

Court No. - 19

Case :- WRIT - C No. - 1007029 of 2009

Petitioner :- Ajij Khan S/O Muzzaffar Khan Objection Filed

Respondent :- State Of U.P. Thru Secy. Tax And Registration And Ors.

Counsel for Petitioner :- Shyam Mohan, Shyam Mohan Pradhan

Counsel for Respondent :- C.S.C.

Hon'ble Manish Mathur, J.

1. Heard Mr. Shyam Mohan, learned counsel for petitioner and Mr. Hemant Kumar Pandey, learned State Counsel for opposite parties no.1 to 4.

2. Opposite parties no.5 and 6 being merely proforma parties, notices stand dispensed with.

3. Petition has been filed challenging order dated 11.08.2009 passed under Section 33 of the Stamp Act, 1899 indicating deficiency in stamp duty in execution of the alleged mortgage deed, which has been termed to be a deed of security by the petitioner. Also under challenge is the order dated 20.10.2009 rejecting appeal preferred by petitioner under Section 56 of the said Act.

4. Learned counsel for petitioner submits that for the purposes of obtaining a loan from opposite party no.6, a guarantee deed was executed between the parties on 01.07.2009 in which predecessor-in-interest of petitioner guarantee the repayment of loan amount of Rs.10,000,00/-. The said loan was secured by opposite party no.5. It is submitted that although the deed indicated that the mortgagee would be entitled to recover the secured loan through attachment and auction sale of movable and immovable properties of the mortgagor, the basic ingredient of the deed remained that of deed of guarantee and cannot be construed to be a deed of mortgage.

5. It is therefore submitted that stamp duty would be payable on the said deed in terms of Article 57 of Schedule 1-B of the Act and not under Article 40 of the said schedule and that the authorities

concerned have erred in treating the aforesaid deed to be a deed of mortgage instead of a deed of guarantee.

6. Learned State counsel has refuted submissions advanced by learned counsel for petitioner with the submission that nomenclature of the deed would be irrelevant for purposes of determining the true nature of the deed and a bare perusal of contents of the deed clearly indicate a transfer of interest whereby the deed would be a deed of mortgage and not of guarantee. He has placed reliance on judgment of Coordinate Bench of this Court rendered in the case of **Navin Mittal versus Chief Controlling Revenue Authority & Ors.** reported in **2014 SCC Online All 5501**.

7. Upon consideration of submissions advanced by learned counsel for parties and perusal of material on record, it is evident that it is the structure of the deed indicated as a guarantee deed which requires interpretation so as to determine whether stamp duty would be payable on the said deed in terms of Article 40 or Article 57 of Schedule 1-B of the Indian Stamp Act. The term mortgage has been defined under Section 58(a) of the Transfer of Properties Act, 1882 and indicates that mortgage is the transfer of interest in specific immovable property for the purpose is as follows:

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage- money" and "mortgage-deed" defined.-

(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferees mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money and the instrument (if any) by which the transfer is effected is called a mortgage-deed."

8. The term of "mortgage deed" has also been defined under Section 2(17) of the said Act in the following manner:

"2.(17) 'mortgage deed'- *Mortgage deed includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an*

existing, or future debt, or the performance of an engagement, one person transfers, or creates to, or in favour of another, a right over, or in respect of specified property." (emphasis added)"

9. However the terms "security bond" has been defined in Section 2(5) of the Indian Stamp Act as follows:-

"(5) Bond'.--'Bond' includes--

(a) any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be;

(b) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

(c) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another."

10. The distinction between a deed of mortgage and a bond can further be determined in terms of specific provisions of Article 40 of the Schedule 1-B of the Indian Stamp Act read with Article 57.

11. Article 40 of the aforesaid Schedule explains a mortgage deed as not being an agreement relating to deposit of title deeds, pawn or pledge, Bottomary bond, mortgage of crop, respondentia bond or a security bond when possession is not given or agreed to be given as aforesaid.

12. Article 57 of Schedule 1-B of the Act defines security bond or a mortgage deed executed by way of security for the due execution of an office or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract or the due discharge of a liability.

13. Upon implementation of the aforesaid definitions and provisions in the present facts and circumstances of the case, it is evident from a perusal of the document that interest and right has been created in the aforesaid deed which does not merely pledge performance of liability of the mortgagor but in fact grants liberty to the

mortgagee to recover the secured loan through attachment and auction sale of the movable and immovable properties of the mortgagor. The document clearly indicates the loan to be secured by means of this document. The aforesaid fact coupled with the fact that it provides right to mortgagor to recover the loan through attachment and auction sale clearly indicates transfer of interest over the property mortgaged.

14. In view of aforesaid ingredients of the aforesaid deed, it is evident that although it has been termed to be a deed of guarantee, but would actually come within definition of a mortgage deed as defined under the Transfer of Property Act particularly since it does not come within definition of a bond as defined under Section 2(5) of the Indian Stamp Act.

15. Considering aforesaid fact that the deed clearly has all the essential ingredients to be construed as a deed of mortgage, in the considered opinion of this Court, there is no error in imposing stamp duty in terms of Article 40 of Schedule 1-B of the Act and not under Article 57 of the aforesaid Schedule.

16. The said proposition of law has also been considered by Coordinate Bench of this Court in the case of **Navin Mittal** (supra) in its judgment.

17. In view of aforesaid, the petition being devoid of merit is **dismissed**. Parties to bear their own costs.

Order Date :- 10.12.2024
Subodh/-