IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29/06/2018
DELIVERED ON : 09/07/ 2020

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

CMA NO.920 of 2008

M/s. Easun Products of India Pvt. Ltd
Temple Tower
No.476, Anna Salai
Chennai-600 035 ....Appellant

Vs

1.The Inspector General of Registration
and Chief Controller of Revenue Authority
Santhome High road, Chennai-600 004

2.The District Registrar
Madras-North, Chennai-1

3.The Sub-Registrar
Tiruvottiyur,Chennai
.... Respondents

Prayer: Civil Miscellaneous Appeal under Schedule 23 of the Indian Stamp Act, 1899 praying to set aside the order dated 06.07.2007 in the proceedings of Miscellaneous Appeal No.20455/F1/2005 of the Inspector General of Registration, Santhome, Chennai directing the respondents to refund the excess stamp duty of Rs.4,960/- and Rs.7,08,240/- collected as deficit registration fee.

For Appellant : Mr. K.Umesh Rao
for K.Jagannatha rao

For Respondents: Mr.S.R.Rajagopal, AAG-IX
for
Ms. A.Madumathi, AGP (CS)

JUDGMENT

The order passed by the first respondent in a revision filed under Section 56(1) of Indian Stamp Act confirming the order charging Stamp Duty under Art.23 of Schedule I of the above Act for registering a Deed of Assignment of Mortgage Debt is under challenge in the above Civil Miscellaneous Appeal.

2. The appellant is the Assignee. The Assignor sold the debt created by an equilateral mortgage by deposit of title deeds along with certain immovable properties as security for due repayment. The respondents have treated the original mortgage as one executed by Deposit of Title deeds and Promissory Note and held that it was not a legal mortgage to bring it under the definition "Mortgage Deed" under Sec 2(17) of the Act and further held that the transfer will not fall under the purview of Art 62(c) and it is chargeable under Art.23 as Conveyance. The first respondent relying on the judgment in the matter of Kamala Ranjan Ray reported in 1937 ILR 486 (FB) confirmed the order of the Sub-Registrar charging stamp duty under Art 23 of Sch- I of Indian Stamp Act,1899. According to the first respondent the claim of the appellant that the deed will attract Art 62 (c) of the Schedule I of the Act is not sustainable.

3. The learned counsel for the appellant would contend that the original mortgage by deposit of title deed has already suffered Stamp Duty and the assignment of mortgage debt cannot be considered as creating any fresh right, but it is only a transfer of right to recover the debt. As such it cannot be construed as conveyance and charging the document under Art 23 is not sustainable and the Stamp Duty collected in excess is liable to be refunded. He would rely on the following judgments to buttress his arguments.

1. Kotak Mahendra Bank Ltd vs State of U.P and others reported in 2018 (2) CTC 39 (FB).

2. Maharana Jaywantsinhji Ranmalsinhji Thakore Saheb of Sanand vs. The State of Bombay reported in AIR 1954 Bom 462 =MANU/MH/0126/1954

3. Chief Controlling Revenue Authority, Board of Revenue, Madras reported in AIR 1967 Mad1 =MANU/TN/0183/1967

4. Padam Chand Jain vs. The Chief Controlling Revenue Authority reported in AIR 1970 All 644=MANU/UP/0091/1970

5. Ramesh Thaper vs The Province of Bombay reported in AIR 1950 Bom 213 = MANU/MH/077/1950

6. In Re: The Indian Stamp Act, 1899 reported in 1954 (56) BOMLR 1054

7. K.J.Nathan vs. S.v. Maruthi Rao and others reported in AIR 1965 SC 430

8. Indore Development Authority and Ors vs. Shailendra

(Dead) through L.Rs. And Ors reported in 2018 (2) SCALE 1

4. The Learned Additional Advocate General appearing for the revenue would contend that the original Memorandum of Deposit of Title Deeds did not require any registration and not suffered any stamp duty. Even assuming it suffered Stamp Duty, the original deposit was for a sum of Rs.6,00,00,000/-, but now the sale value of the mortgage is Rs. 7,05,00,000/- and it is sold for a sum of Rs.4,00,00,000/-. By sale of the mortgage, the right over the immovable property is also transferred. The Assignee is entitled to bring the property to auction and recover the debt to the tune of Rs.7,05, 00,000/-. In that event the deed of assignment transferring a right over an immovable property shall be construed as Conveyance and the document is chargeable only under Art.23 of Sch-I of the Act.

5. Considered the submissions of both sides.

6. From the materials produced before this court, it could be seen that on 18.09.1998 a Memorandum of Deposit of title deeds was recorded between One Easwaran & Sons Engineers Limited and Niskalp Investments and Trading Company for advancing Rupees Six crores for a period of 12 months and an immovable property was offered as Security with a right to enforce the same in case of default. The said secured debt has been transferred, assigned and conveyed to the Assignee/the appellant herein with a right to recover the same by enforcing the security.

7. Now that according to the first respondent the Memorandum of Deposit of Title Deeds did not create any right or charge over the property and hence it will not amount to Legal Mortgage falling under Sec 2 (17) of Indian Stamp Act. For applying Art 62(C) it shall be a transfer of secured interest by mortgage deed. Since there was no secured interest created by the deposit of title deeds, the present transfer creating a right over an immovable property shall be considered as Conveyance and is chargeable.

8. As per Art 6 of Sch-I of the Act which reads as under

> 6. AGREEMENT RELATING TO DEPOSIT OF TITLE-DEEDS, PAWN OR PLEDGE, that is to say, any instrument evidencing an agreement relating to —
> (1) the deposit of title-deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security); or
> (2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money

advanced or to be advanced by way of loan or an existing or future debt—

(a) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement;

(b) if such loan or debt is repayable not more than three months from the date of such instruments.

Exemption Instrument of pawn or pledge of goods if unattested.]

The same duty as a Bill of Exchange [No. 13 (b)] for the amount secured. Half the duty payable on a Bill of Exchange [No. 13 (b)] for the amount secured.

9. As per the above provision the instrument evidencing an agreement relating to deposit of title deeds shall have bargain only with respect to such deposit and, may be conditions subsidiary or ancillary to the deposit of title deeds. It shall not have any other condition giving a character of a mortgage deed. In the present case, a time limit for repayment has been fixed as twelve months. Above that there is a specific bargain with respect to default. Clause (i) the Mortgage deed dated 18.09.1998 clearly consists of a condition as under

i) "That in the event of default the Mortgagee shall have full right, power and authority to enforce the security of mortgage by deposit of title deeds of said premises more particularly described in the First Schedule"

10. In that context the mortgage deed dated 18.09.1998 is not mere deposit of title deeds without further agreement between the parties other than that those title deeds should be the security for the money lent, but as specifically contracted a security interest has been created to enforce the debt. Therefore, the observation of the first respondent that Deposit of title deeds dated 18.9.1998 is not a legal mortgage and no right over an immovable property was created cannot be accepted. The bargain exceeds the character of a deposit of title deeds in simpliciter, but a mortgage creating security interest on a specified immovable property. It is also relevant to note that the issue is not with regard to payment of Stamp Duty on the mortgage deed dated 18.9.1998, rather, the issue is only as to whether the impounded assignment deed is chargeable under Art 23 as Conveyance or not? de hors the non-payment of Stamp Duty at Bombay, the Memorandum dated 18.9.1998 attracts the character of a mortgage and it is not mere Memorandum of deposit of title deeds. The judgment of the Hon'ble Full Bench of Bombay High Court reported in AIR 1954 Bom 462 will reinforce the finding.

11. In the judgment of Chief Controlling Revenue Authority…

Vs Jawahar Mills Ltd, Salem AIR 1967 Mad 1

> "it is observed that the implication of a mortgage created by the delivery of title deeds of the property, a charge could be created by such a delivery simpliciter, with nothing else agreed between the parties, or reduced in writing; in such a case, it is presumption of law that the scope of the security is the scope of documents of title. Where, however, the titles are handed over accompanied by a bargain, the terms of that bargain govern the rights of parties with regard to the scope of security. If the terms are reduced to writing, the Memorandum and that alone must determine what is the scope and extent of the security."

12. In the instant case the recitals of the mortgage deed clearly indicate creation of security on a specified immovable property. In that case the document shall be construed as a mortgage deed. When such recitals are specifically made it is not open to the court to add or amend or rewrite or reframe or assume a different meaning to the recitals. To buttress his argument the learned counsel for the appellant rely of Indore Development Authority & ors 2018 (2) SCALE 1; 1954 (56) BOBLR 1054 Maharana; AIR 1950 Bom 213 Ramesh Thapar; Therefore, there is no doubt that the deed dated 18.9.1998 is a mortgage deed.

13. What is now transferred is nothing but a right to recover the secured debt already created and not a fresh right beyond and in excess of the right created in the original mortgage deed. Any transfer of interest secured by a mortgage deed with or without consideration is chargeable as per Art 62 (c) of Sch-I of the Act, 1899. It is already found that the deed dated 18.9.1998 is a valid mortgage with security interest on a specified immovable property. It is pertinent to note that the assignment is between the Creditor and a third party. The Mortgagor is not a party to the Deed of Assignment dated 11.11.2005 and his rights are not affected. When the Mortgagor does not confer any fresh right expanding the scope of the mortgage, it cannot be construed as Mortgagee creating a fresh right over the immovable property. The Mortgagee cannot assign more right than what is conveyed to him by the Mortgagor. Since this court has come to a conclusion that deed dated 18.9.1998 is a Mortgage deed and since the right to recover the mortgage debt alone is transferred, it will not amount to Conveyance as contended by the respondents, but shall be construed as Transfer chargeable as per Art 62 (c) of Sch-I of the Indian Stamp Act,1899. It is beneficial to read to the judgment of the Full Bench of High Court of Allahabad in Kotak Mahindra Bank Vs State U.P. and ors 2018 (2) CTC 39. The learned Senior Counsel

appearing for the Kotak Mahindra Bank would submit that the Instrument is in consonance with the banking policy framed by the Reserve Bank of India (RBI) permitting transfer of debts, inter se, between banks. The Assignee has acquired a right by transfer of "account receivable", an asset in the hands of Assignor. Reliance was placed on ICICI Bank Limited vs. Official Liquidator of APS Star Industries Ltd. & others, to contend that the debt at the hands of the Bank is an asset. The Bank (Assignor) can transfer it along with the mortgagee's rights in the mortgaged property without in any manner affecting the rights of the borrower. Relevant paragraph is extracted:

> "46. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the borrower(s). The moment ICICI Bank Ltd. transfers the debt with underlying security, the borrower (s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee). At this stage, we wish to once again emphasize that debts are assets of the assignor bank. The High Court(s) has erred in not appreciating that the assignor bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned Deed of Assignment transfers any

obligations of the assignor towards the assignee."

(emphasis supplied) A single instrument may embody several purposes. But what is relevant for the purpose of the Stamp Act, is the dominant purpose of the instrument. If we look at the Instrument, before us, it is clear that the dominant purpose was to transfer/assign the debts along with the underlying securities, thereby, entitling the Assignee to demand, receive and recover the debts in it own name and right. The question that would arise is under which Article of Schedule 1-B of the Stamp Act, as amended in its application to Uttar Pradesh, the instrument would be charged to stamp duty i.e. Conveyance {No. 23} or Transfer {No. 62(c)}.

Article 11 would imply that an instrument of "assignment" can be charged to stamp duty either as:

(i) Conveyance (No. 23)

(ii) Transfer (No. 62)

(iii) Transfer of Lease (No. 63) The agreement is not a 'Transfer of Lease', therefore, it is either 'Conveyance' or 'Transfer'.

Conveyance is defined under Section 2(10) which for our purpose is as follows:

"Conveyance".-- "Conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for [by Schedule I, Schedule I-A or Schedule I-B] [as the case may be];

[Explanation.-- xxx xxx xxx xxx

Conveyance is chargeable to stamp duty under Article 23 which reads as follows:

23. Conveyance [as defined by Section 2(10) not being a Transfer charged or exempted under No. 62--

(a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

Transfer charged or exempt under Article 62, therefore, is not charged to stamp duty as conveyance. Transfer reads as follows:

62. Transfer (whether with or without consideration)--

(a) xxx xxx xxx xxx

(b) xxx xxx xxx xxx

(c) of any interest secured by a bond, mortgage-deed or policy of insurance--

(i) xxx xxx xxx

(ii) xxx xxx xxx

(d) xxx xxx xxx xxx

(e) xxx xxx xxx xxx

The term 'Conveyance' denotes an instrument in writing by which some title or interest is transferred from one person to other. It would appear from the definition that actual transfer of property is an essential feature of "conveyance". The present case does not appear to be of that type. Emphasis may be laid on the words "on sale" and "is transferred" used in the definition of the expression "Conveyance". These words are significant. They denote that the document itself should create or vest a complete title in the subject matter of the transfer, in the vendee.

14. A perusal of the various clause of the instrument would show that the debt which is an asset in the hands of the Assignor was sold and assigned absolutely to the Assignee. The deed stipulated, inter alia, that the Assignee shall have all the rights and obligations under the financial instruments relevant to such debts as if they were executed by the debtors concerned in its favour. Under the instrument in question, in substance and purpose, primarily the rights of the Assignor to recover the debts secured by the underlying securities has been transferred. The requirement of conveyance or sale could not be said to be satisfied.

15. Debt is purely an intangible property, like, intellectual property right or goodwill, as against documentary intangibles, viz., bill of lading, promissory note or bill of exchange, which has to be claimed or enforced by action and not by taking physical possession thereof, in contrast to immovable and movable property.

16. On a plain reading of Article 23, it is evident that the said Article is applicable in the cases where any immovable or movable property is sought to be transferred. The restricted applicability of Article 23 is explicitly clear from opening words of the entry, whereby, transfers charged or exempt under Article 62 of Schedule 1-B are excluded from the purview of Article 23. Thus, where a transaction does not affect the transfer of any immovable or movable property under Article 23 of Schedule 1-B cannot have any applicability. Article 62(c) deals with chargeability of stamp duty on transfer of an interest secured by a bond or mortgage deed. In the instant case, debt along with underlying securities is an interest secured by bonds and/or mortgages. Thus, transfer of debts along with underlying securities would, in our considered opinion, be chargeable under Article 62(c).

17. The first respondent extracted the following paragraph in the matter of Kamala Ranjan Ray reported in 1937 ILR 486 (FB) in support of his decision, which reads as under.

> " ...
> (ii) The word Mortgage deed refers only to Article 40 and not Article 6 of schedule to the Indian Stamp Act, 1899.
> Assignment of debt is different from transfer of mortgage. In the matter of Kamala

> Ranjan Ray reported in 1937 ILR 486 (FB),it was held that "it would seem that fundamentally the document of October 9, 1934 created in favour of the person described as the mortgagee a right over or in respect of specified property, and having regard to the precise terms of the document it is equally apparent that it conferred rights over or in respect of specified property which ordinarily a mortgage would not have by mere deposit of title deeds, that is to say, simply by the physical handing over of titled deeds without further agreement between the parties other than that those title deed should be security for the money lent. Upon the assumption, therefore, that the document of October 9, 1934, was a mortgage deed within the definition contained in s.2(17), it follows, in my view, that it falls within the expression "mortgage deed" as used in sub-head (c) of Article 62 of the Bengal Stamp (Amendment) Act of 1922...........Once one comes to the conclusion as I do, that the document of October, 9, 1934, was a mortgage deed, it seems to be the irresistible conclusion that the document of April 12, 1935, was a transfer of the kind contemplated by the provisions of Art.62(c)". In the instant case assignment of debt is made by the Transferor/Mortgagee which is secured by deposit of title deed and the promissory note and not by way of legal mortgage. Hence Article 62(c) will not apply to this case. The document in question is chargeable to duty under Article 23 of Schedule I to the Indian Stamp Act, 1899."

The above judgment clearly lays down that once the predominant document is concluded a mortgage deed, the irresistible conclusion that the subsequent document is only transfer in the facts and circumstances of the said case. The factual aspects are very similar to the case on hand. The first respondent has wrongly applied the right judgment and arrived at a wrong conclusion. As discussed above the Deed of Assignment dated 11.11.2005 is a Transfer of a right to recover the Security interest secured by a Mortgage Deed and as such chargeable as per Art 62 (c) of Schedule I of The Indian Stamp Act, 1899. Accordingly, the impugned order demanding Stamp Duty as per Art 23 of the above Schedule is erroneous and accordingly set aside. The respondents are directed to refund the excess stamp duty and Registration fee collected from the petitioner within a period of six months from the date of receipt of a copy of this order, failing which the appellant will be entitled to interest at the rate of 9 % per annum till the date of payment.

The Civil Miscellaneous Appeal is allowed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kpr

To

1.The Inspector General of Registration
and Chief Controller of Revenue Authority
Santhome High road, Chennai-600 004

2.The District Registrar
Madras-North, Chennai-1

3.The Sub-Registrar
Tiruvottiyur,Chennai

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BP(CO)
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