

(1991) 02 KAR CK 0046
In the Karnataka High Court
Case No : Writ Petition No. 12001/82

Rashthrothana Parishat

APPELLANT

Vs

State of Karnataka and others

RESPONDENT

Date of Decision : 22-02-1991

Acts Referred:

Karnataka Stamp Act, 1957 — Section 34, 46 A, 6

Citation : AIR 1992 Kar 388 : (1992) ILR (Kar) 565 : (1991) 1 KarLJ 349

Hon'ble Judges : K. Shivashankar Bhat, J

Bench : Single Bench

Advocate : Sri V. Tarakaram, for the Appellant; Sri Satish M. Doddamani, HCGP, for the Respondent

Judgement

1. In the exercise of this power under Sec. 46A of the Karnataka Stamp Act, 1957 ("the Act" for short), the 2nd respondent held the document in question dated 24-1-1974 and registered thereafter, as a simple mortgage of lease hold rights in specific property attracting stamp duty under Art. 34(b) of the Schedule to the Act and also liable to transfer duty to the Bangalore City Corporation; accordingly he ordered the payment of the deficit stamp duty of Rs. 92,280/-. This was affirmed by the 3rd respondent,

2. The proceedings were instated by the issuance of a notice dated 24-7-1980 {An-nexure-C), after Sec. 46A was inserted in the Act No. 15 of 1980 retrospectively. According to the petitioner, the document was an agreement relating to deposit of title deeds executed by it in favour of Corporation Bank, and is covered by Art. 6 of the Schedule to the Act.

3. Petitioner is a Society registered under the provisions of the Societies Registration Act, constituted for the purpose of building up the personality of citizens of India, by assisting them in physical, intellectual, moral and emotional developments and is exempt from payment of Income Tax. In furtherance of its objectives, petitioner obtained apiece of land on lease from Mythic Society under a lease deed and put up a construction thereon; the lease deed was executed in

June 1973. This lease hold right was the subject of an agreement relating to deposit of title deeds; it was stamped and registered accordingly.

4. Some of the terms found in the relevant document (Annexure-B) state, that (i) the document is an equitable mortgage, (ii) mortgagor obtained a loan of Rs. 24 lakhs from the Bank (mortgagee), to put up a multistoreyed building on the lease hold, (iii) the lease was for a period of 30 years; (iv) to secure the loan, mortgagor offered to the Bank, the equitable mortgage by deposit of title deed, (that is, the lease deed) and create charge on the leasehold rights and the title deed of the superstructure; (v) the mortgagee undertook to put the Bank in possession of the entire superstructure of the multistoreyed building in the event of any default in payment of instalments of loan and apprise the tenants in occupation in that behalf and (vi) the Bank may proceed against the assets in Schedule-A to recover the loan in the event of default. However, nowhere a personal obligation was created under the aforesaid deed.

5. The 2nd respondent while invoking his powers under Sec. 46A, has not before him the original instrument; even subsequently he did not obtain it; he initiated proceedings on the basis of the advice he received from the Sub-Registrar and admittedly he had only a copy of the relevant document.

6. Several contentions were urged before me. But I confine myself to the two questions :--

(1) Whether an order under Sec. 46A to pay deficit duty can be made without the presence of the original instrument; and

(2) Whether the document (instrument) in question is a simple mortgage, or an equitable mortgage?

7. The stamp duty is charged on the instrument in question as per S. 30. Section 30 merely states that "the expense of providing the proper stamp shall be borne" by the person executing such an instrument stated in Sec. 30(a) -- deeds falling under Articles 6 and 34 come under this provision; this again is subject to any contract to the contrary between the parties. Mode of paying the duty in respect of an instrument is as prescribed by virtue of Sec. 10; and the payment shall be indicated on such an instrument. Sections 31 and 32 provide for an opinion and adjudication by the Dy. Commissioner as to the duty payable on an instrument, when such an instrument is brought and applied to the Dy. Commissioner. Effect of not duly stamped instrument is stated in Chapter IV of the Act and such an instrument is to be impounded whenever insufficiently stamped instrument is tendered in evidence or is produced before an authority stated therein; an instrument not duly stamped is inadmissible in evidence. Sec. 37 provides for levy of penalty in respect of such an instrument and the person so impounding shall send it in original to the Dy. Commissioner. Sec. 41 provides for endorsement of instrument on which duty and penalty has been paid under various provisions. Sec. 46 provides for recovery of duties and penalties by the Dy. Commissioner.

8. In the above background, if Sec. 46A is examined, it is clear that short levy of duty has to be computed by examining the original instrument. The only basic document for a proceeding to value an instrument of its in classification is the said document itself. Levy of stamp duty on the copy of an instrument is not at all contemplated by the Act.

9. If without the instrument in question, balance of stamp duty is levied and collected and it is not endorsed on the original, the person acting on the instrument or producing it in evidence etc., is likely to face the possibility of it being impounded again.

10. The principle stated, therefore, by the Privy Council in *The Raja of Bobbili v. Inuganti China Sitarasami Garu* 1899) 26 I AP 262 at p. 267 is :

"It is only upon production of the original writ that the Collector has the power given him, or the duty imposed upon him, of assessing and charging the penalty -- a duty which he must in that case perform by writing an indorsement upon the writ submitted to him, which then, and not till then, becomes probative in law."

The said principle should govern the interpretation of Sec. 46A also; without the original instrument in question, no order thereunder levying further duty and penalty could be made.

11. The collection of a short levy presupposes a proper levy, which in turn is possible only by reference to the instrument in question. Language of Sec. 46A is akin to a provision in a fiscal legislation empowering the recovery of short levied tax or duty. As held by the Supreme Court in *Assistant Collector of Central Excise, Calcutta Division Vs. National Tobacco Co. of India Ltd.*, actual collection of tax could only be clothed or invested with validity, after carrying out the obligation to make an assessment to justify it : "it is the process of assessment that really determines whether the levy is. short or complete, it is not a factual or presumed levy which could, in a disputed case, prove "an assessment. This has to be done by proof of the actual steps taken which constitute "assessment".

12. At the time of registration the instrument was before the registering authority; there was no suppression of any fact on the part of the petitioner; bona fide of the parties are not doubted. Nearly after 5 years (though within five years) proceedings were initiated against the petitioners. A provision which enables the taxing authority to go behind the earlier accepted view about the nature of a document will have to be strictly construed. The provision cannot be more liberal than other provisions in the Act governing the assessment for the levy of the stamp duty. All other provisions specifically require the presence of the original instrument for taxation, impounding etc. Therefore, it is not possible to invoke Sec. 46A without the original instrument being before the concerned authority. Admittedly, the Chief Controlling Revenue Authority did not seek the original instrument before deciding the question of stamp levy.

13. The next question pertains to the nature of the document, copy of which is

filed as an annexure to the writ petition. If the document is an "agreement relating to deposit of title deeds", the stamp duty is leviable as per Article 6 of the Schedule to the Act; otherwise, and if it is a mortgage deed, Art. 34 is attracted. Art. 34 is applicable to "mortgage deed not being an agreement relating to deposit of title deeds" falling under Art. 6. Therefore, the approach ought to be to see whether the instrument is an agreement relating to deposit of title deeds; if it falls within Art. 6, then, question of Art. 34 would not arise.

14. As per Sec. 58(f) of the Transfer of Property Act. where a person delivers to a creditor documents of title to immovable property with intent to create a security thereon, transaction is called a mortgage by deposit of title deeds. The intention is to be that the title deeds shall be the security for the debt. Essence of the transaction is to make the title deeds, security for the debt in question.

15. The only clause which seems to have persuaded the respondents to hold it as creating a charge is a clause wherein, petitioner agreed to give possession of property under certain circumstances. But, it does not speak of any charge. To be a simple mortgage, the mortgagor should bind himself personally, to pay the mortgagor (mortgagee--Ed.) the mortgage money. The petitioner has nowhere bound itself in the nature of personal obligation to pay the mortgage money, failing which the mortgaged property may be sold.

16. The respondents held the deed to be in the nature of simple mortgage, but, in the absence of the personal obligation created it is not possible to take such a view. A few terms in the agreement are in the nature of incidental terms to the main term of creating a mortgage by deposit of title deeds. The substance of the document has to be seen before characterising the deed, in one way or the other.

17. A delivery of title deed (by way of equitable mortgage) creates an equitable mortgage upon the whole of the property comprised by the title; the scope of the security is the scope of the title.

18. Therefore, when the document recited that in the event of default, the mortgagee (Bank) may take possession of the property, it was only stating the legal consequences of an equitable mortgage. From such a clause, it cannot be held that the instrument ceases to be equitable mortgage.

19. In these circumstances, I am of the view that the levy of duty under Art. 34 of the Schedule to the Act was unwarranted.

20. In the result, this writ petition is allowed and the impugned orders are set aside, without any order as to costs. Rule made absolute.

21. Petition allowed.