(1997) 07 MAD CK 0011

In the Madras High Court

Case No : W.A. No. 320 of 1992

Nunni H. Advani APPELLANT

Vs

The Chief Controlling Authority and Inspector General Registration, Madras-1, The District Registrar Registration of Documents Madras-1 and The Sub-Registrar Sembiam, Madras RESPONDENT

Date of Decision : 23-07-1997

Acts Referred:

Stamp Act, 1899 — Section 2(10), 2(17), 6
Transfer of Property Act, 1882 — Section 58

Citation : (1997) 07 MAD CK 0011

Hon'ble Judges : V. Kanagaraj, J;Raju, J

Bench : Division Bench

Advocate : Aravind P. Datar, for the Appellant; Viduthalai, Special Govt. Pleader, for the Respondent

Judgement

Raju, J.—The above Writ Appeal has been filed against the order of a learned single Judge of this Court, dated 25.11.1991 made in Writ

Petition No. 10948 of 1983, whereunder, the learned single Judge was pleased to dismiss the writ petition filed by the appellant, seeking for the

issue of a writ of certiorarified mandamus to call for and quash the proceedings of the first respondent herein in D. Dis. P.M. No. 56496/04/82,

dated 8.9.1983 and further direct the respondents to levy stamp duty only in accordance with Article 40(b), Schedule I of the Indian Stamp Act,

1899. The relevant facts necessary for the purpose of appreciating the contentions raised before us are that a deed purporting to be a deed of

mortgage by conditional sale was executed on 3.3.1981 by one M.V. Chellappa, the mortgagor in favour of the appellant, the mortgagee, who was said to have been present for registration before the Office of the Sub-Registrar, Sembiam on 4.3.1981. The said document appears to have

been valued and engrossed on a stamp paper of the value of Rs. 390/- in terms of Article 40(b) of the Schedule to the Indian Stamp Act (in short

the Act). The Registering Authority impounded the document, when it was presented for registration and forwarded the same to the District

Registrar, Madras (North) for adjudication of the stamp duty and the District Registrar passed orders to the effect that the stamp duty leviable is of

Rs. 1952.50 p. under Articles 23 and 5(1) of the Schedule to the Act and after following the procedure prescribed therefore called upon the

parties to pay the deficit stamp duty of Rs.1562.50 p. and a penalty of Rs. 10/- As against the same, the appellant filed a revision before the first

respondent. The first respondent came to the conclusion that the document was capable of being treated as one falling under both Articles 23-

(Conveyance) and Article 40 (Mortgage deed) and therefore in terms of Section 6 of the Act, the document is chargeable only with the highest of

such duties and as such agreed with the assessment of the duty made by the District Registrar. Aggrieved, the appellant filed the above Writ

Petition before this Court, as noticed supra, seeking to quash the order of the first respondent and for consequential relief also.

2. The contesting respondents have also filed a counter affidavit, opposing the claim of the appellant.

3. Learned Single Judge on a careful consideration of the recitals in the document, as also the definition of conveyance in Section 2(10) of the Act

came to the conclusion that the levy in question was quite in accordance with law and it did not call for any interference. Hence, the above Writ

Appeal.

4. Mr. Arvind P Datar, learned counsel for the appellant with his usual force and persuasiveness, contended that the learned single Judge was not

correct in coming to the conclusion that the document would fall well within the definition u/s 2(10) of the Act, and the decision of the learned single

Judge is vitiated on account of the fact that the distinguishing features between a sale and mortgage by conditional sale have not been properly

adverted to and appreciated by the learned single Judge. Reliance was also placed by learned counsel for the appellant in paragraph 6 of the document to content that there has been no transfer of property as such between the Mortgagor and the appellant, and it was only a Covenant to

transfer. Argued the learned counsel further that a mortgage by conditional sale is essentially a mortgage, that there is no element of ostensible sale

in the document, that therefore, the document would fall within the description of Section 2 (10) of the Act and that it has got to be treated for the

purpose of the Act as a deed of mortgage. In support of his claim and contention, learned counsel for the appellant invited our attention to the

provisions contained in Section 58 of the Transfer of Property Act and also some of the decisions of the Apex Court and this court, laying down

the guidelines and principles to determine the character of a document in such and similar circumstances. We do consider it unnecessary to advert

to all the decisions placed before us, except referring to a Judgment of one of us (Raju, J.) reported in Natesapathar(Died) N. Saroja v.

Pakkirisamypathar (1996) (1) CTC 237, wherein the principles for determining the character of the document of the nature in question, particularly

as to whether a document is one of sale or mortgage by conditional sale have been highlighted, restated and reiterated. Applying the principles laid

down therein, we are prepared to agree with the stand taken for the appellant that the document is one which has to be treated as a mortgage by

conditional sale only. No doubt, the Transfer of Property Act maintains a distinction and prescribes the dichotomy between a sale simpliciter and

conveyance as it may be called, and the mortgage, or a mortgage by conditional sale. In view of the conclusion arrived at by us that the document

in question is a mortgage by conditional sale it is unnecessary for us to dwell at length on the character of the document, any more.

5. The question that looms large further for our consideration is as to the Article under which the document in question requires to be stamped for

the purpose of the Act. The transaction which is styled and characterised as mortgage by conditional sale has almost all the attributes of a

Conveyance, since it becomes final and absolute when payment is not made and remaining redeemed though it does not instantly operate as a

Conveyance. Unlike a simple mortgage, often possession also could be or would be handed over to the mortgagee. If there is any deviation and

the parties to the transaction have contracted specifically not to hand over or part with the possession, there should be a specific recital to the contra that possession has not been parted with by the mortgagor or that it continued to be with the mortgagor. That should be the vital fact which

indicates the distinction among the various categories of mortgages. A simple mortgage will not result in the mortgagor necessarily parting with the

possession of the property. An usufructuary mortgagor parts with possession in favour of the mortgagee, and in the mortgage by conditional sale

also it can result ordinarily in the mortgagor parting with possession in favour of the mortgagee; otherwise it is only a simple mortgage. Even viewed

thus and treating the document as one answering the definition of Section 2(17) of the Act, in the absence of any such recital in the document itself

that possession has not been parted with in favour of the mortgagee by the mortgagor and unless specifically it was recited that the possession has

been retained by the mortgagor, the document would attract stamp duty under Article 40(a) of the Act. Even viewed accordingly, the duty

assessed and arrived at by the Authorities has to be allowed to stand and the same calls for no interference by us even though we do not agree

with the view taken by the Authorities below that the document answers the description of conveyance as defined u/s 2(10) of the Act. For all the

reasons stated above, we are of the view that no interference is called for with the order of the learned single Judge, declining to interfere in the

matter, though for different reasons we have assigned in this Judgment. The Writ Appeal fails and is accordingly dismissed. However, there will be

no order as to costs.

