*** THE HON'BLE SRI JUSTICE P. NAVEEN RAO**

+ <u>WRIT PETITION No.5210 OF 2009</u>

% 13.11.2017

Sri Bhanu Prasad Alluri,
S/o.A.V.V.K.Prasad Rao,
R/o. Plot No.96, Sagar Cooperative
Society, Road No.2, Banjara Hills,
Hyderabad, rep., by his GPA Holder,
Sri A.V.V.K. Prasad Rao and others .. Petitioners

And

The Chief Controlling Revenue Authority
and Commissioner and Inspector General
of Registration & Stamps, Andhra Pradesh,
Hyderabad and others .. Respondents

!Counsel for the petitioners : Ms. Neha for Sri S. Ravi

Counsel for the Respondents : Learned Special Government Pleader for the State

<Gist :

>Head Note:

? Cases referred: -

[1] AIR 1926 Mad 1038
[2] AIR 1972 Delhi 146
[3] AIR1995AP329=MANU/AP/0056/1995
[4] AIR 1926Mad1038=MANU/TN/0187/1926
[1] (1884) ILR 10 Cal 274

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHARA PRADESH

***

WRIT PETITION No.5210 OF 2009

Between:

Sri Bhanu Prasad Alluri,
S/o.A.V.V.K.Prasad Rao,
R/o.Plot No.96, Sagar Cooperative
Society, Road No.2, Banjara Hills,
Hyderabad, rep., by his GPA Holder,
Sri A.V.V.K. Prasad Rao and others .. Petitioners

And

The Chief Controlling Revenue Authority
and Commissioner and Inspector General
of Registration & Stamps, Andhra Pradesh,
Hyderabad and others .. Respondents

Date of Judgment pronounced on : 13.11.2017

HON'BLE SRI JUSTICE P. NAVEEN RAO

1. Whether Reporters of Local newspapers May be allowed to see the judgments? : Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals: : Yes/No

3. Whether The Lordship wishes to see the fair copy Of the Judgment? : Yes/No

THE HON'BLE SRI JUSTICE P. NAVEEN RAO

<u>WRIT PETITION No.5210 OF 2009</u>

<u>Dated: 13.11.2017</u>

Between:

Sri Bhanu Prasad Alluri,
S/o.A.V.V.K.Prasad Rao,
R/o.Plot No.96, Sagar Cooperative
Society, Road No.2, Banjara Hills,
Hyderabad, rep., by his GPA Holder,
Sri A.V.V.K. Prasad Rao and others .. Petitioners

And

The Chief Controlling Revenue Authority
and Commissioner and Inspector General
of Registration & Stamps, Andhra Pradesh,
Hyderabad and others .. Respondents

<u>The Court made the following:</u>

THE HON'BLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No.5210 OF 2009

ORDER:

Short but important point that arises for consideration in this Writ Petition is, whether the petitioners are to be mulcted with higher stamp duty by treating the mortgage deed as one burdened with transfer of possession to the mortgagee necessitating payment of higher stamp duty as per Article 35(a) of the Indian Stamp Act, 1899.

2. Petitioners were served notice under Section 40 of Indian Stamp Act informing them that the Sub Registrar impounded the Deed of Mortgage entered by them with Global Trade Finance Limited under Section 33 of the Act. Petitioners were informed that document requires payment of stamp duty of .10,00,000.00 under Article 35 (a) of Schedule I-A to Act. Petitioners were asked to appear and pay deficit duty or to put forth objections. Not satisfied by the explanation offered, the District Registrar passed orders dated 12.9.2008 demanding to pay deficit stamp duty and penalty. Aggrieved thereby, petitioners preferred appeal to Chief Controlling Revenue Authority. Who, in turn, passed orders dated 24.1.2009 affirming the decision of District Registrar. This writ petition is filed seeking declaration that mortgage deed dated 29.2.2008 is an instrument chargeable under Article 35(a) of Schedule I-A of the Act.

3. Heard Ms. Neha, learned counsel representing Sri S. Ravi, learned Senior Counsel for the petitioners, and learned Special Government Pleader for the State.

4.1. Learned counsel for the petitioners contended that it is simple mortgage deed. Taking through the terms of the mortgage deed, she would contend that the terms of deed, particularly Clauses 4, 5, 5.1 and 6 clearly indicate that there was never an intention to handover possession of the schedule mentioned properties to the mortgagee and properties remained in possession and enjoyment of the mortgagor. She would therefore contend that Article 35(a) of the Indian Stamp Act is not attracted and there is no obligation on the part of the petitioners to pay higher stamp duty as demanded.

4.2. Learned counsel further contended that though the opening portion of the agreement mentions 'to have and to hold' and 'English mortgage', the other clauses of deed clearly point out that possession was not handed over. The cumulative reading of various, Clauses of the agreement would clearly show that there was never an intendment to handover possession of the schedule properties, and possession remained with the mortgagor.

4.3. Learned counsel further contended that the very terms used in paragraph No.1 vis-à-vis identical provision to that of Article 35 of the Indian Stamp Act was considered by the Full Bench of Madras High Court in ***the Board of Revenue v. Moopanna Somarazu***[1] and Full Bench of Madras High Court held that mere using of terms, such as, 'to have and to hold' and 'the English Mortgage' do not amount to handing over possession and the agreement should indicate in clear terms handing over possession and not on happening of a future event. She would submit that in the case on hand also mortgagee was entitled to take possession of

[1] AIR 1926 Mad 1038

scheduled property and to deal with the properties only in the event of default in repayment.

4.4. According to learned counsel, the Full Bench of Delhi High Court in ***Dhoomi Mal Ram Chand v. the Collector of Stamps***[2] took similar view and the Full Bench decision of the Madras High Court was followed by this Court in ***Mekapathula Lingareddy v. Durgempudi Gangireddy***[3].

5.1. Per contra, learned Special Government Pleader contended that the opening portion of the agreement as well as first paragraph of the agreement clearly indicate that it is an English Mortgage and the deed of mortgage is burdened with handing over possession and therefore Article 35(a) of the Stamp Act is attracted.

5.2. By drawing the attention to the definition of 'English Mortgage' as defined in Section 58 (e) of Transfer of Property Act, 1882, learned Special Government Pleader would submit that the parties were conscious of the requirements of the 'English Mortgage' and using the word 'English Mortgage' in the opening part of the agreement and other terms in the first paragraph of the agreement indicate clear intention of parties to the deed to hand over possession to the mortgagee. He would submit that to attract the provision in Article 35 (a) of the Stamp Act intention to transfer possession is sufficient and actual transfer of possession is not required. He would submit that other terms of agreement are worded to mislead and to give an impression as if possession continued to vest in the mortgager and to avoid payment of higher stamp duty.

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[2] AIR 1972 Delhi 146
[3] AIR1995AP329=MANU/AP/0056/1995

5.3. He further submitted that it is not possible for the registering authority to verify when the possession was taken to make a demand for payment of required stamp duty under Article 35 (a) and by virtue of such misleading clauses introduced into the agreement mischievously the petitioners cannot avoid payment of specified stamp duty. He submitted that the judgment of the Madras High Court does not come to the aid of the petitioners as the terms used in the said document are not similar to the terms used in the present agreement. The present agreement clearly points out handing over possession to the mortgagee. He would therefore submit that the mortgage deed squarely falls within Article 35(a) and petitioners are required to pay higher stamp duty.

6. Article 35 of Schedule-IA of Indian Stamp Act reads as under:

"Article 35. Mortgagee Deed, not being an agreement relating to Deposit of title deeds, Pawn or Pledge (No.7) Bottomry Bond (No.14) Mortgage of a crop (No.36) Respondentia Bond (no.47) or Security Bond (No.48).

a) **when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given**:	The same duty as a conveyance (no.20) for a consideration or market value equal to the amount secured by such deed.
b) when possession is not given or agreed to be given as aforesaid; such	The same duty as a Bottomry Bond (no.14) for the amount secured by deed.
c) when a collateral or auxiliary or additional or substituted security , or by way of further assurance for the above mentioned purpose where the principal or primary security is duly stamped: for every sum secured not exceeding 1,000; and for every 1,000 or part thereof secured in excess of 1,000	Three rupees Three rupees

7. A plain reading of this Article makes it clear that to attract stamp duty under Article 35(a), mortgagor must hand over possession of subject property to mortgagee. Thus, what is required to be seen is whether possession was handed over to mortgagee. Thus, it is necessary to consider the terms of deed of mortgage in issue.

8. The relevant paragraphs/clauses on which emphasis is laid by Special government Pleader read as under:

> " That in pursuance of the letter of sanction dated June 11,2007 and further amended from time to time, granting to the Borrower the factoring facility and in pursuance to the ***Mortgagors agreeing to give on English Mortgage*** and Mortgaged Property in favour of the Mortgagee and in observance of the said guarantee, the Mortgagors doth hereby assign the said Mortgaged Property, more particularly described in the schedule hereunder written, which is owned and held by the Mortgagors as follows:
>
> As hereinbefore recited, all the rights, title and interest of the Mortgagors under the said Sale Deeds and the Mortgagors doth hereby grant, convey, transfer and assign unto the Mortgagee, all estate, right, title and interest of the Mortgagors on the said mortgaged property TOGETHER WITH all paths, passages, lights, liberties, fixtures, privileges, easements, advantages and appurtenances whatsoever to the said Mortgaged Property as described in the Schedule AND ALSO ALL the deeds and other evidences of title in any way relating to the Mortgaged Property AND TOGETHER WITH all the rights and benefits (including benefits of sanction and permissions) present and future developments under the aforesaid Conveyance TO HAVE AND TO HOLD the Mortgaged Property UNTO AND TO THE USE of the Mortgagee AND TO HAVE AND TO HOLD the Mortgaged Property unto the Mortgagee absolutely, subject to the provision of redemption herein contained. "

9. In juxtaposition to these paragraphs other covenants of mortgage deed leave no doubt in my mind that possession of

schedule property remained with mortgagor. It vests authority in the mortgagee to enter upon the mortgaged property and take possession in the event of default in payment of all or any part of mortgaged debt or in the performance or observance of any or all the covenants. Thus, mortgage deed is not burdened with delivery of possession.

10. This leaves me to consider the purport of the terms in the opening part of the mortgage deed, i.e., 'TO HAVE AND TO HOLD; UNTO AND TO THE USE; AGREED TO BE GIVEN'; and 'English Mortgage', as defined in Section 58 (e) of the Transfer of Property Act.

11. Section 58 (e) does not envisage transfer of possession as important component of 'English Mortgage'. It only signifies transfer of right, title and interest in mortgaged property to mortgagee. The two paragraphs of mortgage deed only emphasize transfer of right, title and interest in the property to mortgagee sans possession.

12. The scope of 'English Mortgage', 'agreed to be given' were considered by Full Bench of Madras High Court in **The Board of Revenue vs. Moopanna Somarazu and Anr** [4]. It was unanimous decision. In their concurring judgments two learned Judges of the Full Bench held as under:

> "**Spencer, J.**
>
> 3.................The mortgage deed before us is in the form of an English mortgage. The mortgagor gives a certain parcel or piece of land to the mortgagee "have and to hold", "subject to the proviso for redemption" therein contained. Then there is a covenant that the mortgagee

[4] AIR 1926Mad1038=MANU/TN/0187/1926

shall permit the mortgagor to retain possession of the premises so long as he shall make the annual payments as stipulated, the net result of which is that the mortgagor remains in possession and thus **possession is not immediately given** by the mortgagor of the property comprised in the deed. **But there is a provision at the end of the document providing that, if default is made in payment of certain annual instalments, the mortgagee may at any time thereafter enter into and upon the said piece of land and premises and shall thenceforth quietly possess and enjoy the same.** The question is whether this covenant amounts to an agreement to give possession. I think that the main agreement between the parties is that possession should not be given to the mortgagee in the first instance as the result of the execution of the mortgage deed and that this covenant for the mortgagee entering on the property in case of the mortgagor making default in payment is a subsidiary agreement which is only to take effect upon a certain contingent event happening which may never happen."

....

Krishnan, J

7. I am inclined to think that this is the proper connotation of the words "agreed to be given ". These words do not really cover a case where on a breach of covenant power is reserved for the mortgagee to take possession if he thinks fit. That will be putting too large an interpretation upon the words "agreed to be given." The principle is that in cases where a **Taxing Act like the Stamp Act imposes a pecuniary burden upon the subject, the construction most beneficial to the subject should be adopted in cases of doubt**. I am therefore of opinion that the words **"agreed to be given" should not be construed as covering cases of agreement to give possession on the Breach of a certain covenant, or on the happening of a future event which may or may not happen, but only cases**

> **where by the words of the document possession is directly agreed to be given**." (emphasis supplied)

13. In **Re:Anonymous**[5] the Full Bench of Calcutta High Court, considered the same issue, though dealing with situation prior to amendment to Stamp Act. On the scope of word **'given'**, Justice Milter held as under:

> " 9................The word "given" in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security of the mortgage money. But where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply, because there it cannot be said that the mortgagor consents to give possession."

14. Clause (a) of Article 40 of pre-amended Stamp Act also contained words 'agreed to be given' as is incorporated in Article 35(a) of Schedule IA. Considering the scope of these words, the Calcutta High Court went on to hold:

> "13. Clause (a) is divisible into two propositions which are as follow: First, "when at the time of execution possession of the property, or any part of the property comprised in such deed is given by the mortgagor," I may at once say that this proposition is not applicable in the present case, there being no suggestion that possession of the property or any portion of it has been given. ***The second proposition is: when at the time of execution possession of the property, or any part of the property comprised in such deed, is agreed to be***

[5] (1884) ILR 10 Cal 274

given." The point to be determined really comes to this, whether by the mortgage deeds which form the subject of the reference, or any of them, it was at the time of execution agreed that possession of the property should be given. I understand this to mean given at any time. I take it that the words "at the time of execution" must be construed with "agreed" and not with "given." Now the Stamp Act is a Revenue Act, an Act which imposes pecuniary burdens; and the rule of construction in respect of such Acts is that in case of a doubt the construction most beneficial to the subject is to be adopted. The subject is not to be taxed, and therefore not to be compelled in this case to pay the higher duty, unless the language is clear and unambiguous. ***I am of opinion that the words "agreed to be given" can only apply where there is an express agreement to give possession-an agreement, that is, in so many words - or an agreement, to be gathered by necessary implication from the whole contents of the documents.*** I think that Clause (a) of Article 44 does not apply when there is no such agreement, express or implied, but the effect of the document between the parties is such that the mortgagee would have a right, that is a right which he could enforce in a Court of law, to obtain possession if he desired to have possession." **(emphasis supplied)**

15. Having regard to view taken by two Full Benches of Madras and Calcutta High Courts respectively and on cumulative reading of subject mortgage deed, I am of the considered opinion that possession of schedule properties was not handed over to mortgagee. Further, handing over possession to mortgagee cannot be assumed unless clear intention is expressed in the mortgage deed. Therefore petitioners cannot be mulcted with higher stamp duty by invoking Article 35 (a) of Schedule I-A of the Indian Stamp Act. The contrary action of respondents is not sustainable. The

writ petition is allowed. There s/-all be no order as to costs. Miscellaneous petitions, if any, pending in these writ petitions shall stand closed.

JUSTICE P.NAVEEN RAO

Date: 13.11.2017
KH/kkm/tvk

Note:- L.R. copy to be marked.
(B/o.)
KH

THE HON'BLE SRI JUSTICE P. NAVEEN RAO

<u>WRIT PETITION No.5210 OF 2009</u>

<u>Dated: 13.11.2017</u>