

(1964) 01 AHC CK 0009

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 1756 of 1961

Krishna Kattha Industries (Private) Ltd.

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 07-01-1964

Acts Referred:

Contract Act, 1872 — Section 126
Stamp Act, 1899 — Article 40, 57

Citation : AIR 1964 All 519

Hon'ble Judges : Mahesh Chandra, J; Jagdish Sahai, J

Bench : Division Bench

Advocate : S.N. Chatterjee, for the Appellant; H.N. Seth, J.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Jagdish Sahai, J.—This case has come to us on a reference made by our brother D.S. Mathur. The facts giving rise to this writ petition are that the Krishna Kattha Industries (Private) Limited, Haldwani district Nainital (the petitioner before us) filed a suit in the Court of the District Judge, Kumaun, against the State of U.P. for a mandatory injunction and also applied for a temporary injunction. The learned District Judge allowed the application by means of the order dated April 8, 1960, in which he, inter alia, required the company to hypothecate property to the tune of several lacs of rupees whereupon on behalf of the company hypothecation bond (annexure "B") scribed on a stamp folio of Rs. 18/- was filed in his Court. The relevant portions of that bond read as follows:

"Hence in pursuance of the said order, J, Sarish Kumar son of Shri Krishna Pyarey Lal Managing Director of the Krishna Kathha Industries Private Limited "July authorised by the resolution of the Company dated 7th April, 1960" and I, Ram Kumar, s/o Shri Krishna Pyare Lal Director of the Company and I, Raghuvansh Kumar, s/o Shri Krishna Pyarey Lal, Director of the Company agree and declare that if the defendant be declared by the Court to be entitled to any

amount over and above the sum of Rs. 2,90,000/- already paid by the plaintiff to the defendant and Rs. 75,000/- for which call deposit receipts of Rs. 25,000/- each duly pledged in favour of the Court, the defendant shall be entitled and shall be at liberty to realise such excess sum by enforcing the charges created hereunder by the sale of the property to the extent of Rs. 3,00,000/- so hypothecated and the aforesaid Company and "its directors, hereby hypothecate and mortgage the properly fully described in the schedule attached hereto situated in Haldwani district Nainital".

"The Company or any one on its behalf shall have no objection whatsoever in the defendant's realising the same in pursuance of the orders of the Court dated 8th April, 1960 and the Company shall be liable and responsible to pay the aforesaid sum." " (underlined (here " ") by us).

When the bond was presented to the Sub-Registrar for registration he after impounding it on the ground that it was insufficiently stamped, sent it to the Deputy Commissioner, who referred the case to the Board of Revenue u/s 56(2) of the Indian Stamp Act (hereinafter referred to as the Act). An application was made to the Board of Revenue to refer the case to the High Court which it refused to do. The Board of Revenue on 1S-3-1961 held that the appropriate article of the Act applicable to the deed was Article 40(b) and that the stamp duty payable was Rs. 4,500/- and not Rs. 18/- paid By the petitioner company. It, therefore, directed the petitioner company to pay Rs. 4,4827- (Rs. 4,500/- minus Rs. 18/- already paid), and a sum of Rs. 107- as penalty, in all Rs. 4,492/-. The petitioner then made a review application which was dismissed by the Board on 24-5-1961. whereafter the present writ petition was filed in this Court.

2. The prayer in. the petition is for the issue of a writ of certiorari calling for the record of the case and quashing the orders of the Board of Revenue dated 18-3-1961 and 24-5-61. It has also been prayed that a mandamus be issued commanding the respondents not to take any steps for the recovery of the amount of the stamp duty and penalty as ordered by the Board. In addition there is the usual prayer for the issue of such writ, order or direction as this Court may, in the circumstances of the case, deem fit and proper to issue.

3. The only question involved in this writ petition and requiring decision at our hands is whether Article 57, or Article 40(b) of Schedule I-B of the Act would be applicable to the deed before us. Article 57 of the Schedule reads as under;

"57. SECURITY BOND OR MORTGAGE DEED executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract or the due discharge of a liability, ?

(a) when the amount secured does not" exceed Rs. 1,000;

The same duty as a Bond (No. 15) for the amount secured.

(b) it) any other case.

Eighteen rupees.

4. It is contended that the bond has been executed by a "surety" to secure the due performance of a contract or the due discharge of a liability and consequently it would fall under Article 57. We are unable to agree with this contention. The deed has not been executed by a surety but on behalf of the company by its Managing Director and two Directors in pursuance of a resolution passed by the members of the company on April 7, 1960. We have already extracted the relevant portions of that deed and underlined (here) the important ones. It clearly follows from the contents of the deed that it is the company: which has hypothecated the property and not the Managing Director or the Directors in their individual capacity. A company though a juristic person is not a sentient being. Consequently, some one has to act on its behalf and in the present case the Managing Director and the Directors have done so in pursuance of a resolution passed by the members of the company. Consequently, there can be no manner of doubt that the deed has not been executed by a surety but by the principal i.e., the company and it is the company which has hypothecated or mortgaged its property. The word "surety" occurring in Article 57 has been used in the same sense in which it is used in Section 126 of the Contract Act i.e., of a third person hypothecating or mortgaging his property in the interest of others. In the present case inasmuch as the principal i.e., the company, itself has made the hypothecation or mortgage the provisions of Article 57 cannot be attracted.

5. In our Judgment the case would fall under Article 40(b) of Schedule I-B of the Act. "That provision reads as under:

"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), Respondent Bond (No. 56) or Security Bond (No. 57).

(a) when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given;

The same duty as a Conveyance (No. 23) for a consideration equal to the amount secured by such deed

(b) When possession is not given or agreed to be given as aforesaid.

The same duty as a Bond (No. 15) for the amount secured by, such deed.

It cannot be denied that the bond in question is a mortgage deed. There cannot also be any doubt, in fact, it is the admitted case of the parties and the document itself shows, that possession of the property has not been given nor it has been agreed to be given. Consequently, the case, in our judgment, falls under Article 40(b) of Schedule I-B of the Act. Mr. Chatterji, who has appeared for the company before us, placed reliance on two decisions of the erstwhile Oudh Chief Court, the same being AIR 1928 143 (Oudh) and Secy, of the AIR

1931 99 (Oudh) . On behalf of the State, Mr. Seth has placed reliance upon In In Re: Stamp Reference (Jangilal) and AIR 1942 371 (Oudh) .

6. In AIR 1942 371 (Oudh) Special Bench of the Oudh Chief Court had occasion to consider and distinguish the two earlier decisions of that Court in AIR 1928 143 (Oudh) and AIR 1931 99 (Oudh) . In AIR 1942 371 (Oudh) the facts were that Mr. Hunter, the Liquidator of the Bank of Upper India made an application for leave to appeal to His Majesty in Council against a certain decree passed by the Oudh Chief Court and also made an application for stay of execution of the decree till the decision of the case by His Majesty in Council. The Oudh Chief Court passed an order that the execution of the decree shall be stayed pending the decision of the appeal by the Privy Council provided Mr. Hunter gave security for the due performance of the decree and for costs, which were determined at Rs. 1,90,000/-. Mr. Hunter executed a document on a stamp paper worth Rs. 7/8/- in favour of the Civil Judge, Lucknow whereby he mortgaged the landed property valued at Rs. 1,90,000/- as security for the due performance of the decree that may ultimately be passed by the Judicial Committee and for costs. The Sub-Registrar before whom the document was presented for registration impounded the same taking the view that it was chargeable as a mortgage deed under Article 40(b) and his view was upheld by the Stamp Officer and the Deputy Commissioner. Hardoi Mr. Hunter paid up the duty and the penalty imposed by the Deputy Commissioner, Hardoi, but being aggrieved by the order carried the matter to the Board of Revenue for refund of the amount. The Board of Revenue referred the case to the Oudh Chief Court and invited the opinion of the Court. It was held by all the three learned judges who heard the reference that the case fell under Article 40(b) and rejected the submission made at the Bar on behalf of Mr. Hunter that it fell under Article 57 of Schedule I-B of the Act.

Ghulam Hasan and Agarwala, JJ., while dealing with the scope of the word "surety" occurring in Article 57 of Sch. I-B, observed as follows:

"It has been argued that the word "surety" used in Article 57 must be given a wide meaning so as to include the case of a party to the proceedings or its principal as distinguished from, a surety in the sense used in Section 126, Contract Act. No authority is cited in support of this contention. The words "executed by a surety" must be given their plain and natural meaning and there seems to be no warrant for extending the scope of the word "surety" to the cases of principals who are parties to the proceedings on whose behalf the deed is executed. It has also been argued that Article 57 should be so read as to mean a security bond or mortgage deed executed by way of security for the due discharge of a liability. This is a construction which the language of the article is on the face of it incapable of bearing. The words "due discharge of a liability" must be read as applicable to the case of the bond or a deed executed by a surety. The words "executed by a surety" cannot be taken out of the article,"

7. Thomas, C. J., who also agreed with Ghulam Hasan, J., observed as follows:

"Mr. Ram Bharose Lal argued that the word "surety" in Article 57 should be given a wider meaning so as to include the case of a party to the proceeding or a principal as distinguished from a surety in the sense used in Section 120, Contract Act. u/s 126, Contract Act, the person who gives the guarantee is called "surety", the person in respect of whose default the guarantee is given is called the "principal debtor" and the person to whom the guarantee is given is called the "creditor". In my opinion therefore the words "executed by a surety" must be given their natural meaning, and there is no justification for extending the scope of the word "surety" to the case of the principals who are parties to the proceedings and on whose behalf the deed is executed."

We find ourselves in respectful agreement with the observations made above.

8. The facts of AIR 1928 143 (Oudh) were that a certain Bisheshwar Baksh Singh instituted a suit in the Chief Court of Oudh for possession of certain property in which he succeeded. In execution of his decree he applied for possession of certain property. The other side preferred an appeal against the decree. A Bench of the Chief Court by an order dated 1-3-1927 directed that Bisheshwar Bakhsh Singh should be placed in possession of the property in question provided he guaranteed to restore that property in the event of his failure in appeal and provided he filed security for its restoration in such circumstances. Certain persons who were not parties to the litigation on 23-3-1927 executed an undertaking whereby they agreed that if Bisheshwar Bakhsh Singh did not restore the property in the event of his failure in appeal, the executants of the deed would pay compensation to the Court to the extent of a lac and a half of rupees, and in security for the payment of this amount they hypothecated certain Immovable property. This document was stamped with a stamp of Rupees 5, which was considered sufficient by the taxing authority on the ground that the mortgage deed executed secured the due performance of a contract. Subsequently, the Inspector-General of Registration questioned the correctness of the view of the taxing authority and made a request that the Court may assess the deed to a higher stamp duty. All the three learned Judges, who were parties to, this decision, were of the view that the deed was covered by the provisions of Article 57 Schedule I-B of the Act. That case was decided on its own facts and in view of the circumstance that it was a third person and not the principal who was the party to the litigation before the Chief Court, who had executed the mortgage or the hypothecation deed, the article that could be applicable was clearly 57 and not 40(b) The case is, therefore, clearly distinguishable.

9. In AIR 1931 99 (Oudh) the facts were that one Arjun Singh obtained a decree for possession of certain immovable property against Jagmohan Singh from the original side of the Oudh Chief Court. Jagmohan Singh preferred an appeal to a Division Bench of the same Court and made an application praying that the property in dispute be placed in charge of a receiver and the execution of the decree against him be stayed The appellate Bench disposed of this application by

requiring security to be taken from the decree holder for the restitution of any property which might be taken in execution of the decree and for the due performance of the decree or order of the appellate Court. In compliance with the requisition made by the Court a security bond was executed by Lalta Bakhsh Singh, who hypothecated landed property to secure payment of the sum of "Rs. 45,000/- to case Arjun Singh, was made liable by the decree of the appellate Court to pay mesne profits and to case of his Failure discharge the liability. All the three learned Judges, who heard the case, opined that the deed fell under Article 57 of Sch. I-B of the Act. That was clearly a case where a third person as a surety had executed a deed of mortgage or, hypothecation. Consequently, the case could not but fall under Article 57 of Sch. I-B of the Act. It is not necessary for us to go into the question into whom the Oudh Chief Court went, i.e., whether or not the hypothecation or; mortgage deeds filed in the cases mentioned above amounted to a contract between the executant and the Court, because that question has not, been raised before us.

We would only like to point out that this Court in In Re: Stamp Reference (Jangilal) dissented from the Oudh view with regard to there being a contract between the executant of a security bond and the Court and referring to AIR 1928 Oudh 143 (FB) observed as follows:

"If the ; judgment-debtor instituted his suit against the Secretary of State in Council on the ground that the Subordinate Judge contracted on behalf of the Secretary of State in Council, he would be met with the objection not merely that the Subordinate Judge did not purport to enter into any contract on behalf of the Secretary of State, but also with the objection that a Judge acting judicially has no authority to enter into a contract enforceable against the Secretary of State. The powers and duties conferred or imposed upon civil Courts are set forth in great detail in the C. P. C. We find no provision in that Code, or in any other Statute empowering, a Judge to, enter into a contract with a litigant on behalf of the Secretary of State. The Courts are given statutory powers to pass decrees and orders and to perform certain acts but not to enter into contracts.

The Subordinate Judge on his part can no doubt enforce his order against the judgment-debtor as an order but he could not enforce performance-against the judgment-debtor to the manner prescribed by law for enforcing a contractual obligation.

We conclude therefore that the Subordinate Judge and the judgment-debtor did not in fact enter into any contract and did not purport to enter into any contract. Even if it be assumed that they entered into an implied agreement it was not such an agreement as would be enforceable by law; therefore it Would not amount to a contract"

10. In the Allahabad case referred to above a judgment-debtor had applied for stay of execution pending decision of an appeal to the High Court. The Subordinate Judge ordered the execution to be stayed under Order 41, Rule 5,

Sub-rule (2), upon the condition that the judgment-debtor should furnish security for the due performance of such decree or order as might ultimately be binding upon him. The judgment-debtor accordingly produced a surety who executed the instrument in question, hypothecating his property in favour of the Subordinate Judge of Muttra, for the benefit of the decree holder, as security for any loss that the latter might sustain, up to a limit of Rs. 4,000/-owing to any default or misconduct on the part of the judgment-debtor. " All the three learned Judges of this Court held that the deed fell under Article 40(b) and not under Article 57 of Schedule I-B of the Act. At that time the words "or the due discharge of a liability" did not find place in Article 57 which stopped short after the words "due performance of a contract" Since the learned Judges took the view that the deed executed in the case did not purport to evidence a, contract between the Court and the executant, they held that Article 57 would not apply.

It is really not necessary for us to base our decision on this Allahabad case for the simple reason that we have before us a deed executed, by the party itself and not by a surety within the meaning of that word as occurring u/s 126 of the Contract Act. But we may point out that this decision cannot be considered any longer to be a good authority for the simple reason that the words "or the due discharge of a "liability" now find place in Article 57 though they did not exist at the time when this case was decided. The position now is that if there is a document executed by a surety to secure the due discharge of a liability the case would fall under Article 57 notwithstanding the fact that the document may not have been executed "to secure the due performance of a contract." It is well known that the words "or the due discharge of a liability" were inserted in this article due to the decision of this Court in *In Re: Stamp Reference (Jangilal)* by means of the U.P. Stamp (Amendment) Act (XVIII of 1938) as it was thought that the view taken by this Court in that Reference was resulting in obvious hardship.

11. There can be no dispute that if a document has been executed by a; surety either "to secure the due performance of a contract" or to secure "the due discharge of a liability", it cannot fall under Article 40(b) but would fall under Article 57 which is a special provision dealing with such deeds executed by a surety. Of all the cases cited before us the one which really, applies to the facts before us is *Bhaira Singh v. Ambika Baksh Singh*, AIR 1942 Oudh 374.

12. For the reasons mentioned; above we are of the opinion that the deed before us clearly fell under Article 40(b) of Schedule I-B of the Act and the order passed by the Board of Revenue is correct We, therefore, dismiss the petition. There is, however, no order as to costs.