(1976) 03 MAD CK 0052

In the Madras High Court

Case No : R.C. No. 1 of 1974

State of Tamil Nadu APPELLANT

Vs

N.K. Venkataravanamma and Others RESPONDENT

Date of Decision : 30-03-1976

Acts Referred:

City Municipal Corporation Act, 1919 — Section 135, 98
Finance Act, 1963 — Section 2(8)
Income Tax Act, 1961 — Section 4, 81
Stamp Act, 1899 — Article 40, 57

Citation : AIR 1977 Mad 47 : (1976) ILR (Mad) 271 : (1976) 89 LW 677

Hon'ble Judges : Kailsam, O.C.J.;Ramanujam, J;Balasubramaniam, J

Bench : Full Bench

Judgement

Kailasam Offg., C.J.—This is a reference under Sec. 57 of the Indian Stamp Act by the Board of Revenue (Land Revenue), Madras. The

facts of the case, briefly stated, are as follows: Respondents 1 to 8 mortgaged the premises bearing Nos. 165 to 168 Devaraja Mudali St. Madras,

with the trustees of Veera Sriamulu Chetti Charities, Madras, and borrowed a sum of Rupees 30,000. Subsequently, on 9-11-1964, they raised a

loan of Rs. 50,000 from the Nedumgadi Bank Ltd., to discharge the earlier loan and for completing the construction. On the same day, they

executed a lease deed in favour of the said Bank in respect of the first floor on a monthly rent of Rs. 500 for a period of ten years to be adjusted

against the mortgage amount due to the Bank. The 9th respondent is the guarantor of the mortgage debt. When the mortgage document was

presented for registration, the Sub-Registrar levied a deficit stamp duty of Rupees 3625 and a penalty of Rs. 10 on 5-1-1965. Aggrieved by this,

the respondents took up the matter on appeal to the Board of Revenue. The

Board of Revenue dismissed the appeal holding that the mortgage in

question was covered by Article 40(a) of Schedule I to the Indian Stamp Act, 1899. Aggrieved by this order, the respondents preferred W. P.

No. 1027 of 1966 to this court praying for the issue of a Writ of Mandamus directing the Board of Revenue to refer the case to this court u/s 57 of

the Indian Stamp Act. While disposing of the writ petition, this court directed the Board of Revenue to decide whether the mortgage in question,

apart from falling under Article 40 of the Indian Stamp Act, is liable to surcharge u/s 135 of the City Municipal Corporation Act, 1919, or not. The

Board of Revenue expressed its view that the mortgage in question is also liable to surcharge u/s 135 of the Madras City Municipal Corporation

Act, and submitted this case and Section 57 of the Indian Stamp Act raising the question as follows:--

Whether the deed of mortgage dated 9-11-1964, executed by the respondents 1 to 8 and guaranteed by the 9th respondent is liable to surcharge

u/s 135 of the City Municipal Corporation Act of 1919 or not"".

The mortgage deed recites that the mortgagors had approached the mortgagee for a loan of Rs. 50,000 repayable with interest at 6 per cent per

annum with quarterly rests on the specific undertaking to let out the entire first floor of the mortgaged property to the mortgagee Bank on a monthly

rent of Rs. 500 for a period of ten years so that the mortgage amount may be discharged by the appropriation of the rents payable by the

mortgagee. The document further recited that the mortgagors thereby created and secured a simple mortgage in favour of the mortgagee for due

payment of Rs. 50,000 and interest thereon at six per cent per annum with quarterly rests. A lease deed was also executed on the same day when

the above mortgage deed was executed agreeing to let out the entire first floor of the mortgaged property to the mortgagee Bank on a monthly rent

of Rs. 500 for ten years to be adjusted against the above mentioned mortgage amount due by the mortgagors to the mortgagee.

2. Now, the question for consideration is whether the mortgage deed dated 9-11-1964 is liable to surcharge u/s 135 of the City Municipal

Corporation Act, 1919.

3. Section 98(h) of the City Municipal Corporation Act enables the Council to levy a duty on certain transfers of property in the shape of an

additional stamp duty. Section 135 is important for the purpose of this case and we will extract it in full:

135. The duty on transfers of property shall be levied-

(a) in the form of a surcharge on the duty imposed by the Indian Stamp Act 1899, as in force for the time being in the State of Madras, on every

instrument of the description specified below, which relates to Immovable property situated within the limits of the City; and

(b) at such rate as may be fixed by the State Government not exceeding five per centum on the amount specified below against such instrument:

Description of instrument Amount on which duty should be levied.

(i) Sale of Immovable property. The amount or value of consideration for the sale, as set forth in the instrument.

(ii) Exchange of Immovable property. The value of the property of the greater value, as set forth in the instrument.

(iii) Gift of Immovable property. The value of the property as set forth in the instrument.

(iv) Mortgage with possession of Immovable property. The amount secured by the mortgage, as set forth in the instrument.

The section enables a duty on transfers of property to be levied. The duty is to be in the form of a surcharge on the duty imposed by the Indian

Stamp Act. This surcharge is leviable on every instrument of the description specified in the section, which relates to Immovable property situated

within the limits of the city. The instruments that are liable to surcharge are mentioned as sale of Immovable property, exchange of Immovable

property, gift of Immovable property and mortgage with possession of Immovable property. Section 135(b) specifies the rates, with which we are

not concerned. On a reading of Section (a), it appears that a surcharge is leviable on the duty imposed by the Indian Stamp Act. But the latter part

of the section provides that every instrument described in the Section, which relates to Immovable property, is liable to surcharge. Thus it is

apparent from the section that a duty is leviable on transfers of property at the rates specified in Section 135(b). This diet shall be in form of

surcharge on the duty imposed by the Indian Stamp Act. In other words, this duty will be in addition to the duty imposed by the Indian Stamp Act.

4. In this case, on a reading of the mortgage document, we are unable to hold

that it is a mortgage with possession of Immovable property. Section

58(d) of the Transfer of Property Act defines ''usufructuary mortgage''. The conditions necessary for creating a usufructuary mortgage are that (1)

the mortgagor should either deliver possession or expressly or by implication bind himself to deliver possession of the mortgaged property to the

mortgagee and (2) the mortgagor must authorise the mortgagee to retain such possession until payment of the mortgage money and to receive the

rents and profits accruing from the property in lieu of interest or in payment of the mortgage money. In this case, by the document, the mortgagors

have not delivered possession. But, on the other hand, they undertook to let out the entire first floor on a monthly rent of Rs. 500 for a period of

ten years, though the rent, that is payable, is to be adjusted towards the interest and the mortgage money. The mortgagors did not authorise the

mortgagee to retain such possession in payment of the mortgage money, for, the lease is limited only for ten years. According to the document, the

mortgages may terminate the lease even before ten years, for, the mortgagee bank is not in the position of the usufructuary mortgagee. In the

circumstances, therefore, we are satisfied that the document in question cannot be termed as a mortgage with possession of immovable property,

which is one of the instruments on which duty can be levied u/s 135 of the City Municipal Corporation Act.

5. Under Article 40(a) of Schedule to the Indian Stamp Act, 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 proper stamp duty will be the same duty as a conveyance for a market value equal to the

amount secured by such deed. The mortgage document in this case is very clear the mortgagors had agreed to give possession under a lease deed

and this agreement to give possession would satisfy the requirements of Article 40(a) and as such the document is liable to stamp duty under that

Article. The matter is put beyond doubt by the explanation, for, it provides that when a mortgagor gives or has given to the mortgagee a power of

attorney to collect rents or gives has given to the mortgagee a lease of the property mortgaged or part thereof he is deemed to give possession

thereof within the meaning of this Article. Reference by the Board of Revenue to Article 40(b) in its order is obviously a mistake. The proper

Article, as conceded by the learned Additional Government Pleader, is Article 40(a). Hence, the document in this case is liable to duty under

Article 40(a) of Schedule I.

6. The next question that arises for consideration is whether surcharge u/s 35 of the City Municipal Corporation Act can be imposed on this

document. While we have found that the document is one which will fall under Article 40(a) of Schedule I to the Indian Stamp Act, it will have to

be considered whether it will fall u/s 135(b)(iv) of the City Municipal Corporation Act, that is, whether it is a mortgage with a possession of

Immovable property, as referred to; it has to be seen whether the requirements of Section 58(d) of the Transfer of Property Act have been

satisfied. By the mortgage deed, possession of Immovable property was not given to the mortgagee by the mortgagors, but it was only by an

undertaking in the mortgage deed possession was given to the mortgagee by a subsequent lease deed. In our view, therefore, where this document

would satisfy the requirement of Article 40(a) of Schedule I to the Indian Stamp Act, it would not come under the provisions of Section 58(d) of

the Transfer of Property Act or u/s 135(a) of the City Municipal Corporation Act. The duty in the form of surcharge is leviable u/s 135(a) on every

instrument of the description specified in four sub-clauses of sub-section (b) of the section. As the document does not fall within the fourth clause,

namely, mortgage with possession of Immovable property, the instrument in question is not leviable on the stamp duty imposed a such, whether the

instrument is of the description specified in Section 135(b) clauses (i) to (iv) or not and that if a stamp duty is leviable, surcharge is automatically

leviable under S. 135 of the City Municipal Corporation Act. Equally it was contended that if a stamp duty cannot be levied on the instrument, no

surcharge can be levied. In support of this contention, a decision of the Full Bench of this court reported in Chief Controlling Revenue Authority,

Board of Revenue, Madras Vs. Simpson and General Finance Co. Ltd., Madras, was cited. In that case, the instrument in question was not liable

to duty under the Stamp Act. In the circumstances, it was held that surcharge u/s 135 of the Madras City Municipal Corporation Act could not be

levied. The document in question in that case was an instrument by which Messrs. Simpson and Co and General Finance Co Ltd., transferred certain properties in favour of Messrs Simpson and Co., which is a subsidiary company of the transferor company. This instrument was exempted

by the Government in the notification dated 17-12-1938. It has agreed that the instrument was not liable to stamp duty under the Stamp Act. Then

the question arose whether surcharge could be levied u/s 135 of the City Municipal Corporation Act. After discussing Sections 98 and 135 of the

said Act, the court expressed its opinion that the words ''a duty on certain transfers of property in the shape of an additional stamp duty'' rendered

it clear beyond doubt that the tax was an additional tax or burden upon a pre-existing tax under the Stamp Act, and could be appropriately levied

only where the instrument was liable to duty under the Stamp Act and not otherwise. The court then observed-

These words, considered together clearly imply that where there is an instrument, which is not at all liable to stamp duty under the Indian Stamp

Act, 1899, as in force for the time being, no surcharge could be levied, because in law, this duty u/s 98 has to be ''in the form of a surcharge on the

duty imposed by the Indian Stamp Act''. Undoubtedly, u/s 135(b), the rates make it clear that this surcharge is not to be a proportion of the Stamp

Duty itself, but will be a rate on the amount of the consideration or the value, of the concerned property, not exceeding five per cent.

Having found that the rates depended on the amount of consideration or value of the concerned property, the court rejected the contention put

forward by the Government Pleader and held that the instrument should be liable to duty under the Stamp Act, before the power u/s 98 could be

invoked to lay an additional burden or before any surcharge itself could be formulated and enforced. The Full Bench also relied on the Madras

Local Revenue (Surcharge) Act, 19 of 1954, and found that the word ''surcharge'' is employed in the very same sense and under the provision

surcharge was to be a proportion of the charge or land revenue at a specified rate. We find ourselves unable to agree with the reasoning of the Full

Bench, for, Section 98 of the City Municipal Corporation Act enables the Council to levy a duty on certain transfers of property in the shape of

additional stamp duty. The Full Bench quotes Section 98 as saying ''in the form of a surcharge on the duty imposed by the Indian Stamp Act.'' We

do not find the words ''in the form of'' in Section 98, but the words used are ""a duty on certain transfers of property in the shape of an additional stamp duty."" All that is required is that the duty imposed is to be in the shape of an additional stamp duty. The words ''in the form of'' are not found

in Section 98, but are found only in Section 135(a). We have already referred to Section 135 of the City Municipal Corporation Act, and though it

is stated to be a surcharge on the duty imposed by the Indian Stamp Act u/s 135(a), the basis for the levy of this surcharge is on certain documents

listed in the section at the rates specified in section 135(b). We, are, therefore, of the view that the levy of surcharge is independent of the levy

imposed under the India Stamp Act and could be sustained u/s 135(b)(iv) if the requirements of that section are satisfied, namely, if they are

instruments specified in the section. Normally if it becomes necessary we should have referred the matter to a fuller Bench, but a recent decision of

the Supreme Court reported in Madurai Dist. Central Co-operative Bank Ltd. v. Income Tax Officer, puts the matter beyond controversy. In the

case before the Supreme Court, the Finance Act of 1963, came to be considered and that Act provided for a levy of additional surcharge under

clause (a) of paragraph A of Part I of the First Schedule. The Co-operative Society, which was the assessee in that case, was not liable to pay

Income Tax or super-tax on its business income under the Income Tax Act. The main contention that was put forward before the Supreme Court

was that as Income Tax or super-tax was not leviable on the co-operative society, additional surcharge could not be levied. Section 81 of the

Income Tax Act provided that Income Tax shall not be payable by a co-operative society in respect of profits and gains of business carried on by

it. Part I, paragraph A under the heading ''Surcharge on income tax"" provided-

The amount of Income Tax computed at the rates here in before specified shall be increased by the aggregate of the surcharge calculated as

under......

Clause (e), with which the Supreme Court was concerned, provided for the levy of ''an additional surcharge for the purposes of the Union

calculated on the amount of the residual income'' at the rates mentioned therein. The question for consideration before the Supreme Court was

whether clause (c) of the portion ''surcharge on income tax'' occurring in paragraph A of Part I introduced a new charge in the shape of additional

surcharge so that the said charge could be levied even on a part of the assesses income which was exempt from Income Tax and super-tax under

Sections 81(i)(a) and 99(1)(v) of the Act of 1961. Rejecting the contention that the heading ""Surcharge on Income Tax under which provisions

was made in the Finance Act for the calculation of a surcharge, a special surcharge and an additional surcharge showed that the levy of additional

surcharge on the residual income could not be dissociated from the main charge of Income Tax the court held that the additional surcharge is a

distinct charge, not dependent for its leviability on the assessee''s liability to pay Income Tax or super-tax. The Supreme Court further observed

that the section used the words ''Income Tax........ shall further be increased by an additional surcharge''. These words are much stronger than the

words ''in the shape of an additional stamp duty'' found in Section 98 of the City Municipal Corporation Act and the words ''in the form of a

surcharge on the duty imposed by the Indian Stamp Act'' found in Section 135(a) of the City Municipal Corporation Act. The court concluded by

observing thus-

The interpretation put by us on the Finance Act, 1963, does no violence to Section 4 of the Income Tax 1961, under which Income Tax at the

rates prescribed by the Finance Act is to be charged ''in accordance with and subject to the provisions of the Income Tax Act. The Income Tax

Act exempts the assessee''s business income from Income Tax and super-tax. The Finance Act brings to tax its residual income.''

The court finally held that the additional surcharge, though levied by the Finance Act 1963, independently of the Income Tax Act, is but a mode of

levying tax on a portion of the assessee''s income computed in accordance with the definition in Section 2(8) of the Act of 1963.

7. The decision of the Supreme Court is clear authority for coming to the conclusion that it is not necessary that a levy under the Stamp Act should

be levied before the surcharge is levied. We have already pointed out that the words in Ss. 98 and 135 of the City Municipal Corporation Act are

very clear that the surcharge is leviable on the instrument specified and not based on the levy under the Stamp Act. In view of the recent

pronouncement of. the Supreme Court in Madurai Dist. Central Co-operative Bank Ltd. v. Income Tax Officer, , the Full Bench decision of this

Court reported in Chief Controlling Revenue Authority, Board of Revenue, Madras

Vs. Simpson and General Finance Co. Ltd., Madras, is no

longer good law.

8. In the result, we hold that the document is not liable to surcharge u/s 135 of the City Municipal Corporation Act of 1919.

9. Reference answered accordingly.