

(1974) 10 MAD CK 0014
In the Madras High Court
Case No : R.C. No. 1 of 1971

The Chief Controller, Revenue Authority	APPELLANT
Vs	
Madras Fertilizers Ltd.	RESPONDENT

Date of Decision : 10-10-1974

Acts Referred:

Stamp Act, 1899 — Article 40, 2(17), 57
Transfer of Property Act, 1882 — Section 58

Citation : AIR 1975 Mad 360 : (1975) ILR (Mad) 374 : (1975) 88 LW 402

Hon'ble Judges : Veeraswami, C.J.;Sethuraman, J;Natarajan, J

Bench : Full Bench

Advocate : Advocate General for Addl. Govt. Pleader, for the Appellant; M. Uthama Reddy and G. Soundarajan, for the Respondent

Judgement

Veeraswami, C.J.—This is a reference u/s 57 of the Indian Stamp Act, the question being whether the document sought to be registered by

the Madras Fertilizers Limited, styled as trust deed securing 5 1/2 per cent bearer debentures 1973 and 5 1/2 per cent, bearer debentures 1981,

to be executed by the Madras Fertilizers Limited, in favour of the First National City Bank, is a mortgage deed subject to levy of stamp duty under

Article 40(b) of the Indian Stamp Act, 1899. The respondent is a Company incorporated under the Indian Companies Act having its head office at

Madras. Through its Counsel, the Company wanted an adjudication of stamp duty payable on the document. The Collector was of opinion that the

document was chargeable to duty under Article 40(b) of Schedule I of the Act and asked the respondent to pay Rs. 38,98,499.90 and to get the

document certified u/s 32 of the Act. In the circumstances, therefore, the respondent asked for a reference u/s 56(2) of the Act.

2. The document in question, which is styled as a trust deed, was preceded by an agreement called Loan and Purchase Agreement dated 19-12-

1966, entered into between the respondent and the Chemical Bank, New York Trust Company, in the United States. This agreement contains

terms for borrowing by the Respondent of a large sum of money in the form of U. S. Dollars secured by debentures to be issued. Section 6 (10) of

this agreement stipulates that the party should take such action as may be necessary or appropriate to effect on the first closing date, and

thereafter, to protect and keep in full force and effect, a legal and valid first floating charge (hereinafter called the floating charge) in favour of a

trustee approved by the Bank for the benefit of the holders of the notes (debentures) on the entire assets and undertakings of the company, then

owned or thereafter acquired, present or future, including its uncalled capital, such floating charge to be created by trust deed in such form as the

Bank may reasonably request. It was pursuant to this stipulation in the agreement that the trust deed dated April 6, 1968, was executed as

between the respondent and the First National City Bank. The recitals refer to the fact of the loan and purchase agreement just now mentioned and

the terms under which the trust deed was being executed. The trust deed contains definition clauses, one of which defines ""the mortgaged

premises"". The definition says that the expression means and includes all the undertaking, property and assets comprised in the floating charge

created by Clause 6 (a) thereof, including any property or asset hereafter charged in accordance with Clause 9 (b) thereof. The charging clause is

Clause 6. Sub-clause (c) of Clause 6 says this:

The Company hereby charges in favour of the trustee by way of floating charge only with the payment of the debentures and other moneys hereby

intended to be secured,

Clause 8:

The security hereby constituted shall (subject as hereinafter provided) become enforceable within the meaning of these presents in each and every

(one) of the events following:

(a) Upon the happening of any event of default specified in Article VIII of the Loan and Purchase Agreement in the event of any such default

continuing un-remedied for the respective periods prescribed therein.

(b) If any Pari Passu floating charge created u/s 7.02(A) of the Loan and Purchase Agreement or otherwise in excess of ₹ 1,000,000 or the

rupees equivalent thereof is crystallised, and pursuant thereto, the Mortgage Premises or any part thereof have been taken possession of or a

Receiver has been appointed thereof, and the same have not been released or the Receiver withdrawn or discharged within seven days.

There are other events also mentioned on which the charge becomes crystallised.

3. From the above recitals it is clear that, what the trust deed created was a floating charge, which means that, though it is intended to create a

security, it is not a charge which involves any transfer of an interest in any specified property or creation of a right in any specified property. When

the floating charge crystallises on the specified event, it becomes a charge, with the result that a right is created in or over or in respect of the

specified property, so that a receiver at that stage can take possession of the property, manage the same and deal with it for enforcement of the

security for payment to the debenture-holders. That, in substance, appears to be the tenor and effect of the deed of trust.

4. Section 2(17) of the Indian Stamp Act defines a mortgage deed. It is an inclusive definition. The expression, therefore, is not only to be

understood in the sense of mortgage as defined by the Transfer of Property Act, but also as included, something more as mentioned in Section

2(17) of the Stamp Act. A "mortgage" under the Transfer of Property Act is the transference of an interest in the specified immovable property as

security for re-payment of money borrowed. So also, a charge, though not involving a transfer of interest in any specified property, creates a right

over or in respect of specified property. As defined in Section 2(17), the inclusive part of it says;

Every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the

performance of an engagement, one person transfers, or creates, to or in favour of another, a right over or in respect of specified property.

Both in the concept of mortgage as understood in general law, and also in the extended definition of "mortgage deed" in Section 2(17), it in

contemplated that there must be a transfer in present of an interest in specified property or creation in present of a right in or over or in respect of

specified property. The idea of transfer of an interest or creation of a right in such property is that it will serve as a present charge binding and

annexed to or going with specified property. This is so unlike a floating charge, because such a charge, so to speak, is something like Damocles'

sword which hangs and drops down, on a specified event, on properties then available for the Receiver to take charge on behalf of debenture-

holders or for the trustee in this case. It is only then and then alone, which happened on the specified event, that there is any transfer of interest or

creation of a right over or in respect of specified property. A perusal of the loan and purchase agreement and also the trust deed clearly brings out

that the trust deed creates a charge of the latter description. In fact, it says in so many words, namely, that what was created under the trust deed

was a floating charge. To make it clear, events are specified when the floating charge will get crystallised and the recitals go further to state what

should happen on such crystallisation of the charge in specified property. So long as the stipulation for repayment is adhered to, the charge is

unenforceable. We cannot, therefore, agree with the Revenue that the trust deed is a mortgage deed within the meaning of Section 2(17), and it will

not attract duty under Article 40(b) of Schedule I of the Stamp Act

5. The Advocate-General for the Revenue, heavily relied on Secy. to Commr. of Salt, Abkari and Separate Revenue, Revenue Board, Madras v.

Orr, ILR 38 Mad 646 = AIR 1916 Mad 374 and has contended that the transaction involved there was more or less similar to the transaction

here, and that we must hold, following that judgment, that the trust deed is a mortgage deed. We have given our careful consideration to the

contention, but are not persuaded that the transaction in the Secy. to Commr. of Salt, Abkari and Separate Revenue, Revenue Board. Madras v.

Orr, ILR 38 Mad 646 = AIR 1916 Mad 374 is like the one in the instant case. There was a question of floating charge in that case. The

transaction involved there was this. One Mrs. Orr was the sole executrix of Mr. M. W. Orr. He was the sole proprietor of certain gold and silver

smith's business and indebted to a certain person. Mrs. Orr entered into an agreement with the Bank of Madras, by which the latter agreed to

advance to the former a certain amount on a promissory note to be executed by one Thomas William Barton in favour of the firm, Messrs. P. Orr

and Sons, and endorsed by them to the Bank of Madras, upon the said Mrs. Orr executing a declaration of trust of the machinery, plant, stock-in-trade, goods, chattels and effects in connection with the business, more particularly described in the Schedule to the instrument. In consideration of advances to be made by the Bank, Mrs. Orr declared that she held the said machinery, plant, stock-in-trade, etc., on trust, for and on behalf of the Bank. The loan granted by the Bank bore interest. There was also a provision that the trustee, namely. Mrs. Orr, should have full power to use and employ the trust property in certain ways and to replace and make good such portions of the trust property as may be sold or otherwise dealt with and the substituted goods should be included in the security. There was also a further declaration that the trustees stood in possession of the net profits realised after payment of all expenses, including the retention by the trustees of a sum not exceeding Rs. 20,000/- annually in trust to pay and apply the same in payment of sums advanced by the Bank. It will at once be obvious that the difference between the transaction just now mentioned and dealt with in that case and the one in the present case is that in the former the charge was enforceable *eo instanti* and enforceability of the charge did not depend upon a particular event in which case the charge would crystallise. In other words, that case was not one of the floating charge, but a case of mortgage, for, there was transfer of an interest in specified immovable property, or in any case, there was creation of a right over or in respect of specified property, as recited. The essence of the difference between the two transactions, the one in the case cited by the learned Advocate-General and the other here, is that the character of a floating charge, which, on the happening of an event, would crystallise and result in the trustee or Receiver taking possession, was not present at all in the former case.

6. We, therefore, answer the question referred to us against the Revenue with costs. Counsel's fee Rs. 2,500/-.