

(1937) 04 CAL CK 0021

In the Calcutta High Court

Case No : In the matter of Reference under sec. 57 of the Indian Stamp Act

In Re: Kumar Kamala Ranjan Roy

Date of Decision : 15-04-1937

Acts Referred:

Citation : (1937) 04 CAL CK 0021

Judgement

Derbyshire, C.J.—In my opinion, it is clear that the document of October 9th, 1934, was executed contemporaneously with the deposit of title deeds of the property concerned. The document itself (at page 3) recites

The mortgagors have applied to the mortgagees to lend and advance them the sum of Rupees three lakhs and fifty thousand which the mortgagee has agreed to do on having the repayment thereof with interest and costs secured in the manner hereinafter mentioned and referred to.

Later, the document recites:-

That in consideration of the sum of Rupees three lakhs and fifty thousand by the mortgagee paid to the mortgagors as aforesaid the first party as the sole beneficial owners have this day deposited with the mortgagee at the residence of the mortgagee's solicitor at No. 10 Baloram Ghose Street in the town of Calcutta the title deeds relating to the said premises No. 13 Pagyapatty Street particularly specified in Part I of Schedule B hereunder written with the intent and effect of creating an equitable mortgage on the messuage, land, tenements and hereditaments and premises No. 13 Pagyaputty Street particularly described in Part I of Schedule A hereunder written and the second party as the sole beneficial owners have this day deposited with the mortgagee at the residence of the mortgagee's solicitor at No. 10 Baloram Ghose Street in the town of Calcutta the title deeds relating to the Old Court House Lane and Radhabazar properties particularly specified in Part 2 of Schedule B hereunder written with the intent and effect of creating an equitable mortgage on the said Old Court House Lane and Radhabazar properties particularly described in Part 2 of Schedule A hereunder written.

Then follow the provisions for the payment of interest by the mortgagors, payment of costs, for the loan not being called in before due time, stipulation as to the way in which the loan should be repaid, property kept in repairs, rates and taxes paid on the property, a stipulation that the loan should not be called in for two years and for the extension of the mortgagor's option for two years more. Then follows the further provision that, if the principal and interest which are due and payable by the mortgagors to the mortgagee be not paid on the due date, the mortgagee shall be entitled to recover them by enforcing his rights and remedies under the equitable mortgage, including his right to appoint a receiver in respect of the said properties under the mortgage, to which appointment the mortgagors irrevocably consented, so as to render any further consent on their part unnecessary. There is a further provision later on in the document that the mortgagors, whenever called upon by the mortgagee, shall execute a mortgage in the form of an English mortgage in the terms hereinbefore and hereinafter mentioned in favour of the mortgagee.

2. To my mind, it is quite clear that, that document creates at the instance of the mortgagors very definite and valuable rights over the properties concerned in favour of the mortgagee. Shortly put, it gives the mortgagee a mortgage by the deposit of title deeds together with the right to appoint a receiver at any time without first having recourse to the Court; and it also gives the mortgagee the right to call upon the mortgagors at any time to execute a mortgage in the English form in favour of the mortgagee. Consequently, it comes within the definition of " mortgage-deed contained in the Stamp Act of 1899, sec;. 2 (17), which enacts that unless there is something repugnant in the subject or context, "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. I can see nothing in the subject-matter of the document itself or the context which is repugnant SO as to prevent this document from being a mortgage-deed within sec. 2, sub-sec. 17.

3. The benefit of that mortgage was transferred by the mortgagee to Rani Sarajini Debi on the 12th of April, 1935, by a document of that date. It is recited in that document that the transfer was made in consideration of arrears of maintenance payable by the transferor to the transferee. The question is whether that document of transfer falls to be stamped under Art. 23 of Schedule I-A of the Bengal Stamp Amendment Act, 1922, which is incorporated into the Stamp Act of 1899 or under Art. 62 (c) of the same Schedule. It seems to me that this case is specifically provided for under Art. 62 of the schedule which provides that where there is a transfer with or without consideration of any interest secured by a bond, mortgage-deed or policy of insurance, (i) a duty of a sum not exceeding Rs. 5 is chargeable for such bond, mortgage deed or policy of insurance and (ii) in any other case- Rs. 7-8as. As I have said, in my view, the document of October 9th, 1934, is a mortgage-deed within the meaning of the Stamp Act.

Under the document of transfer of April 12th, 1935, the benefit of the interest secured by that deed has been transferred from the mortgagee to Rani Sarajini Debi and consequently, the document of transfer, in my view, falls to be stamped with a stamp of Rs. 7-8as. It is quite clear that that document of transfer of April 12th, 1935, is not a conveyance such as is provided for under Art. 23.

4. An argument has been addressed to us that the mortgage-deed (that is, the document of October 9th. 1934) ought in the first instance to have been stamped under Art. 40 of the schedule instead of under Art. 6 of the schedule as, in fact, it was stamped. In my opinion, that is not a question which is to be decided by us to-day. The only question with which we are concerned is whether the document which was impounded by the Revenue Authorities in order to be stamped under Art. 23 and was, in fact, stamped under protest under Art. 23 was correctly stamped or not.

5. For the reasons I have given, as I have said, it was not correct to stamp the transfer of April 12th, 1935, under Art. 23. The proper stamp is that provided for in art. 62 (c), namely, Rs. 7-8as.

6. Mr. Banerji's client will get his costs of this Reference as well as the costs of the Mandamus proceedings.

Costello, J.

7. The Board of Revenue had taken the view that the expression " mortgage-deed," as used in Art. 62 (c), schedule 1 (a) of the Bengal Stamp Amendment Act of 1922, refers only to a mortgage deed in regard to which stamp duty is fixed under Art. 40 of that schedule and that Art. 62 (c) will have no reference to documents which have been treated as falling within the purview of Art. 6 of the schedule. The document of the 9th of October, 1934, was admittedly stamped upon the basis that it was an agreement of the kind contemplated by Art. 6.

8. At an early stage of the argument before us not only the learned Counsel appearing on behalf of the Petitioner but even the learned Advocate-General appearing on behalf of the Board of Revenue expressed the view that that procedure was correct. If that were the case it is, of course, arguable that the document was not excluded from the operation of Art. 40-by virtue of the opening words of that Article which are as follows:-

Mortgage deed, not being an Agreement relating to deposit of Title Deeds, Pawn or Pledge (No. 6), Bottomry Bond (No. 16), Mortgage of a crop (No. 41), Respondentia Bond (No 56) or Security Bond (No. 57).....

9. If the document of the 9th of October, 1934, is really a mortgage deed, it may well come within the main part of Art. 40. In my opinion, the document was the instrument by which the equitable mortgage was created in the sense contemplated by Sir Richard Couch, Chief Justice, in his judgment in the well-known case of Kedar Nath Butt v. Shamlal Khettry 11 Beng. L. R. 405 (1873). It seems obvious upon an examination of the precise terms and conditions of the

document itself that it was not a mere memorandum of a contract between the parties but that it constituted the contract between the parties or to apply the antithesis indicated in the judgment of Lord Carson in the case of *Subramonain v. Lutchman L. R. 50 I. A. 77* at p. 83: s. c. 28 C. W. N. 1 (1922)., the document of the 9th of October, 1934, falls into the category of documents which constitute the bargain between the parties and not into the category of documents which merely record an already completed transaction. It was argued in the well-known case of the *Imperial Bank of India v. U. Rai Gyaw Thu & Co. L. R. 50 I. A. 283: s. c. 28 C. W. N. 470* (1923). that an equitable mortgage effected by deposit of title deeds was not a mortgage in the sense of the Transfer of Property Act. Their Lordships of the Privy Council, as it appears from the judgment of Lord Dunedin at page 293, were however of opinion that that was an untenable proposition in view of the words of sec. 58 (a) of the Transfer of Property Act. His Lordship said:

unless the deposit of title deeds effects the transfer of an interest in a specific immovable property for the purpose of securing the payment of money advanced or to be advanced, it is absolutely nothing at all. Further the concluding words of sec. 59 actually use the word "mortgage" to denote the security effected by delivery of documents of title.

Then he continues,

The consideration, however, on which the Appellants laid most stress was that it was evident that the Legislature wished to preserve the system of mortgaging by deposit of title deeds in the enumerated towns.

10. There can be no question in my view but that a so-called equitable mortgage, i.e., a mortgage effected by deposit of title deeds, but with the bargain between the mortgagee and the mortgagor as enshrined in a document is not only for the purposes of the Transfer of Property Act a mortgage but for also the purposes of the Stamp Act and so it falls within the definition contained in sec. 2 (17) of the Stamp Act of 1899. It says:-

"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 engagement, one person transfers, creates, to, or in favour of, another, a right over or in respect of specified property.

11. In the light of the words of Sir Richard Couch to which I have referred, it would seem that fundamentally the document of the 9th of October, 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 mortgagee would not have by the mere deposit of title deeds, that is to say, simply by the physical handing over of title deeds, without further agreement between the parties other than that those title deeds should be security for the money lent.

12. Upon the assumption, therefore, that the document of the 9th of October, 1934, was a mortgage deed within the definition contained in sec. 2 (17), it follows, in my view, that it falls within the expression of " mortgage deed " as used in sub-head (c) of sec. 62 of the Bengal Stamp Amendment Act of 1922. Art. 62, so far as it is material for our present purposes, may be taken as follows:-

Transfer (whether with or without consideration) of any interest secured by a bond, mortgage deed or policy of insurance.

13. Once one comes to the conclusion, as I do, that the document of the 9th of October, 1934, was a mortgage deed, it seems to be the irresistible conclusion that the document of the 12th April, 1935, was a transfer of the kind contemplated by the provisions of Art. 62 (c). Speaking for myself, I have very great doubts as to whether rightly it can be said that the document of the 9th of October, 1934, is a document of the kind specified or indicated by the provisions of Art. 6 of schedule 1 (a) of the Bengal Stamp Amendment Act of 1922.

14. Once more bearing in mind the ante-thesis set up in the passage in the judgment of Lord Carson to which I have already referred, it may well be that because the document itself constitutes the bargain between the parties and not merely records an already completed transaction, it cannot at one and the same time properly be regarded as a mortgage deed and as an instrument evidencing an agreement relating to the deposit of title deeds. It is not necessary that one should express a definite opinion on this point, but in my view the two ideas must be placed in juxtaposition. If an instrument is itself a mortgage deed, it cannot at the same time be an instrument evidencing an agreement relating to what is really an equitable mortgage. If the instrument itself constitutes an equitable mortgage, it is difficult to see how it can be an instrument evidencing an agreement. However, for the purposes of the present case, I am quite satisfied that, whatever may be the right view on the point whether or not the document of the 9th of October, 1934, was properly stamped, the document of the 12th of April, 1935 was one which ought to be dealt with upon the footing that it was a transfer of the kind contemplated by Art. 62 (c).

Lort-Williams, J.

15. I agree that the document of transfer of the 12th of April, 1935, was properly stamped under Art. 62 (c) as being a transfer of an interest secured by a mortgage-deed, and that the document of the 9th of October, 1934, was a mortgage-deed within the words of the definition contained in sec. 2 (17). With regard to the arguments raised upon the other sections and Articles which have been referred to, it seems to me that a particular document may at the same time both satisfy the definition contained in sec. 2 (17) and come within the specific; words of Art. 6 (1). Having regard to the fact that our decision is that the document in question on this reference was properly stamped under Art. 62 (c), it is not necessary for me to pursue this part of the subject. But it is

conceivable that a document may at the same time be intended both to evidence an agreement already made and to create rights over or in respect of specified property. Whether the document of the 9th of October, 1934, fulfills this condition, it is not necessary now to decide.