetuity have been contemplated within the purview of "lease" under Section 105 of the Transfer of Property Act, 1882. Thus, whatever expression has been used in the nomenclature of the transfer deed-in-question, the transfer pertains to the half share of the petitioner's leasehold rights in the property and not the ownership thereof.
- 27.** In view of the specific distinction between "gift" and "lease", as made in the Transfer of Property Act, the former being a transfer of the property itself while the latter a transfer of right to enjoy property, the general propositions advanced by learned counsel for the petitioner do not hold true in the present context.

- 28.** The general concepts of property in jurisprudence are fluid in nature and encompass the entire gamut of the bundle of rights flowing from ownership of an immovable property. “Property”, undoubtedly, may comprise of the complete bundle pertaining to ownership or a sub-set of such rights in case of limited transfers. Such general distinctions are not relevant for the present purpose, since Sections 122 and 105, respectively, define gifts and leases categorically, drawing a distinction between the transfer of “property” and “right to enjoy property”. Such categorical distinction having been specified in the Transfer of Property Act itself, general jurisprudential propositions cannot be resorted to in order to assess the character of a transfer for the purpose of generating revenue.
- 29.** That apart, the provisions of Section 6 and Articles 33(i) and 63 of Schedule IA of the Stamp Act, read in conjunction, render the petitioner’s submissions on the general nature of ‘property’ rather irrelevant for the present consideration.
- 30.** Article 63 of Schedule IA of the Stamp Act squarely governs such transfers of lease by way of assignment and imposes the same stamp duty as a convenience, which is 6 per cent of the market value of the property in terms of Article 23 of Schedule IA.
- 31.** Article 33, in contra-distinction, envisages ‘gifts’, which must necessarily be defined as the transfer of movable or immovable “property”, as defined in Section 122 of the Transfer of Property and not a transfer of the “right to enjoy” such property (whether perpetual or for a limited period) as reflected in Section 105 of the said Act.

- 32.** Even if original leasehold rights of the initial lessee was transferred by the transaction-in-question, the stamp duty would be same as a convenience in terms of Article 23, as stipulated in Article 35 of Schedule IA. By the same logic that an original lease of more than 30 years is chargeable at the same rate as a conveyance under Article 23, the duty payable on a subsequent assignment of such leasehold interest cannot vary from that payable for the original lease deed at the juncture when the gift deed-in-question was executed.
- 33.** Even if it were to be assumed that both Articles 33(i) and 63 of Schedule IA are applicable to the present transfer, Section 6 of the Stamp Act would come into play, thereby fixing stamp duty at the higher of the two rates, that is, Article 63 of Schedule IA. In such view of the matter, the respondent-authorities were justified in refusing registration on the ground of insufficiency of stamp duty, which is payable as stipulated in Article 63 at 6 per cent of the market value of the property.
- 34.** *S. N. Mathur (supra)* also reasserts the principle laid down in Section 6 of the Stamp Act, as discussed above.
- 35.** As far as *Pran Krishna Dey (supra)* is concerned, with utmost respect, Section 6 of the Stamp Act and/or the G.O. dated June 15, 2010 were neither considered by the learned Single Judge, nor argued, at least as reflected in the said report. Hence, the said judgment cannot be treated as a binding precedent in the present context, since the said provisions have been specifically argued and form an integral part of the reasoning process in rendering the present judgment. Moreover,

even if the proposition laid down in the said report was to be accepted, the same would be irrelevant in view of Section 6 of the Stamp Act having overriding effect. Even assuming that a gift of leasehold rights falls within the ambit of Article 33 of Schedule IA, it would also be covered by Article 63 thereof, which attracts Section 6, thus, mandating the higher duty of the two to be deposited.

36. The initial query assessment cannot bind the Registering Authorities while finally registering a document, since the Registration Act contains sufficient provisions for revisiting the stamp duty and registration charges payable on an instrument before final registration of the same.
37. Hence, there was no illegality on the part of the Registering Authorities in demanding stamp duty in terms of Article 63 of Schedule IA of the Stamp Act and refusing the final registration of the document-in-question on the ground of insufficiency of stamp duty.
38. Accordingly, WPO No. 512 of 2019 is dismissed on contest without any order as to costs. However, in the event the petitioner chooses to deposit the deficit stamp duties in terms of Article 63 of Schedule IA of the Stamp Act (as amended in West Bengal), the Registering Authority shall proceed to register the deed-in-question in accordance with law.
39. Urgent certified website copies of the order shall be provided to the parties upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)