**(1989) 04 MAD CK 0063**

**In the Madras High Court**

**Case No :** R.C. No. 4 of 1983

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| Chief Controlling Revenue Authority (Stamp Act) and Inspector General of Registration, Madras | APPELLANT |
| Vs | |
| Coimbatore Alcohol and Chemicals Pvt. Ltd., Erode and another | RESPONDENT |

**Date of Decision :** 03-04-1989

**Acts Referred:**
Stamp Act, 1899 — Article 40, 64, 2(17), 57
Transfer of Property Act, 1882 — Section 58

**Citation :** AIR 1990 Mad 8

**Hon'ble Judges :** Nainar Sundaran, J;K.M. Natarajan, J;Bellie, J

**Bench :** Full Bench

**Advocate :** V. Thiagarajan, Govt, for the Appellant; T. Raghavan and S.K. Ramamoorthi, for the Respondent

# Judgement

Nainar Sundaram, J.—This is a reference under S. 57 of the Indian Stamp Act, 2 of 1899, hereinafter referred to as the Act. The question referred to for our consideration and answer runs as follows -

"Whether the document No. P.531/77 of Registrar Office, South Madras is a mortgage deed or a trust deed?"

The document, as per the copy disclosed in the typed set, is separately annexed to this order as Annexure-A. As we could see from the contents of the document, the executants are stated to be Murugesan and Coimbatore Alcohol and Chemicals (P.) Ltd. The document is in favour of Ramlinga Gounder. It refers to an agreement dt. 25-10-1977 amongst Muthukumaraswami, Lakshmanasami, Rathanasami, Coimbatore Alcohol and Chemicals (P.) Ltd. and others. There is a reference to the properties, set out in the Third Schedule to the said agreement, and it is further said that until the debts of Rs. 5,28,000 referred to in paragraph 5 of the said agreement are discharged by the sale of these properties, the said properties shall be in the possession of Ramalinga Gounder, and at the time of the discharge of the said debts, possession shall be handed over by Ramalinga Gounder to the purchasers, and he shall not hand over possession to any one without the discharge of the said debts. The Revenue wanted to maintain that this document will fall within the definition of a mortgage deed under S. 2(17) of the Act, attracting Art. 40 of the Act. The respondents, on the other hand, presented the document without tendering any stamp duty, and on objections being raised that the document has got to be stamped as a mortgage deed, the respondents would say that it may, if at all to be stamped, have the character of a declaration of trust and certainly not that of a mortgage deed as defined under S. 2(17) of the Act.

2. Section 2(17) of the Act defines mortgage deed in the following terms :--

"Mortgage deed : ''Mortgage deed'' includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers, or creates, to, or in favour of, another, a right over or in respect of specified property."

As we could see from the above definition, it is an inclusive one. Mortgage, as such, stands defined under S. 58(a) of the Transfer of Property Act, as follows -

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

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

Looking into the language of S. 58(a) of the T. P. Act, we find that there has got to be transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, or an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. The definition of mortgage deed under S. 2(17) of the Act includes every instrument whereby, for the purpose of securing money, advanced or to be advanced, by way of loan, or an existing or a future debt, or the performance of ah engagement, there is a transfer or creation by one person to and in favour of another, a right over or in respect of specified property. Sec. 58(a) of the Transfer of Property Act, refers to mortgages as relating to immovable property only, while the inclusive definition in S. 2(17) of the Act applies it to transfers both of movable and immovable property. With this salient exception, the definitions in both the statutes are practically identical.

3. The document as such by its terms, does not say that there is money advanced or to be advanced by way of loan by Ramalinga Gounder either to the

 

executants or any other person. Equally so, it does not speak about an existing or a future debt by the executants or any other person to Ramalinga Gounder, Hence, the question of securing such a loan or debt to Ramalinga Gounder would not arise. This is because, there is no rule of a creditor apparently given to Ramalinga Gounder as per the terms of the document. So also there is no securing of the performance of an engagement, either giving rise to pecuniary liability or otherwise, to and in favour of Ramalinga Gounder. Assuming all the above aspects in favour of the Revenue, the further question that arises for consideration is as to whether there is a transfer of an interest in or transfer or creation of aright over or in respect of the specified immovable properties with which alone we are now concerned to and in favour of Ramalinga Gounder by the executants. We find from the terms of the document that apart from bare custody of possession given to Ramalinga Gounder subject to certain specified conditions, there has been no transfer of an interest in or transfer or creation of a right over or in respect of the specified immovable properties to and in favour of Ramalinga Gounder. A mere handing over of possession of the specified immovable properties with nothing more or with no intention to transfer an interest in or transfer or creation of a right over or in respect of the same will not bring the transaction within the ambit of a mortgage. Hence, the other crucial element of transfer of an interest in or transfer or creation of a right over or in respect of the specified immovable properties is lacking in the instant case. Apart from a bare possession subject to certain specified conditions, Ramalinga Gounder acquired no interest or right in the specified immovable properties so as to attract the concept of a mortgage within the meaning of both the statutes. For the above reasons, we are not persuaded to hold that the document will fall within the definition of a mortgage deed u/S. 2(17) of the Act so as to attract Art. 40 of the Act.

4. Then the question is whether the document would fall within the ambit of a declaration of a trust under Art. 64 of the Act. We must straightway point out that, it is an essential condition of the creation of a trust that the property must vest in the trustee. In the instant case, the role of a trustee is sought to be given to Ramalinga Gounder. But, there is no vesting of property at all in him with any obligations annexed to such vesting. He has been given the bare possession of the properties as already noted and he has to be in possession of the properties subject to certain specified conditions, set out in the document. He shall not hand over the properties until the debts referred to are discharged. He shall hand over the properties to the purchasers at the time of the discharge of the debts. It is not possible to say that there is any vesting of a property in Ramalinga Gounder as such. It is only a case of a personal relationship and personal obligations and nothing more. Hence we could not characterise the document as a declaration of trust.

5. If this is the position on facts and in law, then we have to hold that the document is one not falling within the ambit of any of the specified Articles under the Act, and it has to be treated as a document not requiring any stamp duty as

 

originally contended by the respondents. We answer this reference as above. We make no order as to costs. We fix the fees for the Government Pleader at Rs. 500.

Annexure A-- to the order dt. 3-4-1989 in R.C.4 of 1983-

(Matter in vernacular omitted (Ed.))

6. Order accordingly.

 