(2008) 06 AHC CK 0036

In the Allahabad High Court

Sudhir Vasudev and Another APPELLANT

Vs

The Commissioner, Kanpur Division and Others RESPONDENT

Date of Decision : 30-06-2008

Acts Referred:
Stamp Act, 1899 — Section 29, 33

Citation : (2008) 06 AHC CK 0036

Hon'ble Judges : Shishir Kumar, J

Bench : Single Bench

Final Decision : Disposed Of

Judgement

Shishir Kumar, J.—Heard learned Counsel for the petitioners and learned Standing Counsel.

2. The present writ petition has been filed for quashing the order dated 26.3.2004(Annexure IV to the writ petition) passed by the respondent No. 2 and order dated 16.1.2006 (Annexure VII to the writ petition) passed by the respondent No. 2 u/s 33/47-A of the Indian Stamp Act.

3. The facts arising out of the writ petition are that the petitioner No. 1 is a guarantor of the loan taken by the third person from the petitioner No. 2. Petitioner No. 1 is only a surety for the purposes of repayment of the bank loan, in case the original borrower become defaulter. The respondents have issued a notice to the petitioner No. 2 for the purposes of deficient stamp duty. Petitioner No. 1 states that no notice to the petitioner No. 1 was given and the amount has been deducted from the account of the petitioner. When the petitioner came to know regarding the aforesaid order they filed an appeal but the appeal too has been dismissed. Hence the present writ petition.

4. Sri Siddharth, learned Counsel for the petitioner No. 1 has submitted that as the petitioner No. 2 is only a guarantor, therefore, he is covered by Article 57, Schedule-1 of the Indian Stamp Act, 1899 but the respondents are demanding the stamp duty on the basis of Article 40. Article 40 and Article 57 are being

reproduced below:

40. Mortgage-Deed

(a) when possession of the property The same duty as a or any part of the property com- Conveyance (No.23) for a prised in such deed is given by consideration equal to the mortgagor or agreed to be amount secured by such given; deed.

(b) when possession is not given or The same duty as a Bond agreed to be given as aforesaid; (No.15) for the amount secured by such deed.

Explanation- A mortgagor who gives to the mortgagee a power- of-attorney to collect rents or a lease of the property mortgaged or part thereof, is deemed to give possession within the meaning of this Article.

(c) when a collateral or auxiliary or additional or substituted security, or by way of further assurance for the above mentioned purpose where the principal or primary security is duly stamped- for every sum secured not Eight annas. Exceeding Rs. 1,000; and for every Rs. 1,000 or part Eight annas. thereof secured in excess of Rs. 1,000.

Exemptions

(1) Instruments, executed by persons taking advances under the Lands Improvement Loans Act, 1883 (10 of 1883), or the Agriculturists'' Loan Act, 1884 (12 of 1884) or by their sureties as security for the repayment of such advances.

(2) Letter of hypothecation accompanying a bill of exchange.

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:

(a) when the amount secured does not The same duty as a Bond exceed Rs. 1,000; (No.15) for the amount secured.

(b) in any other case Five rupees.

Exemptions

Bond or other instrument, when executed:

(a) by headmen nominated under rules framed in accordance with the Bengal Irrigation Act, 1876, Section 99, for the due performance of their duties under that Act;

(b) by any person for the purpose of guaranteeing that the local income derived from private subscriptions to a charitable dispensary or hospital or any other object of public utility shall not be less than a specified sum per mensem;

(c) under No. 3A of the rules made by the (State Government) u/s 70 of the Bombay Irrigation Act, 1879;

(d) executed by persons taking advances under the Land Improvement Loans Act, 1883 (19 of 1883), or the Agriculturists'' Loans Act, 1884(12 of 1884), or by their sureties, as security for the repayment of such advances;

(e) executed by officers of (the Government) or their sureties to secure the due execution of an office or the due accounting for money or other property received by virtue thereof.

5. Therefore, the order passed by the respondents itself is bad.

6. In the present controversy, it is not necessary to go into the question of applicability of Articles 40 & 57, as admittedly, the petitioner No. 1 before passing the order by the respondent No. 2, no notice and opportunity has been given, a specific averment to this affect has been given in paragraphs 6 and 7 of the writ petition.

7. In the counter affidavit filed on behalf of the respondent-State, there is no denial to this effect. The reply given in paragraphs 7 and 8 to the counter affidavit are being reproduced below:

7. That the contents of para 6 of the writ petition have been stated about the written reply and the aversions are not correct and are not admitted. Proper stamp duty has since not been paid. The stamp duty due has to be paid by the executants of document or the person who presented the deed for registration. Anything stated to the contrary is denied.

8. That the contents of para 7 of the writ petition are not admitted as all there was no need of any notice further to any other party as per the provisions of Section 29 of the Indian Stamp Act. Anything stated to the contrary in para 7 of the writ petition is denied.

8. From the aforesaid averment, it is clear that no notice or opportunity has been given to the petitioner prior to passing the order by the respondent No. 2.

9. The petitioner has also placed reliance upon a judgment reported in Smt. Kamla Devi Vs. The Chief Controlling Revenue Authority, Placing reliance upon the Full Bench decision of the Punjab High Court, the learned Counsel for the petitioners submit that as it is a security bond for the purpose of making payment in case of default of the original borrower, it is covered by Article 57. Another judgment relied upon in Milkha Singh Bhandu Singh Vs. Union of India (UOI) and Others, and further reliance has been placed upon a judgment of this Court reported in 1971 ALJ 17 Prem Devi v. Priya Devi and Ors. and reliance has been placed upon paragraph 13 of the said judgment. The same is being reproduced below:

13. Article 57 of the First Schedule to the Indian Stamp Act lays down that a document of this nature, whether or not it amounts to a mortgage deed, shall be

on a stamp of a fixed amount indicated in that article. The stamp duty under Article 57 has been paid in full. The contention of the defendant that the document, the basis of the suit, cannot operate as a mortgage deed because the full amount payable on a mortgage deed has not been paid stamp duty is without force. When Article 57 of the Stamp Act clearly provides that a fixed stamp duty was to be paid, the executant was not liable to pay any larger sum, payable as stamp duty on mortgage simpliciter.

10. After hearing learned Counsel for the parties and in view of the facts and circumstances of the present case, as order has been passed in clear violation of principle of natural justice, therefore, the order is liable to be quashed.

11. In view of the aforesaid fact, the order dated 26.3.2004 passed by the respondent No. 2 and order dated 16.1.2006 passed by the respondent No. 1 u/s 33/47(A) of the Indian Stamp Act are hereby quashed and the matter is remanded back to the respondent No. 2 to consider the same in the light of observation made above and the decision relied upon by the petitioners after issuance of the notice to the petitioners. The respondent No. 2 will also take into consideration Articles 40 and 57 that whether such type of document is covered under Article 57 of the Stamp Act or not and the respondent No. 2 is further directed to pass appropriate orders after affording full opportunity to the affected parties and will pass a reasoned order within a period of six months from the date of presentation of the certified copy of the order. In case it is found that the petitioners are not liable for payment of the amount, the amount so recovered from the petitioners will be refunded with a simple interest at the rate of 6% within a period of one month from the date of passing of the order by respondent No. 2.

12. With these observations the writ petition is disposed of.

13. No order is passed as to costs.

