

(1926) 04 MAD CK 0023
In the Madras High Court

The Board of Revenue

APPELLANT

Vs

Moopanna Somarazu and Another

RESPONDENT

Date of Decision : 21-04-1926

Acts Referred:

Madras Stamp Act, 1922 — Article 33(a) Scheduel IA

Citation : AIR 1926 Mad 1038 : (1926) ILR (Mad) 903 : 97 Ind. Cas. 993 :
(1926) 24 LW 559 : (1926) 51 MLJ 354

Hon'ble Judges : Spencer, J;Krishnan, J;Beasley, J

Bench : Full Bench

Judgement

Spencer, J.—The question before us is whether documents, of which we have a specimen form here, are mortgage deeds of the description

defined in Article 33(a), Scheduel I-A of the Madras Stamp Act (VI of 1922) in these words:

Mortgage deed... 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.

2. In the Stamp Act (XVIII of 1869) the description ran differently. It was a mortgage deed of this class only when possession of property

comprised therein was given by the mortgagor at the time of execution. Then in Act I of 1879, the words ""at the time of execution"" were

transposed from the end to the beginning of the sentence and the description ran thus:

When at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed

to be given.

3. In the present Act, the words ""at the time of execution"" have been altogether dropped. Therefore we have only to consider whether possession

of the property is either given by the mortgagor or agreed to be given under the document that is before us. The decisions in the Anonymous case

ILR (1884) C 274 and Hinganghat Mill Co., Ltd. v. Rekchand Bhikamchand (1884) ILR 8 B 310 being decisions upon Acts which are not now

in force, serve rather as guides for the interpretation of the present Act than as authorities. The mortgage deed before us is in the form of an English

mortgage. The mortgagor gives a certain parcel or piece of land to the mortgagee ""have and to hold"", ""subject to the proviso for redemption

therein contained. Then there is a covenant that the mortgagee shall permit the mortgagor to retain possession of the premises so long as he shall

make the annual payments as stipulated, the net result of which is that the mortgagor remains in possession and thus possession is not immediately

given by the mortgagor of the property comprised in the deed. But there is a provision at the end of the document providing that, if default is made

in payment of certain annual instalments, the mortgagee may at any time thereafter enter into and upon the said piece of land and premises and shall

thenceforth quietly possess and enjoy the same. The question is whether this covenant amounts to an agreement to give possession. I think that the

main agreement between the parties is that possession should not be given to the mortgagee in the first instance as the result of the execution of the

mortgage deed and that this covenant for the mortgagee entering on the property in case of the mortgagor making default in payment is a subsidiary

agreement which is only to take effect upon a certain contingent event happening which may never happen. Under these circumstances

4. I am of opinion that this document is one in which possession is not given or agreed to be given and that it falls under Article 33(b) of the Act.

Krishnan, J.

5. This is a reference by the Board of Revenue for the decision of the High Court the question of the proper stamp duty payable on the document

submitted to us. That document is in the form of an English mortgage. The question we are called upon to decide is whether this mortgage falls

under Article 33(a) or 33(b) of the present Madras Stamp Act, Schedule I-A. To make it fall under Clause (a) it is necessary that

the possession of the property or any part of the property comprised in the deed should be given or agreed to be given.

6. If it does not fall under Clause (a) it must fall under Clause (b). This question was considered on a reference with regard to a similar document in

the Anonymous case ILR (1884) C 274, but under the previous Stamp Act of 1879, Article 44, Scheduel 1. There is a difference in the wording

of that Act and the present Act with which we are now dealing. The words "'at the time of execution'" have been omitted in the present Act. It was

held by the learned Judges that the document before them did not fall under Clause (a) but only under Clause (b). As the Act has been changed, it

is no doubt true as my learned brother says that the case cannot be treated as an authority, nevertheless, it is a useful guide as to the construction to

be placed upon the Article as it is now worded. The question of what stamp duty is payable on a document must necessarily be decided on the

words of the document and the terms it embodies. There can be no doubt that, under the document before us possession is not given by the

mortgagor to the mortgagee for by express stipulation the mortgagor is to continue in possession. The covenant with reference to possession is that

on a certain event happening, namely, on the mortgagor's default to pay in time the instalments fixed in the document, the mortgagee has the power

to sell the property if he so chooses, or to take possession of the property in case he thinks fit to do so. The question then is, whether this

document can be treated as a document by which the mortgagor has agreed that possession of the property should be given to the mortgagee

within the meaning of Clause (a). I am inclined to think that the words "'agreed to be given'" in Clause (a) should not be construed in too wide a

sense as the Advocate-General argues but that these words should be restricted in the manner the Judges of the Calcutta High Court did. Mitter,

J., says with reference to these words in Clause (a):

I am of opinion that Clause (a) of Article 44 covers only those mortgage deeds in which as security for the money advanced on mortgage,

possession of the property or any part of the property mortgaged is actually given or agreed to be given. But it does not include mortgage deeds in

which it is stipulated that the mortgagee would be entitled to take possession of the property, or any portion of the property mortgaged in case

there should be any breach, of the covenants of the deed. The word "given" in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security of the mortgage money. But, where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply.

7. I am inclined to think that this is the proper connotation of the words "'agreed to be given'". These words do not really cover a case where on a breach of covenant power is reserved for the mortgagee to take possession if he thinks fit. That will be putting too large an interpretation upon the words "'agreed to be given.'" The principle is that in cases where a Taxing Act like the Stamp Act imposes a pecuniary burden upon the subject, the construction most beneficial to the subject should be adopted in cases of doubt. I am therefore of opinion that the words "'agreed to be given' should not be construed as covering cases of agreement to give possession on the Breach of a certain covenant, or on the happening of a future event which may or may not happen, but only cases where by the words of the document possession is directly agreed to be given. This view is also supported by the judgment of Field, J., in the same Calcutta case. Garth, C. J, takes a slightly different view based upon the words "'at the time of execution'". But these words are not now in the Act and therefore his judgment is not of much use to us. There is, however, one sentence in it to which I shall draw attention. It expresses forcibly that too large a construction should not be placed upon the words. He says at page 278: Again, if the Advocate-General's view were correct, Clause (a) would be applicable in all cases where possession of the property is agreed to be given at any distance of time, or under any conditions, even temporarily, for nonpayment of interest. I cannot think that the Legislature meant to extend so largely, or so unreasonably, the class of mortgagee which are to be chargeable with the higher duty.

8. There is a further point here and that is, that even if we construe the words "'agreed to be given'" as covering cases where on the breach of a

covenant possession is to be given to the mortgagee, such an agreement does not exist here, for here the agreement is not for the mortgagor to give

possession but for the mortgagee to take possession if he thinks fit. Such a case does not seem to come under Clause (a). This is what Field, J.,

says on the point,

Now, although there is an authority to the mortgagees and trustees to take possession upon the happening of certain events, I think it impossible to

say that there is any agreement by the mortgagor to give possession.

9. The mortgagor, on the breach of a covenant, may refuse to give possession and drive the mortgagee to a suit to enable him to enforce the

covenant as regards possession. A document that contains such a provision is, I think, not contemplated by Clause (a) of Article 33.

10. I therefore agree with my learned brother that this document is not a document which falls under Clause (a), but under Clause (b), and should

be stamped accordingly.

Beasley, J.

11. I agree.