

Court No. - 34

Case :- WRIT - C No. - 7279 of 2006

Petitioner :- D.L.F. Universal Limited And Another

Respondent :- State of U.P. and Others

Counsel for Petitioner :- Shesh Kumar, Saurabh Srivastava, T.P. Singh

Counsel for Respondent :- C.S.C., D Awasthi, V.P. Mathur

Hon'ble Sudhir Agarwal, J.

Hon'ble Rajeev Misra, J.

1. Present writ petition under Article 226 of the Constitution of India has been filed by M/s D.L.F. Universal Limited and its Executive Director, Legal and Constituted Attorney, Sri K. Swarup initially, seeking a writ of mandamus commanding respondents to refund stamp duty of Rs.16,91,03,000/- along with interest at the rate of 24% per annum to petitioners realized from them towards stamp duty on the instrument in question though it was not chargeable with any stamp duty. Subsequently, by amendment prayer (d) has been inserted to issue a writ of certiorari quashing second proviso of amended notification dated 10.07.2008, issued by U.P. Government (Annexure 1 to the affidavit and Annexure 9 to the writ petition) in so far as it relates to denial of stamp duty already paid.

2. Facts, in brief, giving rise to present petition are that petitioner 1, M/s D.L.F. Universal Ltd., is a company incorporated under Companies Act, 1956 (hereinafter referred to as Act 1956) and continuing as such under the provisions Companies Act, 2013 (*hereinafter referred to as "Act, 2013"*). Company is dealing in transaction of land, construction of multi-storeyed colonies, commercial complexes etc. New Okhla Industrial Authority (hereinafter referred to as "NOIDA"), a statutory body constituted under U.P. Industrial Development Act, 1976 (hereinafter referred to as "U.P. Act, 1976") invited tenders for allotment

of commercial plot no. 003, Block M, Sector 18, NOIDA under the Scheme Commercial Hub, Sector 18 (2003-04). Petitioners' tender was accepted by competent authority and they were allotted aforesaid land which has a total area of 54320.18 sq. meter, at the rate of Rs.31,850/- per sq. meter. Total premium of plot was calculated as Rs.1,73,00,97,733/- and allotment money as Rs.43,25,24,433.25. Petitioner had already deposited earnest money as Rs.3 crores, hence, after deducting aforesaid amount, petitioner was required to deposit balance amount of Rs.40,25,24,433.25 within 15 days from the date of acceptance of letter and balance premium of Rs.129,75,73,299.75 was payable within 90 days from the date of issue of acceptance letter without interest. The land in dispute was involved in a Public Interest Litigation, i.e., PIL No. 10137 of 2004 filed by one Anil Kumar Srivastava which ultimately was transferred to Supreme Court and decided in Civil Appeal No. 5402 of 2004, vide Judgment dated 20.8.2004 and it was dismissed. Supreme Court permitted petitioners to pay balance amount of 75 per cent within a week. Pursuant thereto, 75 per cent balance amount was paid to NOIDA on 26 August 2004 and request for execution of lease deed and handing over possession was made. Before lease deed could be executed, State Government issued a notification 19.01.2005 modifying its earlier notification dated 31.08.1998 in exercise of powers under clause (a), sub-section (1) of Section 9 of Indian Stamp Act 1899 (hereinafter referred to as Act 1889) as amended from time to time in State of U.P., stating that with effect from the date of notification dated 19.01.2005 instruments as shown in column 4 of the Schedule executed for the purposes provided in paragraphs 4.2.1, 4.2.2 and 4.2.3 and clauses (a) to (f) of paragraph 8.2 of the Industrial and Service Sector Investment Policy, 2004, are exempted from stamp duty. It also provided that exemption shall be granted only on the first instrument executed for transfer of an immovable property in favour of an entrepreneur. District

Magistrate or General Manager, District Industries Centre was to sign such instrument as witnesses for confirming the fact that transfer is being executed under the said policy. Paras 4.2.1, 4.2.2, 4.2.3 and 8.2 (a) to (f) as said in notification read as under:-

<i>Paragraph number of the Industrial and Service Sector Investment Policy, 2004 of the State</i>	<i>Purpose and other details</i>	<i>Extent of remission</i>	<i>Nature of investment and Article number of Schedule I-B</i>
4.2.1	<i>(a) For setting up of new small scale or Tiny industrial units in 29 district of Purnanchal and in 7 district of Bundelkhand.</i>	<i>Full</i>	<i>Conveyance Article 23(a)</i>
	<i>(b) For setting up of New Medium or large industrial units in 29 district of Purnanchal and in 7 districts of Buldelkhand</i>	<i>Half</i>	<i>Conveyance Article 23(a)</i>
	<i>(c) For setting up of industrial units in rest of the districts of the State</i>	<i>Half</i>	<i>Conveyance Article 23(a)</i>
4.2.2	<i>Transfer of land for development of infrastructure facilities viz. for establishing Industrial Estates, Road, Bridges, over-bridges, wholesale market, Transshipment Centre, Integrated Transport and Commercial Centre, Container Depot, Electricity Supply, Water Supply, Water drainage, Exhibition Centres, Warehouse.</i>	<i>Full</i>	<i>Conveyance Article 23(a)</i>
4.2.3	<i>Establishment of Information Technology, Business Process Outsourcing units, Call Centres, Agro-Processing units.</i>	<i>Full</i>	<i>Conveyance Article 23(a) and Lease Article 35</i>
8.2(a)	<i>Transfer of immovable property for such multi-facility Hospital having an established capacity of minimum 100 beds and having an area which is more than the area for medical purpose as prescribed in the relevant Government order and having such medical facilities as provided in the relevant Government order.</i>	<i>Full</i>	<i>Conveyance Article 23(a) and Lease Article 35</i>
8.2(b)	<i>Transfer of immovable property for a Super-speciality Hospital having medical facilities as provided in the</i>	<i>Full</i>	<i>Conveyance Article 23(a) and Lease</i>

	<i>relevant Government order</i>		<i>Article 35</i>
8.2(c)	<i>Transfer of immovable property for a Hospital established in Block Headquarter (which is different from a Tehsil and District Headquarter) having an established capacity of minimum 50 beds and having such medical facilities as provided in the relevant Government order.</i>	<i>Full</i>	<i>Conveyance Article 23(a) and Lease Article 35</i>
8.2(d)	<i>Transfer of immovable property for a Hospital established in a village (which is different from a Block Headquarter) having an established capacity of minimum 30 beds and having such medical facilities as provided in the relevant Government order.</i>	<i>Full</i>	<i>Conveyance Article 23(a) and Lease Article 35</i>
8.2(e)	<i>Transfer of immovable property for a training institute for Technical or Information Technology established in a Block Headquarter (which is different from a District Headquarter) having a minimum 75 students/ trainees and which is running on a syllabus approved by the State Government.</i>	<i>Full</i>	<i>Conveyance Article 23(a) and Lease Article 35</i>
8.2(f)	<i>Transfer of immovable property for a Medical and Dental College or other Educational Institutions, Multiplex Cinema Hall, Shopping Malls, Entertainment Centres in which the cost of construction and machinery is not less than rupees ten crore and which have such facilities and which fulfill the conditions as have been provided in Government order no. 845/5-1-04-(28)/ 2002 dated Febryary 27, 2004 issued by Medical Section-1, Government of Uttar Pradesh orders issued by the related Government Departments from time to time.</i>	<i>Full</i>	<i>Conveyance Article 23(a) and Lease Article 35</i>

3. Notification also said that immovable property, which was transferred shall not be used for the purpose other than the purpose described in said policy. Explanation in the notification gives details of districts as referred to in aforesaid paragraph 4.2.1 and reads as under:-

“(a) 29 districts of Purvanchal shall comprise of the revenue

districts of Faizabad, Sultanpur, Barabanki, Gonda, Bahraich, Basti, Siddharthnagar, Gorakhpur, Maharajganj, Deoria, Kushinagar, Azamgarh, Mau, Ballia, Varanasi, Ghazipur, Jaunpur, Mirzapur, Sonbhadra, Sant Ravidas nagar, Allahabad, Fatehpur, Pratapgarh, Balrampur, Chandauli, Sravasti, Kaushambi, Ambedkarnagar, Sant Kabir Nagar.

(b) 7 districts of Buldelkhand shall comprise of the revenue districts of Jhansi, Jalaun, Lalitpur, Banda, Mahoba, Hamirpur, Chitrakoot.

(c) Rest of the districts of the State means the districts of the State which are not mentioned in clauses (a) and (b) above.”

4. NOIDA required petitioners to execute sale deed on payment of stamp duty of Rs.166,10,300/-. The lease deed was executed on 25th February 2005 between NOIDA and petitioners and registered on the same day in the office of Sub Registrar-II, NOIDA. Copy of lease deed shows that land was allotted to petitioners for the purpose of shopping malls, multiplexes, showrooms, retail outlets, hotels, restaurants, offices and such other commercial usage after constructing building according to setbacks and building plan approved by lessor. Despite the fact that no stamp duty was payable in terms of paras 8.2(f) notification dated 19.01.2005, in ignorance thereof, NOIDA charged stamp duty upon petitioners for execution of aforesaid lease deed dated 25.2.2005. Petitioners submitted plan for construction of shopping malls etc. which was sanctioned and petitioners started work and the estimated cost of construction is much more than Rs.10 crores. Therefore, all the conditions set out in notification dated 19.01.2005 were satisfied so as to exempt petitioners from payment of stamp duty. Petitioners, therefore, sent letter dated 19.4.2005 requesting Chief Executive Officer, NOIDA to refund stamp duty illegally realized from petitioners.

5. NOIDA officials replied, vide letter dated 16.09.2005 that the matter relating to refund of stamp duty is under the jurisdiction of Tax and Registration Department, U.P. Government. Consequently, petitioners sent representation dated 27.09.2005 requesting District Magistrate/ Collector, Gautam Budh Nagar to refund aforesaid stamp duty which was illegally realised from petitioners. Having received no reply, petitioners sent registered notice dated 19.12.2005 to all concerned authorities, namely, Chief Controlling Revenue Authority, Sub Registrar, District Magistrate and Vice Chairman, NOIDA making demand to refund of stamp duty. This writ petition, therefore, has been filed with a prayer that aforesaid stamp duty should be refunded.

6. During pendency of present writ petition, an amendment has been made in Government Notification dated 31.8.1998, w.e.f 19.01.2005 in exercise of powers under Section 21 of General Clauses Act, 1897 read with Section 9 (1) (a) of Act 1899, by notification dated 10.07.2008, whereby two provisos have been inserted at the end of para 1, which read as under:-

*“Provided that where the District Magistrate or the General Manager, District Industries Centre of the concerned District could not have signed such instrument as witness due to any procedural omission, the District Magistrate of the concerned district shall issue a certificate to the effect that **the instrument of transfer has been executed under the aforesaid policy such certificate shall have the same effect as if such instrument were signed as witness by the District Magistrate or the General Manager, District Industries Centre of the concerned district before the registration thereof.***

Provided further that any amount of the duty already paid on such instrument shall not be refunded on the basis of

aforesaid certificate issued by the District Magistrate of the concerned district.” (emphasis added)

7. Thus, aforesaid amendment denied refund of stamp duty where it has already been paid. This notification has also been challenged on the ground that the amount illegally realized cannot be retained by State and it violates constitutional right of property enshrined under Article 300A of the Constitution. Denial of refund is patently illegal, arbitrary and without any authority of law. An amount realized from any person without any authority of law cannot be retained by State and it cannot deny its refund.

8. Contesting writ petition, a counter affidavit has been filed on behalf of Respondents-1 and 2, sworn by Sri G.K. Srivastava, Deputy Commissioner (Stamp) Head Quarter Allahabad. It is not disputed that petitioners are lessee of plot no.003 Block M, Sector 18, NOIDA, which was allotted by NOIDA, vide allotment letter dated 12.4.2004. The consideration of premium agreed between parties shown in lease deed was Rs.1,73,00,97,733/- and the term of lease is 90 years from the date of execution of lease, which was executed on 25.2.2005. Thus, the deed in question is an “instrument” within Section 2 (14) of Act 1899, which reads as under:-

“(14) “Instrument” includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.” (emphasis added)

9. Instrument is a “lease” under Section 2(16) and it reads as under:-

“(16) “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 a lease intended to signify that the application is granted.”

10. An Instrument of lease, therefore, is chargeable under Section 3(aa) of Act 1899. Section 3(aa) reads as under:-

“3(aa). Every instrument mentioned in Schedule I-A or I-B, which, not having been previously executed by any person, was executed in Uttar Pradesh:

(i) in the case of instruments mentioned in Schedule I-A, on or after the date on which the U.P. Stamp (Amendment) Act, 1948 came into force, and

(ii) in the case of instruments mentioned in Schedule I-B, on or after the date on which the U.P. Stamp (Amendment) Act, 1952 comes into force.”

11. Stamp Duty is payable at or at the time of execution of deed as provided in Section 17 of Act 1889. The amount of stamp duty payable under Article 35 (c) (ii) of Schedule 1-B of Act 1899, reads as under:-

<p>Article 35. Lease (including an under lease or sub-lease and any agreement to let or sub-let)</p> <p>(a) where by such lease the rent is fixed and no premium is paid or delivered-</p> <p>(i) where the lease purports to be for a term not exceeding one year;</p> <p>(ii) where the lease purports to be for a terms exceeding one year but not exceeding five years.</p>	<p>The same duty as a Bond (No. 15) for the whole amount payable or delivered under such lease.</p> <p>The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to four times the amount or value of the</p>
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<p>(iii) where the lease purports to be for a terms exceeding five years but not exceeding ten years.</p>	<p>average annual rent reserved.</p>
<p>(iv) where the lease purports to be for a term exceeding ten years but not exceeding twenty years.</p>	<p>The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to four times the amount or value of the average annual rent reserved.</p>
<p>(v) where the lease purports to be for a term exceeding twenty years but not exceeding thirty years.</p>	<p>The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to four times the amount or value of the average annual rent reserved.</p>
<p>(vi) where the lease purports to be for a term exceeding thirty years or in perpetuity or does not purport to be for any definite term.</p>	<p>The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to four times the amount or value of the average annual rent reserved.</p>
<p>(vii)</p>	<p>The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal the market value of property which is the subject of the lease.</p>
<p>(viii)</p>	
<p>(b) where the lease is granted for a fine or premium or for money advanced and where no rent is reserved-</p>	
<p>(i) where the lease purports to be for a term not exceeding thirty years.</p>	<p>The same duty as Conveyance (No. 23 Cl. (a), for a consideration equal to the amount or value of such fine or premium or advance as set forth in the lease.</p>
<p>(ii) where the lease purports to be for a term exceeding thirty years.</p>	
<p>(c) where the lease is granted for a fine or premium or for money advanced in addition to rent reserved-</p>	<p>The same duty as a Conveyance No. 23 cl. (a), for a consideration equal to the market value of the property which is subject of the lease.</p>
<p>(i) where the lease purports to be for a term not exceeding thirty years.</p>	<p>The same duty as a Conveyance No. 23 cl. (a), for a consideration equal to the amount or value of such fine or premium or advance as set forth in the</p>

(ii) where the lease purports to be for a terms exceeding thirty years.	<p>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:</p> <p>Provided that in a case when an agreement to lease is stamped with the ad valorem stamp required for lease, and a lease in pursuance of such agreement is subsequently executed, the duty on such lease shall not exceed Fifty rupees.</p> <p>The same duty as a Conveyance No. 23 cl. (a), for a consideration equal to the market value of the property which is subject of the lease.</p>
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12. Petitioners at no point of time, either before execution of deed or after execution thereof, within reasonable time, approached Collector (Stamp) seeking remission of duty in question by making application for remission. In order to justify exemption, the instrument in question has to satisfy the following conditions:-

I. The policy referred in the **notification is the Industrial and Service Sector Investment Policy 2004.**

II. Exemption shall be granted only on the **first instrument executed for transfer for an immovable property in favour of an entrepreneur.**

III. The District Magistrate or General Manager, District Industry Centre of the concerned district shall sign such instrument as witness for the purpose of confirming the fact that transfer is being executed under the said policy.

IV. The immovable property so transferred shall not be used for the purpose other than the purpose prescribed in the policy.

13. Petitioners claim to fall under clause 8.2 (f) which restrict

application of notification to transfer of immovable property for a multiplex/shopping mall for which cost of construction and machinery is not less than 10 crores. Duty is chargeable only on instrument and no transaction. Therefore it was incumbent upon petitioners to mention in the instrument specifically all those factors which affect chargeability of stamp duty under At, 1899. Section 27 of Act 1899 requires disclosure of all such facts and it reads as under:-

“27. Facts affecting duty to be set forth in instrument. —The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it its chargeable, shall be fully and truly set forth therein.” (emphasis added)

14. In the case in hand, lease deed no where mention the relevant facts, which may attract notification dated 19.1.2005 inasmuch as it has no where mentioned that cost of constructions and machinery would be 10 crores and above. Similarly petitioners did not present instrument in question either before District Magistrate or General Manager, District Industrial Centre of Gautam Budh Nagar for authentication and confirmation of facts that transfer under lease is covered by the notification. In absence of compliance of all the conditions of notification dated 19.1.2005, petitioners cannot claim exemption from stamp duty and no remission is permissible. At no point of time, petitioners made any application to District Magistrate intimating the cost of construction for securing remission thereon. Notification dated 19.1.2005 has to be read with notification dated 10 July 2008, which has made amendment with effect from 19.1.2005. In view of second proviso to notification dated 19.1.2005 read with notification dated 10th July 2005, no refund is permissible.

15. Respondents 3 and 4 have also filed separate counter affidavits

stating that petitioners never claimed exemption from stamp duty and notification dated 10 July 2008 is within the power of State Government to reduce, remit or compound duties under Section 9 of Act 1899.

16. In the supplementary rejoinder affidavit, petitioners have claimed that notification dated 10th July 2008 is arbitrary and has been issued to frustrate the claim of refund of petitioners.

17. Sri Navin Sinha, learned Senior Advocate assisted by Sri Shesh Kumar, Advocate has appeared for petitioners and learned Standing Counsel as well as Sri Ramendra Pratap Singh, Advocate for respondents.

18. Sri Sinha, submitted that exemption could not be claimed by petitioners at the time of execution of lease deed due to lack of knowledge of Notification dated 19.01.2005 and for that reason petitioners cannot be penalized. He submitted that as soon as petitioners came to know about said mistake, they sent letters dated 19.04.2005 and 16.09.2005 (Annexures-4 and 5 to writ petition) and thereafter a legal notice dated 19.12.2005. He contended that impugned notification dated 10.07.2008 issued with retrospective effect inserting second proviso, is only to deny refund of stamp duty to petitioners and, therefore, is arbitrary, discriminatory and violative of Article 14 of the Constitution of India.

19. Learned counsel appearing for respondents collectively argued that stamp duty was payable by petitioners and they did not satisfy the conditions provided in Notification dated 19.01.2005 so as to entitle for exemption from stamp duty. In any case Notification dated 10.07.2008 has inserted second proviso in Government Order dated 31.08.1998 w.e.f. 10.01.2005 while exemption was granted by Notification dated 19.01.2005 and hence in law second proviso was existing already on statute book when exemption notification was issued and hence it cannot

be said that it is discriminatory. Even otherwise, petitioners have no otherwise legal right to claim refund. Lastly it is contended that with regard to eligibility for exemption etc. the dispute raised by petitioners involve investigation into facts and petitioners have a statutory remedy before Collector, therefore, must avail the same and writ petition should be dismissed.

20. We propose to first consider, whether petitioners are ex facie entitled for exemption from payment of stamp duty and they were covered by para 8.2(f) of notification dated 19.01.2005 for the reason that question of refund will arise only if, this question is answered in favour of petitioners and only then validity of notification dated 10.07.2008 will be necessary to be considered.

21. All the conveyance and instruments transferring immovable property by way of lease in general have not been exempted from stamp duty vide notification dated 19.01.2005. Instead para 8.2(f) is confined to certain conditions if fulfilled only then one can claim exemption from stamp duty under the said notification. These conditions are:

(i) Transfer of immovable property must be for development/ construction of medical and dental college or other educational institutions, multiplexes, cinema halls, shopping malls and entertainment centres.

(ii) The cost of construction and machinery must not be less than Rs. 10 crores.

(iii) Such development/ construction must have such facilities and which fulfill the conditions as provided in Government Order dated 27.02.2004 and other orders issued from time to time.

(iv) The District Magistrate or General Manager, District Industry Centre of concerned District must sign such instrument as

witness for the purpose of confirming the fact that transfer is being executed under above policy.

22. We do not find averments and relevant facts in writ petition that these conditions were satisfied by petitioners so as to entitle them for exemption of stamp duty. In fact Government Order dated 27.02.2004 has not even been placed on record by petitioners and there is no averment whatsoever that the facilities and conditions provided therein were satisfied.

23. Copy of Government Order dated 27.02.2004 has been placed on record by Respondents-1 and 2 as Annexure-CA 3 to their counter affidavit. The aforesaid Government order deals with steps taken to encourage Service Sector in the State of U.P. under Industrial and Service Sector Investment Policy, 2004 and it reads as under:

“प्रेषक,

श्री राकेश कुमार मित्तल,
प्रमुख सचिव,
उ०प्र० शासन।

सेवा में,

महानिदेशक,
चिकित्सा एवं स्वास्थ्य,
लखनऊ।

चिकित्सा अनुभाग-1

लखनऊ दिनांक 27.04.2004

विषय- औद्योगिक एवं सेवा क्षेत्र निवेश नीति 2004 के अन्तर्गत सेवा क्षेत्र को प्रोत्साहन दिये जाने के सम्बन्ध में।

महोदय,

उपर्युक्त विषय पर मुझे यह कहने का निर्देश हुआ है कि विगत कुछ वर्ष से सेवा क्षेत्र का आर्थिक विकास एवं रोजगार सृजन में महत्वपूर्ण स्थान रहा है। तीव्र आर्थिक विकास तथा भूमि पर बढ़ते हुए दबाव को कम करने के लिए सेवा क्षेत्र को प्रोत्साहित किया जाना आवश्यक है। अतः इस नीति के अन्तर्गत सेवा क्षेत्र के विकास पर विशेष बल दिया जायेगा।

2. सेवा क्षेत्र के उपक्रमों यथा-चिकित्सालयों मेडिकल व डेन्टल

कालेजों शिक्षण संस्थानों इत्यादि में निजी क्षेत्र के निवेश को प्रोत्साहन दिया जायेगा। इस हेतु विभाग की ओर से अपेक्षित अनापत्ति / अनुज्ञा प्राथमिकता के आधार पर निर्गत की जायेगी।

3. अवस्थापना सुविधाओं के सदृश ही सेवा क्षेत्र के ऐसे उपक्रम जो निम्नलिखित श्रेणी में आच्छड़दित हैं, को अचल सम्पत्ति के कम अथवा किराये पर लेने पर 100 प्रतिशत स्आम्प डियूटी से छूट और रू0 2 प्रति हजार (अधिकतम रू0 5000) की दर पर निबंधन सुविधा उपलब्ध करायी जायेगी:-

(क) प्रदेश में किसी भी भाग में स्थित निर्धारित सुविधाओं से युक्त ऐसे मल्टी फ़ैसीलिटी चिकित्सालय, जिनकी स्थापित क्षमता न्यूनतम 100 बेड है, और जिनमें चिकित्सा सुविधाओं हेतु प्रयुक्त क्षेत्रफल निर्धारित सीमा से अधिक है।

(ख) प्रदेश में स्थित निर्धारित सुविधाओं से युक्त अति विशिष्टतायुक्त चिकित्सालय।

(ग) विकास खण्ड मुख्यालय (जो जिला व तहसील मुख्यालय से भिन्न हों) पर स्थित निर्धारित सुविधाओं से युक्त ऐसे चिकित्सालय जिनकी स्थापित क्षमता न्यूनतम 50 बेड की हो।

(घ) विकास खण्ड मुख्यालय से नीचे ग्रामीण क्षेत्रों में स्थापित निर्धारित सुविधाओं से युक्त ऐसे चिकित्सालय जिनकी स्थापित क्षमता न्यूनतम 30 बेड हो।

(च) निर्धारित सुविधाओं से युक्त तथा निर्धारित शर्तें पूर्ण करने वाले ऐसे मेडिकल या डेन्टल कालेज, अन्य शिक्षण संस्थाएं जिनमें भवन और मशीनरी में कुल लागत रू0 1000 करोड से कम न हो।

4. उपरोक्त प्रयोजनों हेतु राज्य सरकार द्वारा निम्न शुल्कों से छूट प्रदान की जायेगी।

(1) पूजा निवेश हेतु प्रयुक्त प्लान्ट एवं मशीनरी आदि पर कोई प्रवेश कर देय नहीं होगा।

(2) यदि भूमि का अधिग्रहण राज्य सरकार द्वारा किया जाता है तो अधिग्रहण शुल्क से छूट दी जायेगी।

(3) पूजा निवेश को प्रोत्साहित करने हेतु विकास प्राधिकरणों / स्थानीय निकायों द्वारा लगाये जाने वाले विकास शुल्क, मलवा शुल्क से छूट देने के साथ-साथ 05 वर्षों हेतु हाउस टैक्स, वाटर टैक्स एवं अन्य सभी टैक्सों / शुल्कों से छूट दी जायेगी।

(4) स्थापना की तिथि से 10 वर्ष हेतु इलेक्टिसिटी ड्यूटी से छूट दी जायेगी।

5. इस सम्पूर्ण कार्य को सम्पन्न करने के लिए अधिवासी भारतीयों का विस्तृत सर्वेक्षण कराया जायेगा एवं उनसे सक्रियता से सम्पर्क करके प्रदेश में निवेश के लिए आमन्त्रित किया जायेगा। अधिवासी भारतीयों के देश प्रेम की भावना को दृष्टिगत रखते हुए उन्हें अपने गांव, कस्बे अथवा शहर की स्थानीय सामाजिक अवस्थापना के उच्चीकरण अथवा अन्य समाज सेवा के कार्यों में सहयोग देने के लिए प्रेरित किया जायेगा।

भवदीय,

हस्ताक्षर अपठित

(राकेश कुमार मित्तल)

प्रमुख सचिव।”

24. Learned counsel for petitioners submitted that aforesaid Government Order is not applicable since lease of immovable property executed in favour of petitioners is not for establishment of medical and other institution but for development of land by constructing shopping malls, multiplexes, showrooms, retail outlets, hotels, restaurants, offices and such other commercial usage. Even if it is accepted, still Government Order dated 19.01.2005 will not be attracted unless petitioners demonstrate that condition of cost of construction and machinery is not less than Rs. 10 crores. On this aspect also we do not find any averment and material in writ petition. The only averment which could have been searched out is contained in para 8 and 22 of writ petition, which read as under:

“8. That from the perusal of the said notification, it is clear that

the lease of immovable property relating to first transaction is completely exempted from payment of stamp duty in full if cost of construction is ten crores and above. In this regard it is submitted that the petitioner has been allotted land in question for construction of shopping malls and the cost of the said construction would be much more than Rs. 10 crores, therefore, the said notification (Annexure-2) is fully applicable in the facts and circumstances of the present case and the transaction in question was fully exempted from payment of an7 stamp duty.”

“22. That from the lease deed, copy of site plan and from the spot is is clear that the land in question is being utilized for construction of shopping malls and the cost of such construction would not be less than Rs. 10 crores and the transaction in question is also a first transaction of immovable property, therefore, all the conditions of the notification are applicable to the facts and circumstances of the present case and the petitioner is lawfully entitled to get exemption from payment of stamp duty and the stamp duty already realized from the petitioner is liable to be refunded forthwith. A true copy of estimated cost is annexed herewith as Annexure-8 to the writ petition.”

25. Paragraph 8 has been sworn on the basis of information received from record but no such record is available or placed before this Court.

26. Even letters/ representations claim to have been submitted by petitioners for refund of stamp duty after execution of lease deed, nowhere states that petitioners satisfy the aforesaid conditions and actual cost of construction and machinery etc. is more than Rs. 10 crores. Copy of said representations is Annexures-4 and 6 to writ petition.

27. Annexure-4 is a letter addressed to Chief Executive Officer, NOIDA and Annexure-6 is a letter sent to District Magistrate/ Collector,

Gautambudh Nagar. Nothing has been said in the letter sent to Chief Executive Officer, NOIDA. Letter sent to District Magistrate/ Collector, Gautambudh Nagar also states nothing on this aspect. There is no averment whatsoever that aforesaid conditions are satisfied by petitioners.

28. Learned counsel for petitioners drew out attention to Annexure-8 and averments made in para 22 of writ petition and contended that project's estimated cost is more than Rs. 313 Crores which apparently satisfy the requirement of Government Notification dated 19.01.2005.

29. We have gone through Annexure-8 to the writ petition and find that it does not contain any date and we do not know as to at what stage it was prepared. Moreover, for the purpose of attracting notification dated 19.01.2005 it is not the cost of project but the cost of construction and machinery only which is to be taken into account and question as to what would be included by the term "cost of construction" and "machinery", is a question of fact need to be examined appropriately at appropriate forum. This claim was never made by petitioners before respondents-authorities and from the estimated cost of project, it cannot be said as to what items have to be taken for attracting notification dated 19.01.2005. We, therefore, hold that petitioners have failed to show that they satisfy the conditions precedent for attracting Government Notification dated 19.01.2005 and, therefore, not entitled for exemption.

30. There is one more condition provided in Government Notification dated 19.01.2005 that instrument is the first one executed for transfer of immovable property in favour of an interpreneur and secondly that District Magistrate or General Manager, District Industry Centre (*hereinafter referred to as "GM, DIC"*) of concerned district shall sign such instrument as a witness for the purpose of confirming the fact that transfer is being executed under the said policy. It appears that

petitioners were satisfied that they do not satisfy the aforesaid conditions and, therefore, lease deed executed by petitioners is not witnessed either by District Magistrate or GM, DIC, as contemplated in Government Notification dated 19.01.2005. The two witnesses to the deed are, Subhash Chaudhary and Jasmir Singh. It is not disputed before us that none of them held the office of District Magistrate or GM, DIC at the time of execution of lease deed in District Gautambudh Nagar. Therefore, even this condition remained uncomplied with. Learned counsel for petitioners has not addressed us on the question that aforesaid condition of witnessing the document by District Magistrate or GM, DIC is not a necessary condition for attracting Government Notification dated 19.01.2005.

31. In the alternative, even if we accept the contention of petitioners counsel that Annexure-8 to writ petition read with para 22, the entire cost of project will constitute sufficient satisfaction of requirement of Rs. 10 crores cost of construction and machinery contemplated in notification dated 19.01.2005, we proceed now to consider whether petitioners can claim refund despite an otherwise provision made by Government Notification dated 10.07.2008.

32. It is not in dispute that when an instrument/ conveyance is executed, it attract stamp duty chargeable under Section 3(aa) read with (in the present case) Schedule I-B of Act, 1899. The document in question, therefore, was chargeable with stamp duty.

33. Section 3, however, states that subject to provisions of Act, 1899 and the exemptions contained in Schedule I, the document shall be chargeable with duty of the amount indicated in Schedule. Section 9 confers power upon Government, by rule or order published in official gazette, to reduce, remit or compound duty prospectively or retrospectively and it reads as under:

9. *Power to reduce, remit or compound duties.*-- (1) *The Government may, by rule or order published in the Official Gazette,—*

(a) *reduce or remit, **whether prospectively or retrospectively**, in the whole or any part of the territories under its administration, the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class, or any instruments when executed by or in favour of any particular class of persons or by or in favour of any members of such class, are chargeable, and*

(b) *provide for the composition or consolidation of duties of policies of insurance and in the case of issues by any incorporated company or other body corporate or of transfers (where there is a single transferee, whether incorporated or not) of debentures, bonds or other marketable securities.*

(2) *In this section, the expression “the Government” means,—*

(a) *in relation to stamp-duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts, and in relation to any other stamp-duty chargeable under this Act and falling within entry 96 of List I in the Seventh Schedule to the Constitution, except the subject matters referred to in clause (b) of sub-section (1);*

(b) *save as aforesaid, the State Government.*

34. Section 27 provides that consideration, if any, and all other facts and circumstances affecting chargeability of any instrument with duty or the amount of duty of which it is chargeable, shall be fully and truly set forth in the instrument. It is not disputed that in the entire instrument i.e. lease deed, there is no assertion of facts which may affect chargeability of duty so as to claim exemption or reduction or remission in the amount of stamp duty.

35. Further, the power has been conferred upon Government to reduce, remit or compound duties, which has also been conferred power to do so retrospectively. Notification dated 10.07.2008 has been issued in exercise of power under Section 9(1) of Act, 1899 making amendment in Government Notification dated 31.08.1998 w.e.f. 10.01.2005. It categorically states that amount of duty already paid shall not be refunded. The first proviso which has been inserted by notification dated 10.07.2008 shows that if lease deed was executed in reference to Industrial and Service Sector Investment Policy, 2004 and District Magistrate or GM, DIC have not signed the instrument as witness, subsequently on an application given by party such a certificate can be issued by District Magistrate or GM, DIC which will have the same effect as if the document was signed and witnessed by District Magistrate or GM, DIC but this validation by way of second proviso will not result in refund of any amount of stamp duty. The power to issue notification under Section 9 with retrospective effect has been validly conferred and it could not be said that notification second proviso is ultra vires. In both the provisos which has been inserted are integrally connected and a lapse which earlier has occurred in lease deeds in order to grant other benefits under industrial policy etc., a method has been provided to do away such flaw but with a condition that amount already paid shall not be refunded. Second proviso is integrally connected with first proviso inasmuch as first proviso applies to the case where its compliance was not earlier done, hence duty exemption could not have been claimed. In order to protect the entrepreneur from other benefits he has been allowed to get such mistake rectified but with condition that no refund of amount already paid shall be made. Therefore, both provisos have to stay either together or not and it cannot be said that first proviso should stay but second proviso must go. When a benefit under such document is claimed, one has to claim as it is in its entirety and not

partially.

36. Learned counsel for petitioners contended that denial of refund is illegal but could not dispute that in absence of first proviso, petitioners were not entitled to seek any exemption of stamp duty under Notification dated 19.01.2005. Moreover, exemption has been granted by Notification dated 19.01.2005 which is effective from the date of notification published in official gazette while amendment in Government Notification dated 31.08.1998 has been made by Government Notification dated 10.07.2008 w.e.f. 10.01.2005, meaning thereby when exemption Notification dated 19.01.2005 came into force, second proviso denying refund was already existing on the statute book since 10.01.2005. Hence, it cannot be said that something has been done only to deny benefit to petitioners. Therefore, the contention that refund has been denied to petitioners only by singling out them and it is discriminatory, is not acceptable.

37. No other point has been argued.

38. The writ petition lacks merit. Dismissed accordingly.

Order Date :- 22.11.2019
Arshad/AK