

# **TATA TELESERVICE LIMITED v. UNION OF INDIA:**

## **A CASE COMMENTARY**

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### **CASE-FACTS**

#### ***Parties Involved in the Dispute:***

The parties involved in present case is Tata tele-service ltd. i.e., plaintiff and State of U.P [through Commissioner (stamp), Assistant Commissioner (Stamp)] are defendants. The case is in the jurisdiction of Allahabad High Court because the cause of action has happened in Ghaziabad which is under the territorial jurisdiction of the Allahabad high Court.

#### ***Origin of Present Petition:***

The petitioner was granted a license under Section 4 (2) of the Indian Telegraph Act, 1885 to establish, maintain and operate fixed and mobile telephone services. In connection with this business the petitioner installs radio based station also known as cell sites and Telecom towers at suitable locations usually on empty roof top spaces of buildings.

#### ***Relationship of the Plaintiff and Defendant:***

The petitioner has entered into various identical agreements each described as a license in respect of a number of sites in Ghaziabad for installing cell site and other related equipment's on the terrace or ground space of the property of the '**licensor**'.

#### ***Circular of Govt. Of U.P.:***

A circular letter dated 5.2.2003 was issued by the Commissioner (Stamps) to the various Assistant Commissioners and Collectors of Stamp in U.P. that telephone companies were executing agreements with private persons for taking on rent their roofs for installation of tower

and these documents were neither being registered nor stamped and the Additional Collectors were directed to visit the offices of the companies and to examine the agreements and ensure the recovery of proper stamp duty and registration of such agreement.

***Notice to the Plaintiff:***

In pursuance of the circular the District Magistrate Ghaziabad issued notice dated 9.11.2004 to the petitioner stating that the petitioner was not paying the requisite stamp duty under Article 35 of Schedule 1-B of the Stamp Act, which is applicable to a lease and was thereby violating the provisions of Section 17 of the Act.

***Proceeding and Inquiry by District Magistrate:***

The petitioner was called upon to appear before the District Magistrate on 19.11.2004. The notice was followed by another notice dated 10.12.2004. The notice dated 9.11.2004, which according to the petitioner was served upon the petitioner on 20.12.2004 after the date of the meeting was accompanied by a format in which the petitioner was required to provide information regarding the rent per month payable and the period of the agreement.

The petitioner gave reply dated 27.1.2005 and furnished the details of the aforesaid agreements disclosing the monthly charges being paid by the petitioner as compensation to the licensor/guarantor and the period of the license, namely 20 years.

The petitioner was given another notice dated 17.2.2005 to the effect that it had violated the provisions of the Indian Stamp Act. The petitioner's reply to the notice was that the agreement it had entered into was a license and not a lease.

***Order of the Assistant Commissioner (Stamp), Ghaziabad:***

The respondent no.2 Assistant Commissioner of Stamp, Ghaziabad passed a composite order dated 14.3.2005 holding that the 17 license deeds executed by the petitioner are in fact lease deeds for a period of more than one year and hence liable to stamp duty under Article 35 of Schedule (1-B) of the Indian Stamp Act and a deficiency of Rs. 13, 13,300/- was assessed together with penalty of four times the alleged deficiency.

***Order of the Commissioner (Stamp), Ghaziabad:***

The Commissioner by his order dated 25.4.2006 dismissed the appeal of the petitioner. The petitioner has challenged the order of the Commissioner dated 25.4.2006 as well as that of the Assistant Commissioner dated 14.3.2005 and the circular dated 5.2.2003 as well as the notices and letters dated 9.11.2004, 10.12.2004 and 17.2.2005 in Allahabad High Court.

**ISSUES INVOLVED IN THE CASE**

- 1)- *Whether the instrument in the present case is a license or lease?*
- 2)- *Whether the petitioner is liable to pay the due stamp duty on the unregistered document?*

**PROVISIONS APPLIED IN THE CASE**

**1)-Section 17 in The Indian Stamp Act, 1899-**Instruments executed in India.—all instrument chargeable with duty and executed by any person in [India] shall be stamped before or at the time of execution.

**2)- Section-3 of Indian Stamp Act,1899. Instruments chargeable with duty.** —Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefore respectively, that is to say—

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in [India] on or after the first day of July, 1899; (b) every bill of exchange [payable otherwise than on demand] or promissory note drawn or made out of [India] on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in [India]; and

(c) every instrument (other than a bill of exchange, or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of [India] on or after that day, relates to any property situate, or to any matter or thing done or to be done, in [India] and is received in[India]: Provided that no duty shall be chargeable in respect of—

(1) any instrument executed by, or on behalf of, or in favor of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act 1894, Act No. 57 & 58 or under Act XIX of 1838 Act No. or the Indian Registration of Ships Act, 1841, (CX of 1841) as amended by subsequent Acts.

**3)- Section 4 in The Indian Telegraph Act, 1885-** Exclusive privilege in respect of telegraphs, and power to grant licenses. —[Within [India], the Central Government shall have the exclusive privilege of establishing, maintaining and working telegraphs: Provided that the Central Government may grant a license, on such conditions and in consideration of such payments as it thinks fit, to any person to establish, maintain or work a telegraph within any part of [India]:

[Provided further that the Central Government may, by rules made under this Act and published in the Official Gazette, permit, subject to such restrictions and conditions as it thinks fit, the establishment, maintenance and working- of wireless telegraphs on ships within Indian territorial waters [and on aircraft within or above [India], or Indian territorial waters], and of telegraphs other than wireless telegraphs within any part of [India].

Explanation. — The payments made for the grant of a license under this sub-section shall include such sum attributable to the Universal Service Obligation as may be determined by the Central Government after considering the recommendation made in this behalf by the Telecom Regulatory Authority of India established under sub-section (1) of section 3 of the Telecom Regulatory Authority of India Act, 1997 (24 of 1997). ]

The Central Government may, by notification in the Official Gazette, delegate to the telegraph authority all or any of its powers under the first proviso to sub-section (1). The exercise by the telegraph authority of any power so delegated shall be subject to such restrictions and conditions as the Central Government may, by the notification, think fit to impose.]

**4)- Section-105 of Transfer of property Act, 1882:-**

***Lease defined.***—A lease of immoveable 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. Lessor, lessee, premium and rent defined.—The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

**4)- Section-52 of Indian Easement Act, 1882. `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."

**5)-Section 2 (16) of the Indian Stamp Act - lease is defined** Lease' means a lease of immovable 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 immovable property; (C) any instrument by which tolls of any description are let; (d) any writing on an application for lease intended to signify that the application is granted; (e) any instrument by which mining lease is granted in respect of minor minerals as defined in Clause (e) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957.

## **TERMS AND CONDITION OF THE INSTRUMENT**

It is stated in the preamble of the instrument that the grantor has agreed to grant a right to the use of the terrace space of the premises for the purpose of installing poles/towers, mounted antenna, shelters, D.G. space and other related equipment located in the premises.

**Article 1.1** of the instrument permits the petitioner to make the installation at the terrace space. The consideration for the grant is Rs. 10,000/- per month.

**Article 2.2** of the deed provides that the petitioner shall be entitled to take possession of the premises from 18.2.2004 and start commencement of its work.

The duration for which the grant shall remain operative has been provided for in Article 3.1 and is shown as 216 months in the agreement.

**Article 2.3** contains a condition that the petitioner is obliged to hand over peaceful possession of the demised premises on expiry of the term of the grant or sooner determination thereof in accordance with the terms of the grant.

*Article 5.1* contains a condition that if the grantor plans any repairs, maintenance or renovation work to the terrace the grantor shall give at least ten days prior notice to the petitioner.

*Article 5.2* contains a condition that the grantor does not intend to make any further construction at terrace of the demised premises and further agrees that further constructions, if any, are to be made by the grantor only after prior consent of the petitioner and for providing suitable highest available space to the petitioner for installation of equipments for proper functioning.

*Article 7.3* provides that the grantor shall transfer all deposit, rents and any other payments made by the petitioner to the rightful owner.

*Article 8.2* contains a condition permitting the petitioner to make alteration to the equipments. Such improvements may include but are not limited to the expansion of the existing storage room for equipment or the installation of additional equipment deemed necessary on the agreed premises.

*Under Article 8.3* the petitioner shall have the right to put up another shelter/prefabricated shed and tower for the purpose of expansion of services and the grantor shall not have any objection to the same. If the petitioner acquires more area in addition to the described in the schedule the license fee shall be increased in proportion to the increase of area.

*In Article 9.1* the petitioner has been given right to terminate the deed without assigning any reasons by giving 30 days prior notice or compensation. But this Article for better appreciation has to be read with Article 3.

*Article 10.2* provides that a duplicate set of keys shall be handed over to the petitioner for access.

*Article 14.1* provides that the deed is a transferable one during the period of the deed or its renewal. The transfer/assignment is however subject to prior consent of the grantor. However, such consent shall not be unreasonably refused or withheld by the transferor.

## **LEGAL INTERPRETATION OF THE CASE**

**1)-Introduction-** As per section-105 of Transfer of property Act, 1882 a lease of immovable property is a transfer of a right to enjoy and use the property made for certain time or in perpetuity. The expression “**Transfer of a right to enjoy**” stands in contrast with the words

“**transfer of ownership**” occurring in Section-5 of the T.P. Act, 1882 in the interpretation of the word “**transfer**”. In sale all the rights attached to it will be transferred unlike the lease where only the enjoyment right is transferred.

2) – **Contract between two people**- In every lease, there is an implied contract that the lessee will be put in possession, of the property by the lessor. The term “**lease**” imports a transfer of an interest to enjoy the property i.e., the right to the exclusive possession of the property. The lease is therefore not a mere contract but is also a transfer of an interest of property. The use of the word “**enjoy**” in section-105 of the T.P. Act instead of “**possession**” does not mean that no possession to the lessee is necessary to constitute a lease. The term “enjoyment” in section-105 has been used only for showing that a bare right to the usufruct<sup>1</sup> is not a lease.

3) - It is clear from section-105 that for the creation of relationship of landlords and tenant, there should be a contract between the parties regarding transfer of a right to enjoy the property. The existence of such a contract may, however, be implied i.e., evident from the conduct of the parties. *In G Cariappa v. Leila Sinha Roy*<sup>2</sup> it was held that it may evident from the intention of the parties and such intention to be gathered from terms of agreement examined in the light of the surrounding circumstances.

4)- **Immovable property**- A composite lease of a building along with the equipment, or the lease of a mill which includes building and machinery , or the lease of a factory are recognized by law and accepted by the court as lease. The subject matter of the lease must be immovable property as defined in section-3 of TP Act. Under the terms of Section-3 which defines “immovable property” the expression includes not only land, minerals, and buildings, but also intangible immovable property as well.

5)- **Time-period**- Both the time when the lease begins and the time when it ends must be fixed. Where day is expressed for the commencement of the lease, such day must be excluded in computing the whole period of lease. Section-110 of the TP Act enacts that if the day of the commencement is not stated, the lease begins from the date of execution. If it expressed to commence from a past day that is only for the purpose of computation and the interest of the lessee begins from the date of execution. There is a permanent lease also which is also known

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<sup>1</sup> *Usufruct is a limited real right found in civil-law and mixed jurisdictions that unites the two property interests of usus and fructus: Usus is the right to use or enjoy a thing possessed, directly and without altering it*

<sup>2</sup> *AIR 1983 Cal 105*

as perpetuity, it could be granted through presumed grant and also where tenancy is of permanent nature it could not be revoked so long as the plaintiff paid rent in cash or kind may be inferred from various terms and condition of a lease.

**6) – Premium/rent-** To create a lease there should be a consideration. Under Section 105, the consideration must be either premium or rent. Under section-105 defines a premium as “**price paid or promised**”. This price may be in the shape of actual cash or in the shape of debt payable that is it will included not only actual cash but also money due. The amount due must be ascertained or capable of being ascertained at the time of transfer. Rent is also allowed in the premium part, it is a consideration for the transfer of the right to enjoy leased property. Rent is a periodical payment for lease. Rent must be certain or capable of being ascertained. The rent be paid according to the terms of the lease either periodically.

**7) – Partial Transfer (Demise) -** The word “**Demise**” is used in the case to denote the transfer or conveyance in lease. “**Demise**” means originally ‘**any transfer in succession of a right**’: but now it gives the meaning ‘to grant a lease of lands or other hereditaments<sup>3</sup>’ but only partially. When we say that a particular agreement of lease creates a ‘present demise’ it means that though in form of agreement, it actually affects a transfer by lease i.e., transfer of a right to enjoy specific immovable property. This shows that the agreement contains all the necessary terms and condition of the lease.

**8)- Execution-** As per Para three of section-107 provides that lease may be executed both by the lessor or lessee. This is because in a lease both enter into covenants. When a lease is made by registered instruments, such instruments or where there are more instruments than one each such instrument shall be executed by, both the lessor and the lessee. A lease is void if unregistered in cases where the registration is compulsory. But a lessee, who is in possession of the land under an unregistered lease, is not a trespasser but merely a tenant at will. The lesser is entitled to claim compensation from such lessee for the use and occupation of the land.

**9)-License-** License means permission or authority to do a particular thing. License as a personal and revocable privilege to do some act or series of acts upon the lands of another without possessing any estate therein. It gives immunity to the license while acting under the

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<sup>3</sup> *Hereditaments-* In law, a *hereditament* (from Latin *hereditare*, to inherit, from *heres*, heir) is any kind of property that can be inherited. *Hereditaments* are divided into corporeal and incorporeal



privilege but confers not vested right by which he can rightfully enjoy it contrary to the will of the grantor. Section-52 of the easement Act defines the term 'license' 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 license.*"

10)- Accordingly a license is a right which is granted by one person to another, or to a definite number of other persons whereby such other person or persons get a right to do or continue to do on the immovable property of the grantor something which, in the absence of such right, be unlawful. Such a right does not amount to an easement nor does it create an interest in the property in respect of which is granted.

**11)- Main features of license;- 11.1)- It is privilege of liberty and not right;-** License is privilege of the grantee to do something he would have otherwise been not authorized to do. This privilege never matures into right and continuous till the grantor likes. It can be withdrawn at any time without any notice to the grantee that can never get it enforced in Court of law.

**11.2)- It is purely personal;** License is personal to grantee. It touches no interest over the property.

**11.3)- It is non-transferable and non- heritable;** Unless different intention arises in the license either expressly or impliedly it is treated non-transferable and non-heritable.

## **CRITICAL ANALYSIS OF THE CASE**

1)- As per first issue we will focus to distinguish between the Lease and license because as per the contention of the petitioner they are holding license so they are not entitled to pay stamp duty as per registration act but this can only be established when the terms of the instrument will be analyzed with the Provisions of the Case.

2)- As per the concept of lease there is always an interest created in the property towards the lessee which is partial in nature which is also used in the present case as the word demise is used which means partial transfer of interest while in license it doesn't pass any interest it is

merely a right to do or continue to do something on the personal privilege of the grantor it doesn't touch even the boundaries of the interest. According to facts and the terms of the instruments we will see that in Article-2.2 and 2.3 it was clearly mentioned that there is a peaceful possession and demise of the property which indicate the partial interest of the property which is not possible in the license because it doesn't pass any interest to the licensee.

***Khalil Ahmed v. Tufel Hussain Samasbhai***<sup>4</sup>:- The court has distinguished the lease and license. If an interest in immovable property entitling the transferee to enjoyment was created, it was a lease, if permission to use land without exclusive possession was alone granted, a license was the legal result.

3)- In case of lease there is consideration is involved in the form of Rent/money or share in the gain out of the property but in case of license the consideration to be paid in the form of fee. As per the facts of the case and Article-1.1 and 7.3 it was mentioned that there is a monthly submission of Rs.10000 per month which should be in the form of rent and deposit in the name of the Owner which clearly shows that it was not the fees but rent which is on monthly basis so it is clearly not come under the criteria of fees so it was said to be a Rent/premium which is on fixed span.

4)- In case of lease which is revocable only on certain condition and notice but on the license there is revocable right at the option of the grantor and as per the instrument in the present case Article-9.1 which clearly mentioned about the 30 days prior notice before the termination of the Agreement which clearly shows the element of the lease not the license in the present case and all the 17 deeds involved in the case has same terms and conditions. So, on the above averments it is very clear that this case comes under the ambit of the Lease not license.

5) - The clause that the deed is a transferable one also indicates that interest in the property was intended to be created. It thus appears that the deed in question creates a lease within the meaning of the Transfer of Property Act and is thus covered in the definition under the Stamp Act also. The terms of the deed read as a whole also indicate that it contains an undertaking in writing to pay an amount periodically to occupy immovable property. This payment has been described in Article 7.3 in the agreement as rent and at other as license fee. But the nature of the periodical payment is consideration for occupying immovable property. The nature of the

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<sup>4</sup> AIR 1988 SC 184

payment is therefore rent. In the preamble of the agreement it is stated that the petitioner has agreed to take on grant the 'demised' premises for a period of 216 months. In Article 3 of the Agreement there is a condition that the petitioner cannot terminate the deed except on the ground of the object of the deed elaborated in Article 9. The deed is therefore a lease also within the meaning of Clause (b) of Section 2 (16) of the Indian Stamp Act.

*Associated Hotels of India Ltd v. R.N.Kapoor*<sup>5</sup> This case has clarified all the doubts of the lease and license where they gave two point test for the distinguishing between the lease and license here the Supreme Court held that 1)-To ascertain the where the document creates a license or a lease the document must comply with the ingredients of either of the two.

2)- The Intention test is also very relevant in this case whether they intended to create a lease or a license that can be determined by the intention of the parties whether the agreement is for the interest of the property in the form of possession or it should be mere privilege to give a right to use the property.

6) - As the averments above we are very clear that the instrument is a lease deed and not the license so we can say that action taken by the Commissioner and collector for the collection of the Stamp duty is valid and the above instrument is subject to registration and they are also liable to pay the fine imposed by the government under section-17,33 and 3 of the Indian Stamp Act.

## CONCLUSION

The present case plays a very important role in distinguishing between lease and license and how it is relevant to have such a precedent because it grab many people who tries to save the tax and duties and in order to do that they play with the terms and conditions of the agreement but this case has put a very comprehensive analysis and made a connection between the relevancy of document which is registered and which is unregistered. The present case also gave a detail between the connections of Easement act, TP Act, and Stamp Act and how they

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<sup>5</sup> AIR 1959 SC 1262

are used to inculcate the exhaustive definition of “Lease” and how the present case fits in the ambit of the definition is also a intensive part of the judgment.

The case has enlighten many of the observation which I would like to quote in form of pointers is as follows-

- 1)- The nature of the periodical payment is consideration for occupying immovable property.
- 2)- The nature of the payment is therefore rent.
- 3)-In the preamble of the agreement it is stated that the petitioner has agreed to take on grant the 'demised' premises for a period of 216 months.
- 4)- In Article 3 of the Agreement there is a condition that the petitioner cannot terminate the deed except on the ground of the object of the deed elaborated in Article 9 of the Agreement.
- 5)- The deed is therefore a lease also within the meaning of Clause (b) of Section 2 (16) of the Indian Stamp Act.

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3.2)- Associated Hotels of India ltd v. R.N.Kapoor, AIR 1959 SC 1262

3.3)- In G Cariappa v. Leila Sinha Roy, AIR 1983 Cal 105