

(1971) 12 DEL CK 0029

In the Delhi High Court

Case No : Stamp Duty Reference No. 1 of 1969

Dhoomi Mal Ram Chand

APPELLANT

Vs

The Collector of Stamps

RESPONDENT

Date of Decision : 13-12-1971

Acts Referred:

Citation : AIR 1972 Delhi 146 : (1972) ILR Delhi 755

Hon'ble Judges : V.S. Deshpande, J;S.N. Shankar, J;Hardayal Hardy, J

Bench : Full Bench

Advocate : R.M. Lal, Arun Mohan, D.K. Kapur, Rishikesh and N.S. Goswal, for the Appellant;

Judgement

V.S. Deshpande, J.

(1) In this reference u/s 57(2) at the Indian Stamp Act, we have to consider the true nature of the mortgage deed dated 24-6-1968 to opine whether :-

(1)it is a mortgage deed by which "possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given" in the meaning of Article 40(a) of Schedule I-A (Delhi) of the Stamp Act;

AND(2) the duty on transfer of property livable u/s 147 of the Delhi Municipal Corporation Act, 1957 in the form of a surcharge on stamp duty can, be recovered as deficiency along with penalty u/s 40 of the Stamp Act.

(2) Question NO. 1 :-

it is common ground that the deed in question is a "mortgage deed" within the meaning of section 2(17) of the Stamp Act. The question is whether it is a mortgage with possession or a simple mortgage. The distinction between these two types of mortgage has to be gathered from the provisions of the Transfer of Property Act, 1882, section 58(b), of which defines a simple mortgage and section 58(d) of which defines a usufructuary mortgage. In a simple mortgage. the mortgagor does not deliver possession of the mortgaged property to the

mortgagee but binds himself personally to pay the mortgage-money and agrees that on his failure to pay the same, the mortgage, the mortgagor does not deliver possession of the mortgaged pro so far as may be necessary for the satisfaction of the mortgage debt. In a usufructuary mortgage, on the other hand, the mortgagor delivers possession of the mortgaged property to the mortgagee or expressly or by implication binds himself to deliver such possession and authorises the mortgagee to retain such possession until payment of the mortgage-money and to receive rents and profits of the property and appropriate the same towards the satisfaction of the mortgage debt. The meaning of "possession" in section 58 of the Transfer of Property Act is not actual physical possession but such possession which the property is capable of.

(3) The recitals in the deed in question are that the whole of the property comprising two buildings Nos. 8 and 9 in Block A, Con- naught Place, New Delhi, belonged to the Dayal Singh Library Trust Society who agreed to sell them to Messrs. Dhoomi Mal Ram Chand for a price paid to the Trust by the New Bank of India in consideration of the mortgage of the whole property by Messrs. Dhoomi Mal Ram Chand to the said Bank. The deed is thus a tripartite agreement between the seller, the purchaser-mortgagor and the mortgagee. A part of the property was already in the possession of the mortgagee as a lessee. By clauses 4 and 5 of the deed, the parties agreed that the said lease shall remain effective and binding on the mortgagor. The Collector of Stamps was of the view that the possession of the property was thus delivered by the mortgagor to the mortgagee and, Therefore, the deed in question was a usufructuary mortgage. The Chief Controlling Revenue Authority was, on the other hand, of the view that the mortgagor did not give possession to the mortgagee in this transaction which could not, Therefore, be considered as a mortgage with possession.

(4) it is essential to remember that the Bank was already in possession of a part of the property as a lessee of the Trust, When the whole property was sold by the Trust to Messrs Dhoomi Mal Ram Chand, the latter became the Lesser of the Bank. The relationship of the Bank with Messrs. Dhoomi Mal Ram Chand continued to be that of a lessee and a Lesser as before even after the purchase of the property by Messrs. Dhoomi Mal Ram Chand from the Trust. When Messrs. Dhoomi Mal Ram Chand mortgaged the whole of the property to the Bank in consideration of the payment of the price payable by Messrs. Dhoomi Mal Ram Chand to the Trust, the possession of the property as a whole was neither transferred by the mortgagor to the mortgagee nor was it agreed to be so transferred within the meaning of section 58(d) of the Transfer of Property Act. On the contrary, the possession was retained by the mortgagor and the mortgagee was given a right to bring the property to. sale. if the mortgagor failed to pay the mortgage debt. The transaction: was also expressly described as a simple mortgage. The Collector of Stamp contused the possession of a part of the property with the Bank as a lessee with the possession which a mortgagor gives to the mortgagee in a usufructuary mortgage. He thought that the actual possession of a part of the mortgaged property with the mortgagee was

sufficient to satisfy the requirement of section 58(d) of the Transfer of Property Act to make the transaction a usufructuary mortgage. The error which he committed was to overlook the nature of the possession of the Bank. . This possession originated with the Bank purely in its capacity as a lessee. It had then nothing to do with the subsequent mortgage. The possession of the Bank as a lessee continued to be in the capacity of a lessee even after the property was sold by the Trust to Messrs. Dhoomi Mal Ram Chand and even after Messrs. Dhoomi Mal Ram Chand mortgaged the same property to the Bank. Such possession had nothing to do at all with the mortgage. It was a sheer accident that the amount of the price payable by Messrs. Dhoomi Mal Ram Chand to the Trust was borrowed by Messrs. Dhoomi Mal Ram Chand from this Bank. Even if Messrs. Dhoomi Mal Ram Chand had borrowed such amount from any other person or any other Bank, the legal position would have been the same. The person who advanced the money to Messrs. Dhoomi Mal Ram Chand would have become the mortgagee and the New Bank of India would have continued to be the lessee of the mortgagor as before. The mortgagee would then have had no connection at all with the New Bank of India. The rights of the mortgagee were enforceable only against, the mortgagor but not against the lessee of the mortgagor with which the mortgagee would have had no privity of contract. The capacities of the lessee and the mortgagee were thus distinct. These two capacities became possessed by the New Bank of India quite accidentally when Messrs. Dhoomi Mal Ram Chand borrowed the amount of the price from the New Bank of India instead of doing so from any other person or the bank. This accident should not be allowed to cloud the fact that the possession over a part of the property by the New Bank of India was in the capacity of a lessee only. The nature of this possession did not change by the mortgage. On the other hand, it remained the same, namely, that of the lessee.

(5) The law finds no difficulty in contemplating a transaction in which the mortgagee or the mortgagor can be a lessee of one another quite apart from the rights of these two persons arising out of the mortgage. In Mathuralal Vs. Keshar Bai and Another, the mortgagee was the landlord and the mortgagor the tenant. It was held that the mortgagee could sue independently of the mortgage on the basis of the lease even though his remedy on mortgage had become unenforceable inasmuch as the lease was a separate transaction altogether from the transaction of the mortgage. This principle is applicable to the present case even though the mortgagor happens to be the Lesser and the mortgagee the lessee.

(6) For the above reasons our answer to the first question referred to us is that on the facts of the present case, the mortgagor did not transfer the possession of the whole or a part of the property to the mortgagee while mortgaging the property to him. The transaction was, Therefore, a simple mortgage and not a usufructuary mortgage. It is dutiable, Therefore, under Article 40(b) and not under Article 40 (a) of Schedule I-A (Delhi) of the Stamp Act.

(7) In view of the answer to Question No. 1, the question of recovering deficiency along with penalty u/s 40 of the Stamp Act does not arise in this case. The second question referred to us does not, Therefore, arise for consideration in the present case. The reference answered accordingly.

(8) We make no order as to costs.