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W.P. Nos.40658/2015 – 22586/2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
15.09.2022	11.11.2022

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

**W.P. NO.40658 OF 2015
W.P. NO.22536 OF 2016
AND
W.M.P. NOS.19217 & 19218 OF 2016**

V.Guruswamy Naidu & Co. Pvt. Ltd.
Rep. by its Authorised Signatory
A.Mahadevan
333, Poonamallee High Road
Amaindakarai, Chennai 600 029.

.. Petitioner in both petitions

- Vs -

No.100, Santhome High Road
Chennai 600 028.

Chennai North
No.1, Murthygal Lane
Rajaji Salai, Chennai 600 001.

1. The Inspector General
of Registration

2. The District Registrar
(AIG)

3. The Sub Registrar



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Ambattur
Municipality Community Hall
Gopalasamy Street, Ram Nagar
Chennai 600 053.

.. Respondents in both petitions

W.P. No.40658 of 2015 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus to call for the records of the 3rd respondent issued vide impugned notice dated 25.09.2014 (received on 03.02.2015) and impugned order of the 1st respondent dated 12.6.2015 in proceedings No.13214/C2/2015, both based on the Audit Report of Accountant General Office No.20-54/2014-15 dated 04.08.2014 (Para I/IIA) issued in relation to the Mortgage Deed bearing Doc. No.8400/2013 in the Office of the 3rd respondent and quash the same and consequently direct the 1st respondent department to refund the sum of Rs.2,03,00,000/- (Rupees Two Crores and Three Lakhs only) collected pursuant to the impugned notice.

W.P. No.22536 of 2016 filed under Article 226 of the Constitution of India praying this Court to issue a writ of certiorarified mandamus to call for the records of the 3rd respondent issued vide impugned notice dated 25.09.2014 (received on 03.02.2015) and impugned order of the 1st respondent dated



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12.6.2015 in proceedings No.13214/C2/2015, both based on the Audit Report of Accountant General Office No.20-54/2014-15 dated 04.08.2014 (Para 2.1/IIA and 2/4/IIA) issued in relation to Debentures issued under the Mortgage Deed bearing Doc. No.8400/2013 and 10577/2013 in the Office of the 3rd respondent and quash the same and consequently direct the 1st respondent department to refund the collective sum of Rs.21,00,000/- (Rupees Two Crores and Three Lakhs only) collected pursuant to the impugned notices.

For Petitioners : Mr.P.R.Raman, SC, for
Mr. C.Seethapathy

For Respondents : Mr. Ramanlal, AAG, assisted by
Mr. R.P.Muruganraja, GA

COMMON ORDER

Questioning the rejection of the representation vide the impugned order and negating the refund of the amounts paid by way of stamp duty and registration fee by the 1st respondent, the present petitions have been filed.

2. It is the case of the petitioner that it is a company incorporated under the Companies Act, 1956 and involved in the business of real estate, housing and



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property development. The company was incorporated in the year 2009 and is associated with VGN Group of Companies.

3. It is the further case of the petitioner that the lands in Survey Nos.330, 335/1,, 2, 338, 340/1, 2, 341, 342, 344/1, 2, 345, 471, 472/1A, 1B, 2, 473, 474, 475, 482, 484, 485, 486, 487/1, 2, 489/1, 2, 490, 501, 502, 512/1, 512/2, 515/1, 515/2, 516, 51`7, 518, 519, 520, 521/1, 521/2, 523/2, 524/1, 2, 526/1A, 1B, 1C, 2, 527,539/1, 542, 543, 544, 545/1, 2A, 2B1, 2B2, 546, 547, 548, 550/1, 2, 551/1, 2, 3 and 552 situated in Ambattur Village, Ambattur Taluk, Thiruvallur District measuring a total extent of 60.86 acres was purchased by one Mr.V.N.Devadoss in the year 2004 under registered sale deeds by paying the requisite stamp duty and registration charges under Doc. No.6939/2004 and patta was also issued in the name of V.N.Devadoss.

4. It is the further case of the petitioner that the said V.N.Devadoss subsequently joined with other third parties and formed a partnership firm by the name of “V.Guruswamy Naidu & Co.” in the year 2007 and towards capital contribution to the said firm, the said V.N.Devadoss brought in the aforesaid



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lands held by him into the stock of the firm. It is the further case of the petitioner that the deed of the partnership firm had a specific clause in which V.N.Devadoss had declared that the property would form part and parcel of the partnership firm and that he would have no interest in the same except as a partner of the firm and the Partnership Deed was also registered with the Registrar of Firms after paying necessary fees and following the due procedure involved.

5. It is the further case of the petitioner that the partnership firm was later converted into a joint stock company, which is the petitioner company. It is the further case of the petitioner that in the Memorandum of Association of the petitioner company, Clause C (VI) clearly mandates that all properties belonging to the above partnership firm would become the properties of the petitioner company for running the business of the company. It is the further case of the petitioner, that though the properties of the Partnership Firm became the properties of the petitioner company, however, the patta, originally issued in favour of V.N.Devadoss was yet to be changed in favour of the petitioner company by the authorities concerned.



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6. It is the further case of the petitioner that in the year 2013, for the purpose of raising funds for the development of housing projects, one of the company belonging to the petitioner's group of companies, decided to mortgage part of the above mentioned property as additional security. Therefore, the petitioner company first entered into an Indenture of Mortgage/Mortgage Deed on 21.3.2013 whereby 10.959 acres of lands from the total extent of 60.86 acres of the abovementioned property was placed as collateral security. It is further averred that subsequently another separate Indenture of Mortgage was entered with the Mortgage/Debenture Trustee on 13.06.2013, whereby another 9.98 acres was placed as collateral security for the purpose of raising funds. The said deeds of mortgage were duly registered before the 3rd respondent and assigned Nos.10577/13 and 8400/2013. Appropriate stamp duty and registration fee, in accordance with Article 40 (b) under Schedule I of the Indian Stamp Act was also paid for both the deeds.

7. It is the further case of the petitioner that even at the time of mortgaging the property, patta had not been mutated in favour of the petitioner company and, therefore, the Bank/Mortgagee in the Mortgage Deed



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No.8400/2013 insisted on V.N.Devadoss to be included as a 'confirming party' to merely declare that he is not the owner of the said properties under mortgage and to confirm the status of the petitioner company as the owner of the property.

8. It is the further case of the petitioner that in view of requirement of additional funds, the petitioner company decided to mortgage another 11.90 acres and, accordingly, Indentures of Mortgage/Mortgage Deeds were entered into with the Bank/mortgagee on 23.12.2014 and the same was submitted for registration before the 3rd respondent. It is averred that the 3rd respondent received the said documents and kept the same under Pending Nos.319 and 320 of 2014, and as the mortgagee bank had not released the funds, representation dated 27.1.2015 was submitted by the petitioner to register and release the documents.

9. It is the further case of the petitioner that on 3.2.2015, the 3rd respondent forwarded the impugned demand notice dated 25.9.2014, demanding payment of stamp duty to the tune of Rs.2,03,00,000/- based on audit



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objections of the Accountant General with regard to the mortgage deed bearing Regn. No.8400/2013, which was also accompanied with notices in relation to payment of deficit duty for the debentures dealt in the Indentures of Mortgage in relation to the subject properties, which was placed as collateral security. Since the 3rd respondent demanded payment of deficit stamp duty and refused to register the mortgage deeds, the petitioner, in dire need of funds, paid the alleged deficit stamp duty under protest on 10.2.2015. Consequent to the said payment, representation was made by the petitioner to the respondents requesting to refund the alleged deficit stamp duty collected by setting out the necessary facts vide letter dated 19.03.2015, for which the 1st respondent called upon the 2nd respondent for a detailed report, and inspite of the same, as there was no action, the petitioner filed W.P. No.12551 of 2015 in which this Court, vide order dated 27.4.2015 directed the 1st respondent to consider the representation of the petitioner and pass orders and pursuant to the same, the petitioner submitted the requisite representation along with the documents, but to the shock and dismay of the petitioner, the impugned order was passed by the 1st respondent, agreeing with the reasoning raised in the audit report and justified the collection of the deficit stamp duty and registration fees. Vide the



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same impugned order, the deficit stamp duty on debentures to the tune of Rs.21,00,000/- was also upheld by the 1st respondent.

10. It is the further averment of the petitioner that the audit report, based on which the impugned order has come to be passed, had merely recorded that the property, which is the subject matter of the mortgage deed bearing No.8400/2013 had been transferred by V.N.Devadoss to the petitioner company without executing and registering a formal sale deed and, therefore, alleged payment of deficit stamp duty. It is the averment of the petitioner that the audit report has not properly considered the attendant facts, which would clearly reveal that the presence of V.N.Devadoss as a confirming party is only for the purpose of establishing the ownership of the property with the petitioner company as the patta stood in the name of V.N.Devadoss, which was yet to be changed in favour of the petitioner company. However, without properly advertng to the aforesaid facts, the audit report has emanated based on which the erroneous impugned order has been passed based on the wrong conclusion arrived at in the audit report.



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11. It is the further averment of the petitioner that the property, which is the subject matter of mortgage deed bearing No.8400/2013 was part of a larger extent of lands brought in as capital by V.N.Devadoss during the formation of the partnership firm and, thereafter, the property became the property of the partnership firm and later upon conversion of the same to a company, the property devolved upon the petitioner company. However, as the patta bore the name of V.N.Devadoss, which record was not mutated, the bank required the said V.N.Devadoss to be a confirming party and, therefore, for the purpose of execution of mortgage deed, the presence of V.N.Devadoss as a confirming party would not in any way alter the ownership of the property, which devolved on the petitioner company. However, misconstruing the aforesaid facts, the report of the audit has been filed resulting in the passing of the impugned order and, therefore, left with no other effective remedy, the present writ petitions have been filed.

12. Learned senior counsel appearing for the petitioner submitted that the entire extent of 60.86 acres was purchased by V.N.Devadoss in the year 2004 and only an extent of 9.98 acres out of the total extent of 60.86 acres was the subject



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matter of Document No.8400/2013. It is the further submission of the learned senior counsel that once the above extent was brought into the partnership firm by V.N.Devadoss, which has been duly recorded in the partnership deed dated 1.4.2007, as capital contribution, such property becomes the asset of the firm and there is no requirement for registration, as is necessary in the matter of conveyance and, therefore, it does not attract any stamp duty as if it is a conveyance. In this regard, learned senior counsel placed reliance on the decision of the Hon'ble Apex Court in ***Sunil Siddharthbhai – Vs – Commissioner of Income Tax, Ahmedabad, Gujarat (1985 (4) SCC 519)***.

13. Stressing further on Sections 566, 567, 568 and 575 of the Companies Act, learned senior counsel further submitted that the lands originally owned by V.N.Devadoss to the extent of 60.86 acres became the immovable asset of the petitioner company and that no stamp duty implication is contemplated by law for the incorporation of a joint stock company from a partnership deed by way of a conveyance. It is the further submission of the learned senior counsel that the mere inclusion of V.N.Devadoss as a confirming party in the mortgage deed, which was at the behest of the bank, could in no way alter the character of the



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deed and would in no way substantiate any interest of V.N.Devadoss over the subject property. Such being the case, the transfer of property in favour of the company without payment of stamp duty could in no way be termed as a fraudulent transaction, merely because, the revenue records have not been mutated in the name of the petitioner company from that of the individual.

14. It is the further submission of the learned senior counsel that the inclusion of V.N.Devadoss in the mortgage deed as a confirming party in the light of the transfer of property from V.N.Devadoss to the petitioner company without payment of stamp duty as conveyance cannot be construed to be a non-payment of applicable stamp duty to a conveyance to the extent of the property covered under the mortgage deed.

15. It is the further submission of the learned senior counsel that the Debenture Trust Deed executed between the parties is not a compulsorily registrable document, as per Section 17 of the Registration Act and that both the mortgage documents suffered appropriate stamp duty under Article 40 (b) of Schedule I of the Indian Stamp Act and that Doc. No.8400/2013 clearly referred



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Rs.21,00,000/= in relation to debentures are wholly erroneous and not in consonance with the relevant provisions of the Indian Stamp Act and Indian Registration Act read in conjunction with the Companies Act and, therefore, the impugned notices as also the demand are required to be interfered with by allowing this writ petition and directing refund of the alleged deficit stamp duty paid to the petitioner.

18. In support of his submissions, learned senior counsel placed reliance on the following decisions :-

- i) *Sunil Siddharthbhai – Vs – Commissioner of Income Ta, Ahmedabad, Gujarat (1985 (4) SCC 519);*
- ii) *The Weavers Mills Ltd. – Vs – Balkis Ammal & Ors. (AIR 1969 Madras 462);*
- iii) *Vali Pattabirama Rao & Anr. – Vs – Sri Ramanuja Ginning & Rice Factory (P) Ltd. (AIR 1984 AP 176); and*
- iv) *State of Bihar & Ors. – Vs – Industrial Corporation (P) Ltd. & Ors. (2003 (11) SCC 465).*

18-A. Per contra, learned Addl. Advocate General appearing for the respondents submitted that the impugned order pertains to two documents, viz.,



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D. Nos.8400/2013 and 10577/13, yet, initially the petitioner has challenged only the levy made with respect to Doc. No.8400/13, which consists of two parts, viz., sale and mortgage, wherein levy of Rs.2,03,00,000/- and Rs.14,00,000/- has been made on the petitioner. The petitioner has chosen only to challenge the levy made in respect of Doc. No.8400/13 and only on an afterthought, the petitioner has challenged the levy in respect of Doc. No.10577/13, which is not maintainable and is clearly hit by delay and laches.

19. It is the further submission of the learned Addl. Advocate General that even in respect of the notice calling upon the petitioner to pay the deficit stamp duty in respect of Doc. Nos.8400/13 and 10577/13, the petitioner had challenged the same by filing W.P. No.40658/15 in which this Court had directed the respondents to dispose of the representation of the petitioner dated 19.3.14. It is submitted by the learned Addl. Advocate General that the notice, which is an off-shoot of the audit report, though was challenged, yet this Court was not inclined to interfere with the said notice and had directed the respondents to dispose of the petitioner's representation. Such being the case, the petitioner



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cannot challenge the very same audit report, which is nothing but *constructive res judicata*.

20. It is the further submission of the learned Addl. Advocate General that the unregistered partnership firm was formed on 1.4.2007, which was subsequently registered on 16.4.2009 and, thereafter, the partnership firm was converted into a Joint Stock Company of M/s.Guruswamy Naidu & Co. Pvt. Ltd., incorporated on 11.12.2009. It is further submitted that though the property is claimed to be a company property, however the said claim is not supported by any documents. Though the petitioner claims two transactions relating to transfer of title, however none of the said documents are registered. It is the further submission of the learned Addl. Advocate General that the recitals, more specifically Clause 3-D of the mortgage deed clearly reveals that though the petitioner claims transfer of title in favour of VGN by the confirming party, viz., V.N.Devadoss, which is to be charged in favour of the debenture trustee, yet, the revenue records in this regard have not been mutated in favour of the petitioner and that the records stand in the name of the confirming party. This not only shows that V.N.Devadoss is the owner of the property but it is a clear admission



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of ownership and only to circumvent charges against the sale and transfer of the property in favour of the company through the partnership firm, the confirming party was included in the mortgage deed.

21. It is the further submission of the learned Addl. Advocate General that though the deed is styled as a mortgage deed, however, in effect, it is a conveyance of the property in favour of the company which was mortgaged thereafter. It is the further submission of the learned Addl. Advocate General that clause 7 (a) clearly shows that it is a continuing security and so without title, a continuing security cannot be created. Only to create a continuing security so as to enable the petitioner to have title, V.N.Devadoss was added as a confirming party without mutating the revenue records and, therefore, the levy of deficit stamp duty is sustainable.

22. It is the further submission of the learned Addl. Advocate General that though it is the claim of the petitioner that the property has become the property of the partnership firm from the year 2007, yet, the revenue records clearly establish that the property stood in the name of V.N.Devadoss and that neither



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possession has been given nor any materials placed to substantiate the transfer of ownership of property to the partnership firm.

23. Learned Addl. Advocate General, to substantiate that the property has not become the property of the partnership firm, placed heavy reliance on the documents filed in the typed set, viz., the encumbrance certificate and other materials and submitted that V.N.Devadoss had mortgaged the property in favour of Andhra Bank and Indian Overseas Bank and that the mortgage was discharged and receipt was registered only on 24.9.2010, which clearly shows that it was only V.N.Devadoss, who was dealing with the property. That being the case, it is the submission of the learned Addl. Advocate General that the property could never be termed to be the property of the partnership firm on and from 1.4.2007. Further, the firm is registered only on 16.4.2009 and the company was incorporated on 11.12.2009. In spite of the fact that the registration of the firm and the company were prior to the discharge of the mortgage, the property, which stood in the name of V.N.Devadoss could never be termed to be the property of the partnership firm, which had, thereafter, gone on to the hands of the petitioner company. It is therefore the submission of the learned Addl.



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Advocate General that it is only to circumvent the payment of stamp duty, V.N.Devadoss was brought in as a confirming party, which has been rightly pointed out in the audit report leading to the impugned notice and collection of deficit stamp duty from the petitioner company.

24. It is the further submission of the learned Addl. Advocate General that merely because the levy has been paid under protest would not in any way alter the character of the transaction, as could be evident from the encumbrance certificate, which is issued after 18.6.2013, which shows the property to be that of the property of the petitioner company. The petitioner company having tried to circumvent the whole process by evading payment of stamp duty, rightly it has been pointed out in the audit report, resulting in the collection of deficit stamp duty by the respondents and, therefore, no interference is warranted with the said order.

25. With regard to the deficit stamp duty claimed and paid, which is the subject matter of Doc. No.10577/2013, learned Addl. Advocate General submitted that as per the terms of mortgage, it was for the purpose of issue of



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rated, listed, taxable, secure redeemable non-convertible debentures on private placement basis. It is the submission of the learned Addl. Advocate General that as per Article 27 of the Schedule of the Indian Stamp Act, exemption of stamp duty is granted to any debenture deed provided that such debenture is expressed in terms of mortgage on the issuer making over in sole or part of the property to the Trustees for the benefit of the debenture holders, which in effect would mean that possession of the security mortgaged is handed over to the trustee. It is the submission of the learned Addl. Advocate General that the clause in the mortgage deed would make clear that the mortgagor has not given possession of the mortgaged property to the mortgagee and have also not agreed to give possession of the mortgaged property to the mortgagee until the security becomes enforceable. The above clause in the mortgage deed, according to the learned Addl. Advocate General, is a clear admission of the fact that the petitioner company has retained possession of the property and, therefore, the exemption is not available and the petitioner company has to pay the entire stamp duty. Therefore, rightly, deficit stamp duty was directed to be paid, which cannot be said to be erroneous.



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26. Insofar as the decisions relied on by the petitioners, learned Addl. Advocate General submitted that the said decisions would not be factually applicable to the case on hand as those decisions stand on a different footing and is not in line with the facts placed in the present case. It is the further submission of the learned Addl. Advocate General that the document was kept pending for payment of deficit stamp duty and the audit report was not the cause of demand of deficit stamp duty. Therefore, questioning the audit report as the cause for levy of deficit stamp duty is not justified and the act of the respondents in levying deficit stamp duty cannot be said to be bad either.

27. In support of his submissions, learned Addl. Advocate General relied on the following decisions :-

- i) *The Board of Revenue, Madras – Chief Controlling Revenue Authority, Madras – Vs – N.Narasimhan & Anr. (1974 LW 432);*
- ii) *The Madras Refineries Ltd. – Vs – The Chief Controlling Revenue Authority, Board of Revenue, Madras (1977 (2) SCC 308); and*
- iii) *The Chief Controlling Revenue Authority, Board of Revenue, Madras – Vs – Tvl. Inca Cables (Pte) Ltd., Madras (1995 LW 18).*



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28. This Court gave its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record and also the decisions relied on by the learned senior counsel for the petitioner.

29. The facts, which are undisputed are that the subject property belonged to V.N.Devadoss, who is shown as the confirming party in the Indenture of Mortgage bearing Doc. No.8400/2013, which is with respect to the mortgage deed entered into in Doc. Nos.8400/2013 and 10577/2013. The subject property was purchased by the said V.N.Devadoss, which is not disputed by either parties to the *lis*. The subject property, in addition to vast extent of lands, were purchased by V.N.Devadoss in the year 2004. It is also an admitted fact that the partnership firm of 'V.Guruswamy Naidu & Co.', was formed in the year 2007. Towards capital to the said firm, it is alleged by the petitioner that V.N.Devadoss had brought into stock of the firm the subject property along with the other extent of land purchased by him in the year 2004. However, evidencing the transfer of the said properties from the hands of V.N.Devadoss, there is no



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material or registered instrument which would show that the properties were transferred in the name of the firm by V.N.Devadoss, except for the partnership deed, which also spells out that the subject properties along with other properties were brought in as the capital on behalf of V.N.Devadoss.

30. Thereafter, the partnership firm was converted into a Joint Stock Company and in the Memorandum of Articles of Association of the petitioner company, Clause C (VI) speaks that the properties belonging to the partnership firm became the properties of the petitioner company. However, it is the admitted case of the petitioner company that all along, even till the time the Indenture of Mortgage was entered into, the revenue records pertaining to the subject properties and other properties stood in the name of V.N.Devadoss, which, according to the petitioner necessitated the inclusion of V.N.Devadoss as a confirming party in the Indenture of Mortgage.

31. It is only in this backdrop that the petitioner claims that the subject property is the property of the firm, which had passed on to the company and, therefore, the deficit stamp duty claimed by the respondents is wholly erroneous



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and against the provisions of the Indian Stamp Act and Registration Act, but to the contra, it is the claim of the respondents that the subject property still rests in the name of V.N.Devadoss and the transfer, as mandated under the relevant provisions of law has not taken place and, therefore, stamp duty is payable at normal rates and no exemption could be claimed, as transfer of the property to the name of the firm has not taken place.

32. Before proceeding to analyse the issue that has arise before this Court, the decisions, which have a bearing on the issue on hand requires to be looked into, so as to take a holistic view to come to a definitive finding with regard to the possession and title to the subject property.

33. In ***The Chief Controlling Revenue Authority, Board of Revenue, Madras – Vs – Tvl. Inca Cables (Pte) Ltd., Madras (1995 (2) LW 18)***, a Full Bench of this Court had occasion to deal with a Schedule I and Articles 23 and 55 of the Stamp Act with regard to the distinction between conveyance and release and the stamp duty leviable on such documents and in this context, the Full Bench held as under :-



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"6. Mr. S.Adaikalam, amicus curiae, appearing for the respondent cites the decision reported in Board of Revenue v. Narasimhan, (FB) and submits that the parties have a right to select a particular form of transaction to minimise the expenses and that in the present document, it has been clearly stated that the transaction is only a release. No doubt, in this Full Bench decision, it has been stated as follows (head note):-

"There can be no legal impediment to a party selecting and adopting a particular form of transaction to minimise the expenses of stamp duty. The revenue authorities cannot say that the object of the transaction was to achieve a purpose not disclosed in the document and that, therefore, the document should be deemed to be that which it was not.

The true scope of the rule of substance prevailing over the form with reference to a document chargeable to stamp duty is that the recitals therein should not be lost sight of merely because the parties gave a particular description of the nature of the document".

5. Reading as a whole, it is very clear that it is not the nomenclature that is given to a document that determines the character of the document but the substance of it must be looked into to decide the nature of the document. There can of course be no legal impediment to a party selecting and adopting a particular form of transaction to minimise the expenses of stamp duty. But what exactly is the document is the question to be decided.



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Considered in the light of the decisions reported in Chief Controlling Revenue Authority vs. Rm. L. Rm. L.Lakshmanan (FB) and in the matter of Hiralal Navalram (1908) ILR 32 Bom, 505, it is clear that the document in question cannot by any stretch of imagination be a release deed and it can only be a conveyance within the meaning of S.2(10) of the Indian Stamp Act and as such stamp duty has to be levied under Art. 23 of Sch. I to the Stamp Act. The reference is answered accordingly.”

(Emphasis Supplied)

34. In ***The Madras Refineries Ltd. – Vs – The Chief Controlling Revenue Authority, Board of Revenue, Madras (1977 (2) SCC 308)***, the Hon’ble Supreme Court, while dealing with the stamp duty that is chargeable upon an instrument, quoted with approval the decision in ***Limmer Asphalte Paving Co. – Vs – I.R.C. (1872 LR 7 Exch. 211)***, and held as under :-

“5. In Limmer Asphalte Paving Co. – Vs – I.R.C. (1872 LR 7 Exch. 211), it was stated thus :

In order to determine whether any, and if any, what stamp duty is chargeable upon an instrument the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although they may have believed that its effect and



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operation was to create a security mentioned in the Stamp Act, and they so declared.

This appears to be a correct statement of the law. We have therefore to determine the real and true meaning of the Guarantee Agreement and to decide whether it could be said to be the principal and primary security.”

35. From the above pronouncements, the ratio that could be culled out is that the nomenclature that is given to a document by the parties does not determine the character of the document; rather the substance of the document should be looked into to determine the character of the document.

36. In the above backdrop, the pivotal issue that falls for consideration in the present petitions is whether the transfer of the subject property, as alleged by the petitioner from V.N.Devadoss to the partnership firm had taken place in the manner known to law. Only if the transfer of the subject property from the hands of V.N.Devadoss to the partnership firm stands substantiated, the outflow of the property from the partnership firm to the petitioner company could be



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made out, which alone would enable the petitioner company to claim exemption of stamp duty and, consequently, seek for a refund.

37. As pointed out above, it is admitted by the petitioner that the subject property, which is a portion of a larger extent of land, was purchased by V.N.Devadoss in the year 2004. The partnership firm was formed in the year 2007 and according to the respondents, it was registered on 16.4.2009. The said fact is not disputed by the petitioner. The passage of the subject property, at the first instance, from V.N.Devadoss to the partnership firm assumes significance. Therefore, it would be prudent for this Court to skim through the partnership deed to find out the manner in which the subject property has been dealt with. The relevant clauses in the partnership deed, which is of significance to the issue, are extracted hereunder :-

“5. The capital required for the purpose of the business of the firm shall be contributed by the parties mutually agreed by them from time to time. That the parties have also agreed to contribute their land holdings as their capital contribution described in detail in schedule ‘A’, ‘B’ and ‘C’ annexed to this deed as belonging to each of the parties respectively and also the

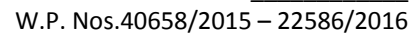


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declaration of the parties hereto of even date forms part of this deed on the conditions as agreed with as under :

- (a) That the land holding contributed to the partnership absolutely belongs to them.*
- (b) That the land will henceforth belong to the partnership and the parties contributing the same will not have any personal interest in it excepting as a partner.*
- (c) That the party will hold the same in its own name and on behalf of the partnership.*
- (d) That each party assures the other partners that the piece of land, so contributed to the partnership is free from all encumbrances excepting the charge over the properties at Padikuppam and Ambattur in favour of Andhra Bank/Indian Overseas Bank created by all the partners to this Deed shall be borne by the respective partners to this deed in its/their individual capacity and the partnership shall not have any liability over the said charges. Neither any party has gifted nor agreed to transfer these lands to any third party.”*

(Emphasis Supplied)



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39. Be that as it may. Further to the partnership firm being converted into a Joint Stock Company under Sections 566, 67 and 568 of the Companies Act, agreement has been entered into on 16.11.2009 and the Memorandum of Association of the Company has been drafted, the relevant clauses of the same, which has relevance to the case on hand, is extracted hereunder :-

“And whereas the parties hereto and on the basis of dividing the profit/loss on the account of the partnership firm and have mutually settled their right of accounts in the said Partnership Firm to form a Joint-Stock Company and continuing the business of the Partnership Firm uninterrupted in a Joint-Stock Company, having an Equity Share Capital of Rs.41,16,92,000/- (Rupees forty One Crores Sixteen Lakhs Ninety Two Thousand only) divided into 411692000 Equity Shares of Rs.10 (Rs. Ten only).

* * * * *

VI. All the business and assets of M/s. V.GURUSWAMY NAIDU & CO. partnership firm including capital goods as agreed between all the partners and that it carry a clear and marketable title and all the assets and liabilities shall become the property/liability of the Company and having regard to the obligations imposed on the Firm by these present shall be taken by the Company without dissolution of the Firm and un-interruption of the business as per



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the Balance Sheet made as at 31st October, 2009, under the provisions of Part IX of the Companies Act, 1956.”

40. From the above clauses in the Memorandum of Association, it is evident that the partners of the partnership firm had settled their right of accounts in the said partnership firm, when it was formed as Joint-Stock Company and shares equivalent to the amount of their contribution to the company has been allotted to them. The further clause (VI) provides that the capital goods, as agreed between all the partners, which carry clear and marketable title and all the assets and liabilities shall become the property of the Company. However, as noted above, a charge on the subject property with Andhra Bank/Indian Overseas Bank was subsisting in the name of the title holders of the property and that the partnership deed provided that the respective party would hold the property in their name on behalf of the partnership firm.

41. From the above, it is evident that though capital had been pumped into the partnership firm in the form of the subject property, yet transfer of the property to the partnership firm had not taken place as the property was held in



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the very name of the partners and that the said subject property was also carrying a charge with the Bankers, which was subsisting. There is no whisper about the charge that the subject property was carrying though it is spelt out that the assets and liabilities of the partnership firm would be carried over to the Joint Stock Company. However, what is relevant here to point out is the fact that the charge over the subject property was created by the partners, which was exclusive of the property alleged to have been held by the partnership firm. The Joint Stock Company had only taken over the assets and liabilities of the partnership firm, but the charge with regard to the Bank being on the shoulders of the partners of the firm and the subject property having been held by the partners, it cannot be said that the subject property had actually been transferred to the books of the partnership firm. Any such construction with regard to the subject property having been transferred to the books of the partnership firm would be against the tenor and character of the partnership deed as also the Memorandum of Association.

42. Further one other fact that stares writ large on the issue of transfer of the subject property is the fact that in the Declaration of the Partner contributing



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his immovable property to the firm as capital, there is a specific recital that a particular sum has been credited to the individuals capital account in the books of the firm as mutually agreed between the partners. If that be the case, the subject property ought to have been given clear of any charge, which alone would give the partnership firm a hold on the subject property. Subsistence of charge to the Bank, holding of the subject property in the name of the partners and also crediting the amount into the capital account of the partners are all mutually destructive statements, which are found in the partnership deed, which clearly shows that the subject property has not been transferred as property of the partnership firm, but for the recital in the said document. Further, it is even the admitted case of the petitioner that even as on the date of execution of the Indenture of Mortgage, the revenue records shows the name of V.N.Devadoss as the title holder of the subject property.

43. Though this Court has come to the *prima facie* conclusion that no transfer, as provided under the Registration Act has taken place, as alleged by the petitioner, the recitals in the Indenture of Mortgage would also have to be



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scrutinized to come to a definitive conclusion as to the character of the property and the person or entity, which holds the title to the property.

44. The Indenture of Mortgage has been entered into between the V.Guruswamy Naidu Company Pvt. Ltd. And V.N.Devadoss on the one hand in favour of IL & FS Trust Company Ltd. The relevant clauses in the said deed, which have some significance attached to it to be read in tandem with the other documents, viz., the partnership deed and the Memorandum of Association, are quoted hereunder :-

"This Indenture is made at

(VGN and the Confirming Party are hereinafter collectively referred to as the "Security Providers" and Each of VGN, the Confirming Party and the Debenture Trustee are collectively referred to as the "Parties" and individually as a "Party").

** * * * **

(D) The immovable property proposed to be charged in favour of the Debenture Trustee pursuant to this Deed has been transferred to VGN by the Confirming Party. However, the land records in this regard have not mutated in this regard. At the request of VGN, Mr.V.N.Devadoss has agreed to act as a Confirming Party under this Indenture.

** * * * **



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11.

(x) The Mortgaged Property is the sole and absolute property of the Security Providers and is at its disposal and free from any prior charge or encumbrance and the Security Providers have good right, full power and absolute authority to grant, convey, transfer and assure the Mortgaged Properties unto and to the use of the Debenture Trustee in the manner aforesaid."

(Emphasis Supplied)

45. A careful perusal of the recitals in the Indenture of Mortgage reveals that it has been specifically stated in the aforesaid deed that the immovable property proposed to be charged in favour of the Debenture Trustee has been transferred to VGN by the Confirming Party, viz., V.N.Devadoss, though land records still stands in the name of the Confirming Party. However, what is more intriguing is the fact that there is a specific recital in the said deed that the mortgaged property is the sole and absolute property of the security providers, meaning thereby, that the said property is collectively owned by VGN as well as by the Confirming Party, viz., V.N.Devadoss. This Court is at a loss to understand as to how the subject property could be termed to be the sole and absolute property of the Security Providers, viz., the petitioner and V.N.Devadoss,



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notwithstanding the fact that it is the alleged claim of the petitioner that the subject property stood transferred in the name of the partnership firm.

46. The above recitals in the Indenture of Mortgage, coupled with the partnership deed and the Memorandum of Association clearly reveal that the property, which is the subject matter of mortgage, cannot be deemed to have been transferred to the partnership firm by V.N.Devadoss and the mere recitals in the partnership deed and the Memorandum of Association cannot be held to be a transfer within the meaning of the Stamp Act.

47. Further, Section 14 of the Partnership Act deals with the property of the firm and the same is quoted hereunder for reference :-

“14. The Property of the firm.- Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of business of the firm, and includes also the goodwill of the business.”



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48. From the above provision, it is clear that subject to contract between the partners, the property of the firm would include all property and rights and interests in property originally brought into the stock of the firm. In the case on hand, the subject property is alleged to have been brought into the capital account of the firm as the share of the partner, V.N.Devadoss, which is the recital in the partnership deed. However, as already stated, the subject property, though is alleged to have been brought into the capital account of the firm as the share of the partner, V.N.Devadoss, yet the property stood in the name of the said individual, which could only mean that the property still was held by the said individual and it cannot be said to be the property of the firm, as the revenue records, even till the date of Indenture of Mortgage, have not been mutated for which there is no possible and plausible reason forthcoming from the side of the petitioner.

49. In ***Arm Group Enterprises Ltd. – Vs – Waldrof Restaurent (2003 (1) RCR (Rent) 594 (SC))***, it has been held that the property exclusively belonging to a person does not become a property of the partnership merely because it is used for the business of the Partnership and that such property will become property



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of the partnership if there is an agreement. However, in the case on hand, notwithstanding the fact that there is an partnership deed, in which there is a recital to the effect that the property is put in as capital towards the share of V.N.Devadoss, cannot be construed as transfer within the meaning of Stamp Act for the simple reason that the revenue records still stand in the name of V.N.Devadoss. Therefore, for all purposes, the property would be held to be the property of V.N.Devadoss without there being any transfer, as the recital in the partnership deed could only be deemed to mean that the property of a partner has been allowed to be used in the partnership business and that it would not be construed as partnership property, which view has been arrived at in the decision in **Noor Mohd. Mir – Vs – Qadir Mir (AIR 1983 NOC 181)**.

50. In the aforesaid backdrop, the decision in *Inca Cables* and *Madras Refineries (supra)* would lend support to the decision arrived at by this Court above, as it is not the nomenclature that is given to a document that determines the character of the document, but the substance of the document would decide the nature of the document and in the case on hand, as discussed above, the mere fact that the recital in the partnership deed speaks about the property



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being given to the partnership firm, but the other records having held in the name of the V.N.Devadoss and the further fact that even in the Indenture of Mortgage, not only V.N.Devadoss is shown as confirming party, but there is a clear recital that the mortgaged property is the sole and absolute property of the security providers makes it clear that the transfer made for the purpose of minimizing the stamp duty at the earliest point of time and it is not a transfer within the meaning of the Stamp Act and, therefore, the transfer not being effectively made according to the provisions of the Registration Act and Stamp Act, necessarily exemption cannot be claimed by the petitioner. Therefore, this Court holds that there is no transfer in the eye of law and, therefore, the petitioner could not claim any exemption from payment of stamp duty and the deficit stamp duty of Rs.2,03,00,000/- claimed by the respondents cannot be said to be erroneous or unjustified.

51. Learned senior counsel for the petitioner had relied upon the decision in ***Sunil Siddharthbhai – Vs – Commissioner of Income Tax, Ahmedabad, Gujarat (1985 (4) SCC 519)*** to impress upon this Court that the capital assets have been transferred by V.N.Devadoss in favour of the partnership firm. However, the said



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decision cannot be of any help to further the case of the petitioner for the reason that it pertains to personal assets, which were shares, which have been pumped into the firm in the form of capital assets and the issue therein related to the computation of income tax on the capital gains.

52. The decision in ***Vali Pattabhirama Rao & Anr. – Vs – Sri Ramanuja Ginning & Rice Factory (P) Ltd. & Ors. (AIR 1984 AP 176)*** has also been relied upon by the petitioner, which is a case relating to transfer of property from an individual to a company. However, in the said case, the transfer is on the basis of a permanent lease entered into between the individual and the company therein. However, the facts in the present case are wholly different from the said case and the said decision cannot be pressed into service to sustain the case of the petitioner.

53. Insofar as the claim of stamp duty on the debenture deed and debenture to the tune of Rs.7,00,000/= and Rs.14,00,000/- are concerned, it is the claim of the petitioner that Article 27 of the Stamp Act provides for the



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exemption and, therefore, the deficit stamp duty claimed by the respondents cannot be maintained.

54. Article 27 of the Stamp Act deals with exemption with regard to debenture and for better appreciation, the same is extracted hereunder :-

Description of Document	Rate of Stamp Duty
Article 27 : Debenture (Whether a mortgage debenture or not being a marketable security transferable) (a) By endorsement or by a separate instrument of transfer (b) By delivery Explanation – The term 'Debenture' includes any interest coupons attached thereto, but the amount of such coupons shall not be included in estimating the duty. Exemption. – A debenture issued by an incorporated company or other body corporate in terms of a registered mortgage deed, duly stamped in respect of	0.05% per year of the face value of the debenture, subject to the maximum of 0.25% or rupees twenty five lakhs, whichever is lower



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the full amount of debenture to be issued thereunder, whereby the company or body borrowing makes over in whole or in part, their property to trustees for the benefit of the debenture holders:

Provided that the debentures so issued are expressed to be issued in terms of the said mortgage deed.

55. From a careful perusal of Article 27, it is clear that to claim exemption, the company issuing debenture should make over, in whole or in part their property to the trustees for the benefit of the debenture holders. It is therefore unambiguous that the property, which is mortgaged with the mortgagee as security for the debenture issued should be made over in whole or part to the mortgagee for the benefit of the debenture holders.

56. In this background, the recitals in the mortgage deed assumes relevance which alone could determine whether the exemption is permissible for



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the instrument in question. The relevant portion of the mortgage, with regard to possession of the property at the hands of the mortgagee is quoted hereunder :-

"In Doc. No.10577/13

3. CREATION OF SECURITY

3.1 For the consideration aforesaid and as a continuing security inter alia for the payment/repayment of the Debenture Payments and performance of the Company's and Mortgagor obligations under the respective Transaction Documents, the Mortgagor hereby :

3.1.1 Mortgage and charge unto Debenture Trustee, for the benefit of the Debenture Holders, without possession, a first and exclusive charge together with the benefit of renewal(s) thereof under trust for the benefit of Debenture Holders by way of a registered mortgage over the land described in Schedule I, the Receivables AND all the estte, right, title, interest, development rights, property, claim, income, right of purchase and performance and demand whatsoever of the Mortgagor into and upon the same by virtue of law, title documents and greements held by the Mortgagor or custom, absolutely UPON TRUST and subject to the powers and provisions herein contained and subject also to the proviso for redemption hereinafter mentioned (collectively the "Mortgaged Property"):

Provided that the Mortgagor has not given the possession of the Mortgaged Property to ITCL and have also not agreed to give the possession of the Mortgaged Property to ITCL, until the



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security herein becomes enforceable in terms of these presents, applicable Law or the Transaction Documents.

In Doc. No.8400/2013

15. POSSESSION

Each of the Security Providers or their representatives possessing the Mortgaged Properties, have not given possession nor agreed to give possession of the Mortgaged Properties to the Debenture Trustee. This is without prejudice to the right of the Debenture Trustee to take possession of the Mortgaged Properties under this Indenture or other rights under Applicable Law.”

57. From the above recitals in the mortgage deeds it is clear that possession has not been given to the Mortgagee by the Mortgagor. There can be no second thought as to the inference that could be drawn from the above recitals, as possession of the mortgaged property is held by the Mortgagor. Therefore, under the mortgage deed, possession of the property, given as security, has not been parted with by the mortgagor to the mortgagee. In this backdrop, a careful perusal of Article 27 of the Stamp Act reveals that insofar as debenture is concerned, the borrower has to make over, in whole or in part, their property to the trustees for the benefit of the debenture holders. Only in such



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circumstances, exemption provided under Article 27 is available in respect of stamp duty payable on the said mortgage deed. It is clear from the recitals that possession has not been parted with by the Mortgagor in favour of the Debenture Trustee and such being the case, the borrower, viz., the petitioner, not having made over the property in whole or part, viz., giving possession of the property to the Debenture Trustee, cannot claim the exemption granted under Article 27 of Schedule I of the Stamp Act. Therefore, rightly, the respondents have assessed the stamp duty payable and have demanded stamp duty and, therefore, the same does not call for any interference from this Court.

58. For all the reasons aforesaid, this Court is of the considered view that no transfer in the eye of law has taken place and, therefore, the exemption claimed by the petitioner with regard to stamp duty has been negated by the respondents and rightly so and no interference is warranted with the impugned order. Accordingly, both the writ petitions fail and the same are dismissed. Consequently, connected miscellaneous petitions are closed. In the circumstances of the case, there shall be no order as to costs.



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11.11.2022

Index : Yes / No

Internet : Yes / No

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To

1. The Inspector General of Registration
No.100, Santhome High Road
Chennai 600 028.

2. The District Registrar (AIG)
Chennai North
No.1, Murthygal Lane
Rajaji Salai, Chennai 600 001.

3. The Sub Registrar
Ambattur
Municipality Community Hall
Gopalasamy Street, Ram Nagar
Chennai 600 053.



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M.DHANDAPANI, J.

GLN

**PRE-DELIVERY ORDER IN
W.P. NO.40658 OF 2015
AND
W.P. NO. 22586 OF 2016**

**Pronounced on
11.11.2022**