

Supreme Court of India

State Of Maharashtra vs Atur India Pvt. Ltd on 11 February, 1994

Equivalent citations: 1994 SCC (2) 497, JT 1994 (1) 640

Author: S Mohan

Bench: Mohan, S. (J)

PETITIONER:

STATE OF MAHARASHTRA

Vs.

RESPONDENT:

ATUR INDIA PVT. LTD.

DATE OF JUDGMENT 11/02/1994

BENCH:

MOHAN, S. (J)

BENCH:

MOHAN, S. (J)

VENKATACHALLIAH, M.N. (CJ)

CITATION:

1994 SCC (2) 497 JT 1994 (1) 640

1994 SCALE (1) 532

ACT:

HEADNOTE:

JUDGMENT:

The Judgment of the Court was delivered by MOHAN, J.- The respondent is a company incorporated under the Companies Act. It carries on business of construction of multi-storeyed buildings and selling tenements therein on ownership basis in accordance with the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963.

2. In the year 1968, the Government of Maharashtra started reclamation work in the area known as Backbay Reclamation area abutting Bombay City on the Cuffee Parade and Nariman Point. The object of reclamation was to provide for construction of multi-storeyed buildings. The reclaimed land was divided into five blocks; each was given a number; for Block No. 5, the appellant (State of Maharashtra) issued the invitation to the public to make offers for purchase of plot of land for putting up multi-storeyed buildings. The plots and structures were to be given on 99 years' lease at specified rates.

3.Pursuant to the advertisement, the respondent offered to secure the plot. It made an offer along with the letter dated December 15, 1970 in respect of Plot No. 46, Block No. V, Backbay Reclamation Estate, measuring 2500 square metres. The respondent also filed a questionnaire as required to be filled in accordance with the advertisement in which it was clearly mentioned that the offer was as promoter.

4.On January 1, 1971, the Collector of Bombay informed the respondent that the State Government had accepted the tender for lease of the plot at the rate of Rs 2225 per sq. metre. The respondent was also called upon to make payment of security deposit of Rs 75,000. This was complied with. A guarantee bond was also furnished for a sum of Rs 3,04,000. A cheque of Rs 300 was deposited towards the cost of preparation of agreement. In the letter dated February 23, 1971, it was stated, drawing the attention to the answer in the questionnaire that the respondent was acting as a promoter and the lease might be granted in favour of cooperative society.

5.Thus, it was made clear that the company will be acting as the promoter and builder for the aforesaid scheme. The lease of the plot will be taken in the name of cooperative housing society. A specific request was made to the Collector to make necessary provision for grant of lease in the name of the cooperative society. On March 16, 1971, the Collector of Bombay informed the respondent that the Government had sanctioned the lease of the plot in favour of respondent as promoter of the cooperative society.

6.On June 21, 1972, the respondent informed the Collector that it had agreed to sell the plots in the buildings and the purchasers of the said flats would form a cooperative society under the name of Basant Cooperative Housing Society Limited. The respondent informed the Government that the cooperative society was registered. On July 30, 1974, the building was completed and completion certificate was obtained. The Collector sent a reply dated December 13, 1977 informing the respondent.

7.On receipt of this letter, a request was made that a deed of lease be prepared in the name of the Navrang Basant Cooperative Housing Society Ltd. at the earliest convenience. As the Secretary, Revenue Department, Ministry of Revenue & Forests Department did not respond to the request, another letter was written on February 17, 1978 relating to the demand for execution of lease. On July 25, 1980, the Collector of Bombay informed the respondent that a direct lease deed in respect of Plot No. 101 will be executed in the name of cooperative housing society provided the respondent being the confirming party subject to charging of premium under the following terms:

"(a) Amount equal to the stamp duty chargeable on a document between the original allottee and the Government.

(b)Amount equal to the stamp duty chargeable on document of assignment by the original allottee to the cooperative society, company etc. had the lease deed been executed with the original allottee.

(c) 50 per cent of the unearned income i.e. 50 per cent of the difference between the valuation of the land at the time of the original allotment and at the time of transfer. In case the lease deed is to be executed with cooperative society the date of transfer for the purpose of determining the value of the land for purposes of calculating the unearned income should be the date on which the society has been registered. In the case of companies etc. also the same criteria should be applied provided the company is registered on a date later to the date of original allotment. Otherwise the date on which request for execution of lease in the name of such company etc. is made or the date on which the transfer has taken place.

(d) Legal expenses i.e. expenses on preparation of the agreement to lease which may be done away with plus expenses on preparation of the lease deed which might have been entered into which the original allottee as the case may be.

(e) Registration charges with reference to

(d) above."

8. The respondent, thereafter addressed several communications informing the Collector that the assumption that the company was transferring the leasehold interest in favour of the cooperative housing society is entirely misconceived. It was pointed out that right from the inception, it has been clearly held out that the lease is to be executed in favour of the cooperative society formed by the purchasers of the flats. The Collector specifically agreed to this course. It was further stated that at the time of offer itself, it was disclosed that the company was a promoter or builder and the lease was never to be executed in its favour. Therefore, the Collector refused to pay any heed to the request made by the respondent to execute the lease in favour of cooperative housing society without demanding premises and imposing other conditions on the assumption that the leasehold rights had to be transferred by the respondent in favour of cooperative housing society.

9. On February 24, 1983, the Superintendent of Stamps addressed to the respondent inter alia reciting that by virtue of certain correspondence between the respondent and the Government of Maharashtra, the respondent had agreed to abide by certain terms and conditions of lease to be executed in respect of Plot No. 101. The letter further recited that the lease had not been executed by the respondent. Therefore, the Superintendent claimed that the agreement arrived at by correspondence between the respondent and the Government of Maharashtra amounted to lease falling under Article 36 of the Bombay Stamp Duty Act, 1958. On that basis, a demand for stamp duty for a sum of Rs 1,86,175 was made. Failing to do so, it was stated that the same would be recovered as arrears of land revenue. It was this which led to filing of Writ Petition No. 2494 of 1983 before the High Court of Bombay.

10. The learned Single Judge by judgment dated August 30, 1990 dismissed the petition in the view that Article 36 of Schedule 1 of the Bombay Stamp Act, 1958 applied to the case. The demand was legal. In fact, the respondent was not mere promoter. On the contrary, the respondent was a nominee of the proposed cooperative housing society.

11. Aggrieved by the same, Appeal No. 1371 of 1990 was filed before the High Court. The Division Bench by a judgment dated July 23, 1992 reversed the judgment of the learned Single Judge. It was found that the correspondence between the respondent and the Government spelt out an agreement to lease; but that agreement was not for the benefit of the respondent but for the cooperative housing society. It is not open to the State Government (appellant herein) to refuse to execute lease in favour of the cooperative housing society on the ground that the correspondence sets out agreement between the Government of Maharashtra and the respondent herein. Accordingly, the letter dated February 24, 1983 and the demand contained therein was quashed. The appeal was allowed and a writ of mandamus was issued directing the State Government to execute the lease in favour of Navrang Basant Cooperative Housing Society Ltd.

12. It is under these circumstances, the present appeal by special leave came to be preferred.

13. Shri S.K. Dholakia, learned counsel for the State of Maharashtra should urge that an offer was invited on November 30, 1970. In Part II of that offer, memo of terms and conditions for lease of Block V, Backbay Reclamation was enclosed. Condition No. 7 specifically stated that the use of the building will be for private residence only. Condition No. 13 stipulated that the licensee will be put in possession of the plot on his executing the agreement to lease. More than this, under Condition No. 15, the licensee was debarred either directly or indirectly from transferring, assigning or encumbering or part with interest under or the benefit of the agreement to lease of any part thereof in any manner without the previous consent of the Government in writing. It further stipulated that the Government will be free to refuse to such consent or grant it in its absolute discretion. Equally, condition No. 16 stated that the lessee will not assign or part with possession of the demised premises or any part thereof or transfer the lessee's interest therein without the previous consent in writing of the lessor. Having regard to all these terms, it is clear that there cannot be any assignment of benefit of contract. On December 15, 1970, the respondent wrote a letter making this offer. The Government in its reply dated 1.1971 (sic) had stated that the Government has been pleased to accept the tender for the lease at the rate of Rs 2225 per sq. metre. The request for grant of lease in the name of cooperative society came to be made prior to the registration of the society. The society was registered on June 21, 1972. For five years, no action was taken which is rather strange. If really, the benefit of the contract was intended for the cooperative society, there is no justification for maintaining quiet for these long number of years. Therefore, as learned Single judge rightly held that the contention on behalf of the respondent is purely technical. What remained to be done was mere execution of a document. As it is clear the privity of the contract was between the State of Maharashtra and the respondent, the cooperative society being nowhere in the picture.

14. In opposition to this, Mr Harish N. Salve, learned counsel for the respondent would urge that apart from answering the questionnaire on February 23, 1971, it was specifically stated that the company proposed to construct the building on the above said plot and sell the flats on ownership basis. Thereafter the purchasers of the flats will form a cooperative housing society to which the rights of the company including the right of lease of plot will be transferred. On that basis, the request was made for granting the lease in the name of the said cooperative housing society. This was the specific request made to the Collector. On March 16, 1971, the respondent received a letter from the Collector stating that Government has sanctioned the lease of the above plot in favour of

the respondent as promoters of a cooperative housing society. It was on this basis that the request was made on June 21, 1972 drawing the attention of the Collector to the letter dated March 16, 1971 and permission was sought to transfer the rights, title and interest in favour of Basant Cooperative Housing Society Ltd. After the formation of society, on December 13, 1977, the Government sanctioned the request to transfer the rights, title and interest in Plot No. 101 to the Basant Cooperative Housing Society. Therefore, bypassing all these, to merely go by the terms and conditions of a licence and to contend that what was granted was a lease and nothing further remained excepting the execution of a formal lease deed is not correct. When the tender of the respondent was accepted, it was nothing more than an agreement to lease. It is open to the respondent's society to assign the benefit under that agreement. If really what was agreed to between the appellant State and the respondent is nothing more than an agreement to lease it does not require registration. The benefit of it can be assigned in favour of the cooperative society to which the Collector gave his consent and permitted the transfer. Now to contend that it was an agreement of lease and therefore, liable to stamp duty ignores the important fact that throughout the respondent acted only as promoters with the knowledge and consent of the appellant. Besides, clause 15, on which reliance is placed now, was never enforced.

15.A brief analysis of the facts may be made before we go to the legal aspect.

16.On November 30, 1970, a notice was issued inviting offers for the lease of various plots from Block V, Backbay Reclamation Estate which specifically mentioned Plot No. 46 (which is renumbered as Plot No. 101) with which we are concerned. To the said notice was annexed in Part II, a memo of terms and conditions for the lease. Clauses 7, 13, 15 and 16 are relevant for our purposes and they are extracted below :

"7. The user of the building will be for private residence only.

13.The licensee will be put in possession of the plot on his executing the agreement to lease which will be prepared by the Solicitor to Government Law & Judiciary Department, at the entire cost of the licensee including stamp duty and registration charges. The licensee will have to pay a deposit of Rs 300 towards the professional charges of the Solicitor to Government.

15.The licensee will not directly or indirectly transfer, assign, encumber or part with the interest under or the benefit of the agreement to lease of any part thereof in any manner without the previous consent in writing of the Government. Government will be free to refuse such consent or grant it, subject to such conditions including a condition regarding the payment of premium as Government may in its absolute discretion think fit.

16.The lessee will not assign or part with possession of the demised premises or any part thereof or under let or transfer the lessee's interest therein without the previous consent in writing of the lessor. The lessor will be at liberty to refuse such consent or grant it subject to such conditions including a condition requiring payment of

premium as the lessor may in his absolute discretion think fit."

But what is necessary to notice is the draft agreement of licence clearly stated in clause II as under :

"Nothing in these presents contained shall be construed as a demise in law of the said land hereby agreed to be demised or any part thereof so as to give to the licensee any legal interest therein until the lease hereby contemplated shall be executed and registered but the licensee shall only have a licence to enter upon the said land for the purpose of performing this agreement.

17. On this, the respondent made an offer on December 15, 1970 in the prescribed form duly stamped along with annexures enclosing the receipt for payment of Rs 75,000 as earnest deposit. In the questionnaire which accompanied this offer, it was stated as under :

"The company proposes to sell the flats in the said proposed building on ownership basis and the purchasers of such flats will form a cooperative society or an incorporated body to whom the property and the rights of the company will be transferred."

18. On January 1, 1971, the Collector wrote to the respondent as under "The Government has been pleased to accept your tender for the lease of the above plot at the rate of Rs 2225 per sq. metre."

19. On February 23, 1971, the respondent requested the Collector to above the Government for the issue of necessary orders for the lease of plot. it was specifically stated in that letter as under :

"We would also like to inform you that at the time of making the offer for the above plot, in the accompanying questionnaire form, we have stated that the company proposes to construct the building on the above plot and to sell the flats on ownership basis and the flat purchasers shall form into a cooperative society or an incorporated body to which the rights of the company including the rights for the lease of the above plot will be transferred. As such, the company will be acting as the promoters or the builders for the aforesaid scheme and the lease of the plot will be taken by us in the name of a cooperative society or an incorporated body to be formed or constituted hereafter. In these circumstances, we would request you that necessary provision for granting lease in the name of a cooperative society or an incorporated body as aforesaid, may please be made in the orders to be passed by the Government."

20. Referring to this letter, the Collector in his reply dated March 16, 1971 stated as under:

"No. SB/CC3/LND 2832 (46) Office of the Collector of Bombay, (Survey Branch) Old Custom House, Fort, Bombay 1.

Dated 16.3.1971 To M/s Atur India Pvt. Ltd., Civil Engineers, 31 1, Mirabelle, 33 A, New Marine Lines, Bombay-20.

Gentlemen, Sub: Lease of Plot No. 46, Block V, Backbay Reclamation. Please refer to your letter dated 23.2.1971.

2. Govt. has sanctioned the lease of the above plot in your favour as promoters of a cooperative housing society or an incorporated body to be formed by you, on the ground rent calculated at 6 1/2% per annum on the value of the land at Rs 2297 per sq. metre subject to the terms and conditions detailed in the accompanying memo whose terms and conditions have already been agreed to by you.

3. I am requesting the Asstt. Solicitor to Government L. & J. Deptt. to take in hand the preparation of the draft agreement to lease.

Yours faithfully, Sd/ Collector of Bombay.

Copy forwarded with compliments to the: Asstt. Solicitor to Govt. L. & J., Deptt., with reference to G.R. & R & F Deptt. No. LBL 2570/290652-AI, dated 3rd March, 1971, please take in hand the preparation of the draft agreement to lease.

Copy submitted for information to the Secretary to Govt. R & F Deptt., A-1, Branch Sachivalaya.

Sd/-

Collector of Bombay."

21. With this letter was enclosed the draft agreement to lease. On February 16, 1972, the Collector wrote to the respondent "as you have furnished the required undertaking on stamp paper, the possession of the above plot may be deemed to have been handed over to you with effect from the date of this letter". On June 21, 1972, the respondent informed the Collector that it agreed to sell the flats in the building under construction and the purchasers would form a cooperative society under the name of Basant Cooperative Housing Society Ltd. and that the society is being registered shortly. On that basis, it was requested to grant permission to transfer the rights, title and interest of the respondent in favour of Basant Cooperative Housing Society. The building was completed some time in 1974 and Bombay Municipal Corporation granted occupation certificate by a letter dated July 30, 1974. On August 8, 1977, the Basant Cooperative Housing society Ltd. came into being. On December 13, 1977, the following letter was addressed to the respondent : "No. SB/CC3/LND-2832 (101) Collector's Office, Survey Branch, Old Custom House, Fort, Bombay.

Dated : 13.12.1977.

To The Secretary, M/s Atur India Pvt. Ltd., 31 1, Mirabelle, 33 A, New Marine Lines, Bombay-20.

Sub : Lease of Plot No. 101, Block V B.B.R. to M/s Atur India P. Ltd., Sir, Please refer to your letter No. AI/1 10/7-72/582 dated 21st June, 1972. Govt. has sanctioned your request to transfer the rights, title and interest in the Plot No. 101 from Block V, Backbay Reclamation to the Basant Cooperative Housing Society Ltd.

Yours faithfully, Sd/-

For Collector of Bombay."

Whereupon the request was made on February 17, 1978 reiterating the demand to execute the lease in favour of the society. It was at this stage, the Collector wrote a letter dated May 25, 1978 demanding stamp duty on the basis that there was a lease from the Appellant Government to the respondent and onward to the society and further demanding unearned increase @ 50% of the difference between the market value and the price at which allotment was made. On February 24, 1983, a letter was addressed by the Superintendent of Stamps to the respondent requiring the respondent to pay stamp duty. The correspondence was impounded on the ground that the agreement arrived at by the correspondence in this case amounted to lease.

22. On a careful examination of these documents, the following emerge

(i) What was contained in the notice dated November 30, 1970 was only an offer to lease of land and the offer was specifically as promoter which is evident from the answer to the questionnaire which has been extracted above.

(ii) The appellant stated that it was pleased to accept the tender of the respondent for the lease. At that time, the appellant was aware of the offer of the respondent as promoter.

(iii) Right from February 23, 1971, again and again the respondent reiterated his position as promoter.

(iv) A request was made on December 7, 1977 for execution of lease in favour of the cooperative society. That was specifically acceded to by the Collector on December 13, 1977.

(v) There was no actual demise on the date of acceptance of the offer of tender of the respondent. Even on February 16, 1972, it was only a case of deemed possession.

23. The notice dated November 30, 1970 contained various clauses requiring the use of building only for private residence and debarred from transferring or assigning the right. Clause 15 was never enforced at any point of time. If really, that was so, the appellant would not have agreed to the respondent's transferring the rights, title and interest in favour of the cooperative society. Therefore, the stand of Mr Harish N. Salve, learned counsel for respondent that clause 15 was not enforced, has to be accepted.

24. The facts mentioned above are clearly indicative of an agreement to lease and not an agreement of lease. The distinction between the two may be seen first with reference to English law. Woodfall in Law of Landlord and Tenant, Vol. 1, 28th Edn., 1978 at page 127 states as under:

"A contract for a lease is an agreement enforceable in law whereby one party agrees to grant and another to take a lease. The expressions 'contract for lease' and 'agreement for lease' is to be preferred as being more definite, agreement frequently means one of many stipulations in a contract. A contract for a lease is to be distinguished from a lease, because a lease is actually a conveyance of an estate in land, whereas a contract for a lease is merely an agreement that such a conveyance shall be entered into at a future date."

(emphasis supplied) In contradistinction to this, in the case of a lease, there must be words of demise. On this Woodfall states at page 184 as under:

"The usual words by which a lease is made are 'demise' and 'let'; but any words which amount to a grant are sufficient to make a lease. Whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it, for any determinate time, whether they run in the form of a licence, covenant or agreement, are sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been used for that purpose; for if the words used are sufficient to prove a lease of land, in whatsoever form they are introduced, the law calls in the intent of the parties, and moulds and governs the words accordingly."

Again at page 185, it is stated :

"Although no specific words are necessary to create a lease, yet there must be words used which show an intention to demise, therefore, where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did; it was held, that the memorandum was a mere unaccepted proposal, and did not operate as a lease. (Doe d. Bingham v. Cartwright)"

25. Hill & Redman in Law of Landlord and Tenant, 17th Edn., Vol. 1 at page 100 dealing with this aspect of the matter states as under:

"DISTINCTION BETWEEN LEASE AND AGREEMENT FOR LEASE

40.(1) A lease is a transaction which as of itself creates a tenancy in favour of the tenant.

(2) An agreement for a lease is a transaction whereby the parties bind themselves, one to grant and the other to accept, a lease.

(3) If the agreement for a lease is one of which specific performance will be granted the parties are, for most but not all purposes, in the same legal position as regards each other and as regards third parties as if the lease had been granted.

(4) Whether an instrument operates as a lease or as an agreement for a lease depends on the intention of the parties, which intention must be ascertained from all the relevant circumstances.

50. An instrument in proper form (a); by which the conditions of a contract of letting are finally ascertained, and which is intended to vest the right of exclusive possession in the lessee either at once, if the term is to commence immediately, or at a future date, if the term is to commence subsequently is a lease which takes effect from the date fixed for the commencement of the term without the necessity of actual entry by the lessee (b). An instrument which only binds the parties, the one to create and the other to accept a lease thereafter, is an executory agreement for a lease, and although the intending lessee enters, the legal relation of landlord and tenant is not created."

26. A useful reference may be made to *Green v. Bowes-Lyon*². This ruling clearly brings out the distinction between an agreement to lease and a lease. At pp. 304-05, it is held by Pearson, J. as under:

"The defendant's contention is that the instrument dated March 19, 1958, that is the instrument called a reversionary lease, is in truth an agreement between the landlord and the tenant 'for the grant to the tenant of a future tenancy of the holding on terms and from a date specified in the agreement' within the meaning of Section 28. If that is right then the defendant's sub-lease from the plaintiff was the 'current tenancy' referred to in Section 28, and it continued only until April 5, 1 (1820)3B&Ald326 2 (1960) 1 All ER301:(1960)1 WLR 176 1959, and no longer, and was not, therefore, a tenancy to which Part 2 of the Act applied. So it was not continued indefinitely under Section 24. Then on that basis it is said that the agreement binds the interest of the plaintiff under para 3(1) of Schedule 6 to the Act of 1954, and that para 4 of that schedule gives the plaintiff a right to compensation.

The question in the end is a very simple one : is the instrument of March 19, 1958, a reversionary lease or is it an agreement for the grant of a future tenancy? Having regard to its name and provisions I hold that it is a reversionary tenancy and not an agreement for the grant of a future tenancy. It creates an estate and not merely a set of contractual rights and obligations. There is a definition of term of years absolute in the Law of Property Act, 1925, Section 205(1) (XXVII), as a term of years 'taking effect either in possession or in reversion whether or not at a rent' and so on.

Then it is stated in *Woodfall on Landlord and Tenant* (25th Edn.), P. 286, that 'A lease may be limited to take effect either immediately or from a future date. It is provided by the Law of Property Act, 1925, Section 205(1) (XXVII), that "term of years absolute" includes a term of years taking effect either in possession or in reversion.' At p. 287 of *Woodfall on Landlord and Tenant* (25th

Edn.) it is stated :

'Reversionary leases : All leases which are not to take effect in possession immediately, but from a future day, are considered as reversionary leases, within the meaning of powers to grant leases in possession and not in reversion. In legal acceptance a lease for years in reversion, and a future interest for years, are one and the same : a future lease and a lease in reversion are synonymous. But strictly speaking a reversionary lease-is one granted for a term which is to commence from or after the expiration or other determination of a previous lease.' In my view, this instrument is a reversionary lease which was granted for a term which was to commence from and after the expiration of the previous lease, which is the lease from Mr Rye to Mr Wells, expiring on April 4, 1959, and this instrument granted is a reversionary lease commencing on April 5, 1959.

It seems to me that the distinction between the reversionary lease referred to in Section 65(3) and the agreement for a future tenancy referred to in Section 28 is the difference between something which creates an estate and something which creates merely a set of contractual rights and obligations."

27.We will now turn to Indian law. Mulla in The Transfer of Property Act (7th Edn.) at page 647 dealing with agreement to lease states as under :

"An agreement to lease may effect an actual demise in which case it is a lease. On the other hand, the agreement to lease may be a merely executory instrument binding the parties, the one, to grant, and the other, to accept a lease in the future. As to such an executory agreement the law in England differs from that in India. An agreement to lease not creating a present demise is not a lease and requires neither writing nor registration. As to an executory agreement to lease, it was at one time supposed that an intending lessee, who had taken possession under an agreement to lease capable of specific performance, was in the same position as if the lease had been executed and registered. These cases have, however, been rendered obsolete by the decisions of the Privy Council that the equity in *Walsh v. Lonsdale* does not apply in India."

28.If it is merely an agreement to lease as to whether it requires registration has come up for discussion of this Court in *Tiruvani Bai v. Lilabai*³. At page 111 it was held as under:

"Before dealing with these points, we must first consider what the expression 'an agreement to lease' means under Section 2(7) of the Indian Registration Act, hereinafter referred to as the Act. Section 2(7), provides that a lease includes a counterpart, *Kabuliyat*, an undertaking to cultivate and occupy and an agreement to lease. In *Hemanta Kumari Debi v. Midnapur Zamindari Co. Ltd.*⁴ the Privy Council has held that ,an agreement to lease, which a lease is by the statute declared to include, must be a document which effects an actual demise and operates as a lease'. In other words, an agreement between two parties which entitles one of them merely to claim the execution of a lease from the other without creating a present and immediate demise in his favour is not included under Section 2, sub-section (7). In

Hemanta Kumari Debi case⁴ a petition setting out the terms of an agreement in compromise of a suit stated as one of the terms that the plaintiff agreed that if she succeeded in another suit which she had brought to recover certain land, other than that to which the compromised suit related, she would grant to the defendants a lease of that land upon specified terms. The petition was recited in full in the decree made in the compromised suit under Section 375 of the Code of Civil Procedure, 1882. A subsequent suit was brought for specific performance of the said agreement and it was resisted on the ground that the agreement in question was an agreement to lease under Section 2(7) and since it was not registered it was inadmissible in evidence. This plea was rejected by the Privy Council on the ground that the document did not effect an actual demise and was outside the provisions of Section 2(7). In coming to the conclusion that the agreement to lease under the said section must be a document which effects an actual demise the Privy Council has expressly approved the 3 1959 Supp 2 SCR 107: AIR 1959 SC 620 4 LR (1919) 46 IA 240: AIR 1919 PC 79 observations made by Jenkins, C.J., in the case of Panchanan Bose v. Chandra Charan Misra⁵ in regard to the construction of Section 17 of the Act. The document with which the Privy Council was concerned was construed by it as "an agreement that, upon the happening of a contingent event at a date which was indeterminate and, having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted"; and it was held that 'until the happening of that event, it was impossible to determine whether there would be any lease or not'. This decision makes it clear that the meaning of the expression 'an agreement to lease' 'which, in the context where it occurs and in the statute in which it is found, must relate to some document that creates a present and immediate interest in the land'. Ever since this decision was pronounced by the Privy Council the expression 'agreement to lease' has been consistently construed by all the Indian High Courts as an agreement which creates an immediate and a present demise in the property covered by it."

29.Examining in the light of above, we hold that the notice of the appellant dated November 30, 1970, the offer of the respondent dated December 15, 1970 and the acceptance of the Collector of the tender of respondent for lease dated January 1, 1971 would merely constitute an agreement to lease. Clause 13 clearly contemplates that the licensee will be put in possession of plot on his executing the agreement to lease. Therefore, it is clear that by the respondent accepting the offer on December 15, 1970, the relationship of lessor and lessee between the appellant and the respondent had not come to be established. Further as pointed out earlier there was no actual demise on the date of the accepting of tender. Therefore, it is only an agreement to lease. It will not fall under Section 2(n) of the Act in which case, it is not an instrument chargeable to duty and the question of impounding does not arise. Much less, there could be a demand for stamp duty.

30.It is the benefit of this agreement which is sought to be assigned in favour of Basant Cooperative Housing Society. In the narration of facts, we have pointed out as to how from the beginning i.e. from December 15, 1970 onwards, when the offer was made by the respondent in answer to a questionnaire, it was made clear that the offer was made as a promoter. This position was again affirmed on February 23, 1971 which was accepted by Collector on March 16, 1971. The letter from

the Collector dated December 13, 1977 puts the matter beyond doubt because the respondent's request to transfer the rights, title and interest in Plot No. 101, in favour of Basant Cooperative Housing Society was sanctioned. In law, the benefit of such a contract can be assigned. That is precisely what the respondent did in the instant case.

5 ILR (1910) 37 Cal 808: 14 CWN 874