
(1974) 10 MAD CK 0013
In the Madras High Court
Case No : R.C. No. 4 of 1968

The Chief Controlling Revenue Authority APPELLANT
Vs
The Madras Refineries Ltd. RESPONDENT

Date of Decision : 09-10-1974

Acts Referred:

Stamp Act, 1899 — Article 27, 40, 3, 4

Citation : AIR 1975 Mad 362 : (1975) ILR (Mad) 529 : (1975) 88 LW 440

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

Bench : Full Bench

Advocate : Advocate General for Addl. Govt. Pleader, for the Appellant; C. Ramakrishna and M. Shakir Ali, for the Respondent

Judgement

Veeraswami, C.J.—This is a reference u/s 57 of the Indian Stamp Act, 1899. The Board has proposed to this court the following questions-

(1) Whether the decision of the Board of Revenue that the instrument relating to the deed of Trust and mortgage would attract the levy of stamp

duty as laid down in Article 40(b) of Schedule I of the Indian Stamp Act and that the debentures would be exempted from the levy of Stamp Duty

is correct or not: and (2) Whether the claim of the respondent herein that the stamp duty is payable on the debentures under Article 27(a) and on

the deed of Trust and mortgage, under Article 40(c) is tenable or not ?

This reference was heard before by the then Chief Justice along with two other learned Judges, who expressed no final opinion, but in exercise of

the powers u/s 58 of the Stamp Act, called for a further reference propounding the following additional questions:

1. Whether the President's guarantee in this case is a document liable to stamp duty under the Indian Stamp Act ?

2. If it is liable to stamp duty, whether it is entitled to the exemption contained in any of the provisions of the Indian Stamp Act; and

3. If it is found that it is not entitled to the exemption but is liable to stamp duty whether such stamp duty has been levied and Paid in any

proceedings which the law permits the concerned Revenue Authority to initiate for the purpose ?"" The answer to these questions by the Board is

that the President's guarantee having been executed by him in that capacity is not liable for stamp duty u/s 3, Proviso (1) of the Stamp Act. It is

also stated that u/s 29 of the Indian Stamp Act, in the case of a bond as defined u/s 2 Clause (5) of the Act, the Stamp Duty is payable by the

person executing the instrument and that if, in the normal course, therefore, there is any stamp duty payable on this Instrument, it is to be borne by

the President. Under Proviso (1) to Section 3 of the Indian Stamp Act, in respect of any instrument executed by or on behalf of the Government,

where but for this exemption the Government will be liable to pay the duty, no duty shall be chargeable. We may at once say that the additional

questions propounded by this court in respect of which the Board has made a report, do not, on the view we take, arise in the case and, in any

case, we agree with the Board that the document executed by the President by way of guarantee does not attract stamp duty for the reasons stated

by the Board.

2. To appreciate the questions which had been originally referred by the Board of Revenue to this court, it is necessary to notice the essential facts.

The respondent, the Madras Refineries Ltd., is a Government public limited company incorporated under the Indian Companies Act, 1956. By a

document described as a loan and note purchase agreement dated 20-12-1966, which it entered into with the First National City Bank as trustee

for various Pension trusts and six others, it was agreed that the company would authorise the creation and issuance of secured notes for

14,880,000 U. S. Dollars at certain rates of interest called series A and another set of secured notes for 7,440,000 U. S. Dollars at the same

interest, as series B. The notes were to be issued under and secured by a deed of trust and mortgage between the company and the First National

City Bank, trustee. The notes shall be dated, shall mature, shall bear, interest, shall be payable, shall be secured and shall have such other terms

and provisions as provided in the mortgage and shall be guaranteed by the President of India pursuant to the terms of a guarantee agreement in the form attached to the agreement. Then followed various covenants in the agreement which it is not necessary for us to notice, except that most of the terms in this agreement refer to those in the mortgage-cum-trust deed. For instance, one of the clauses in the covenants is that in order to obtain the necessary funds for the construction of the Refinery and for working capital the company proposes to issue and sell equity shares of its capital stock for a cash consideration, aggregating the rupee equivalent of \$ 18,000,000, computed, at the time of payment, at the exchange rate specified in Section 14.06 of the mortgage. Again, we find it stated that the borrowing to be evidenced by, and the sale, of, the notes pursuant to the agreement and the execution and delivery of the agreement, the mortgage and the notes have been duly authorised by all necessary corporate action on the part of the company. There is a further stipulation in the agreement that the President of India and the trustee shall enter into a guarantee agreement which shall be in full force and effect. In short, a perusal of this agreement shows that the notes of both the series, which in legal parlance are debentures, were to be issued under and secured by a deed of trust and mortgage and that the First National City Bank was to be the trustee and that the essential terms on which the debentures would be issued would be those mentioned in the mortgage cum trust deed.

Pursuant to this agreement was executed on 29-6-1967, a deed of trust and mortgage. This document was executed as between the Madras Refineries Ltd., and the First National City Bank, which is a national banking association incorporated and existing under the law of the United States of America having its corporate trust office in New York. The very first recital in this document is-

Whereas, the company is in the process of constructing a refinery for the refining of crude oil and deems it necessary from time to time to borrow money to finance such construction and to issue its notes therefore and to mortgage and charge its properties hereinafter described to secure the payment of such notes, and to that end has authorised the issuance of its notes to be issued in two series; and

Whereas the company has determined to issue its 5 1/2 per cent, secured notes series A in the aggregate principal amount of \$ 14,880,000 in

lawful money of the United States of America and its 5 1/2 per cent, secured notes series B in the aggregate principal amount of \$ 7,440,000 in

lawful money of the United States of America.

We may notice the following further recital which also throws light on the problem which we have to answer.

Whereas, all acts and proceedings required by law and by the Memorandum of Association and Articles of Association of the company, including

all acts requisite on the part of the share-holders, directors, and officers necessary to make the notes of the company provided for herein, when

executed by the company, authenticated and delivered by the trustee and duly issued, whether upon the sale, pledge, or other disposition thereof

by the company, the valid, binding and legal obligations of the company and to constitute this Indenture the valid, binding and legal instrument of the

security of such notes, in accordance with its and their terms have been done and taken;

We may mention that this indenture has been defined to mean the deed of trust and mortgage as originally executed or as it may from time to time

be supplemented, modified or amended by any supplemental indenture. On the 10th June 1967 came the agreement between the President of

India and the First National City Bank as trustee under the deed of trust and mortgage dated 29-6-1967. Recitals are found as to the need of the

company to raise loans and the arrangement that has been made and then the operative part said-

Without limitation or restriction on any of the other covenants on his part of this agreement contained, the Guarantor hereby unconditionally

guarantees, as primary obligor and not as surety merely, the due and punctual payment from time to time of sums secured by the mortgage.

The 12th paragraph of this guarantee agreement said that the trustee entered into and accepted the agreement of guarantee upon the terms and

conditions set forth in Article 12 of the mortgage.

3. The Board of Revenue considered that the deed of trust and mortgage was the primary document which attracted stamp duty under Article

40(b) and charged accordingly. It was also of the view that because of the exemption contained in Article 27, the debentures did not attract stamp

duty. In taking that view, the Board rejected the respondent's contention that

the primary instruments were the debentures and that they were chargeable as such under Article 27(b) read with Article 40(c). This is upon the assumption that the deed of trust and mortgage constituted a collateral, auxiliary of additional security for the debenture holders.

4. During the hearing of the reference on the earlier occasion, apparently, this court thought that the nature of the Presidential guarantee for purposes of the Stamp Act should also have to be determined and it was on that view, as we mentioned earlier, a further reference was called for on the additional questions above referred to.

5. In our opinion, on the first question, the answer should be in the affirmative, that is to say, that the decision of the Board charging the deed of trust as the primary instrument under Article 40(b) is correct, and on the second question, in the negative, that is to say, that the contention contained therein is not tenable.

6. The Indian Stamp Act, by Section 3, and subject to the provisions of the Act and the exemptions contained in Schedule I require the instruments mentioned therein to be chargeable with duty of the amounts indicated in that schedule. In passing we may refer to Section 4, which applies to several instruments used in bringing about a single transaction by way of sale, mortgage or settlement. The relevance of this section will appear in due course. The related Articles are these. Article 27 deals with stamping of debentures, whether a mortgage debenture or not, being a marketable security transferable by endorsement or by delivery. The exemption to this Article reads.

A debenture issued by an incorporated company or other body corporate in terms of a registered mortgage deed, duly stamped in respect of the full amount of debentures to be issued thereunder, whereby the company or body borrowing makes over, in whole or part, their property to trustees for the benefit of the debenture holders.

Such a debenture will not attract duty under Article 27, due to this exemption. Article 40 relates to mortgage deed, not being an agreement relating to deposit of title deeds, pawn or pledge, bottomry bond, mortgage of a crop, respondentia bond or security bond, each of which is separately dealt with by several Articles in the Schedule. Clause (a) applies 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. Obviously, this clause will have no application to the instant case, whatever may be the

ultimate view we may take, Clause (b) is attracted when possession is not given or agreed to be given as in Clause (a). There is an explanation to

Clause (b), which we need not read for the purposes of this reference. Then Clause (c) applies when it is a collateral or auxiliary or additional or

substituted security or is by way of further assurance for the purpose above mentioned where the principal or primary security is duly stamped.

These are the provisions in the Act in the light of which we have to frame our answer. The application of one or the other Article to the instant case

will make a large difference in the quantum of the rate of stamp duty. The stamp duty actually charged and paid under Article 40(b) was Rs.

37,66,500/- If the respondent's contention were accepted, it would make a difference of at least about Rs. 12,00,000/-.

7. In deciding under which Article the stamp duty will have to be levied, what is essential to determine is as to the nature and character of the

instrument because the charge depends on the instrument, as for instance, whether it is a debenture, or a mortgage deed, or a document of any

other description having regard to its true effect and tenor. In the present case, there are three documents as we have already indicated, (1) the

loan and note purchase agreement dated 20-12-1966, (2) the deed of trust and mortgage dated 29-6-1967 and (3) the guarantee agreement

dated 10-6-1967. The whole purpose of these transactions is to enable the respondent to borrow on security. For this purpose, the usual device

adopted by incorporated companies has been followed, that is to say, issue of debentures, secured by a mortgage-cum-trust deed. What is

peculiar here is the guarantee of the President because the company worked in the public sector. The entire money to be covered by the two series

of debentures was to come from the United States in the form of dollars. Where a transaction of such a nature, namely, borrowing on security

offered in that pattern, is brought about by the several instruments, Section 4 directs that the principal instruments only shall be chargeable with

duty prescribed in Schedule I. A great deal of argument at the Bar and on behalf of the respondent has centred round as to which of the

documents constitutes the principal instrument. The learned Advocate-General for the Revenue has contended that the deed of trust and mortgage

is the primary principal instrument, under and in terms of which the debentures were issued and that the guarantee of the President, though he rendered himself liable as the original guarantor, is not the principal instrument. On the other hand, for the respondent it was strenuously contended by Mr. Ramakrishna that the debentures were the principal instruments which were to be delinked from the deed of trust and mortgage and that, in any case, in view of the fact that the President's guarantee stipulated that the President should be regarded as the original obligor and that the debentures could be enforced directly against him, it should at least be treated as the principal instrument. Obviously, the attempt of this argument is to make the mortgage a collateral, auxiliary or additional security. We are of opinion that the respondent's contention cannot prevail in view of the terms and tenor of the documents. We have already mentioned that in the agreements of 20-12-1986, it was clearly agreed between the company and the First National City Bank that the debentures were to be issued under and secured by a deed of trust and mortgage between the company and the First National City Bank, trustee, in the form attached thereto and that further the debentures should be dated, mature bear interest, be repay-able, be secured and contain such other terms and provisions as provided in the mortgage and shall be guaranteed by the President of India. These words are very clear, in that they point to the fact that the mortgage is the primary instrument and under and in terms thereof, the debenture notes of both the series were to be issued. Without the mortgage and without reference to the terms thereof, the debentures would have no existence, having regard to the agreement of 20-12-1966. Though the counsel for the respondent invited our attention to some parts of the agreement and the other two documents, we are not persuaded that they contain any recitals which would enable us to come to the conclusion that either the President's guarantee or the debentures should be regarded as the Principal instrument. On the other hand, the debentures have their origin to the mortgage not only for their issue, but also for their security for repayment. The guarantee by the President in spite of its recital that the President shall be regarded as the primary or original obligor, cannot be regarded as the principal instrument for, by itself, it cannot stand. It does not create any security by itself. It is only a promise that the President will make himself liable even directly for repayment

to the debenture holders. But this does not mean that the guarantee serves as a mortgage or even as security in the sense of the Stamp Act. The

agreement of 20-12-1966, says that the security is the mortgage for the debentures and the repayment shall be guaranteed by the President,

though as the original obligor.

8. Mr. Ramakrishna invited our attention to certain passages in Sergeant on "Stamp Duties", 5th Edn., at page 170. But it may be seen that the

scheme of the English Stamp Act is different. Mortgage, Bond, debenture and covenant are all treated for purposes of stamp duty as falling under

the same category, which is not the case in the Indian Stamp Act. Apart from that, Sergeant himself observes at page 171-

In the case of a trust deed securing debenture stock it is the trust deed itself which, as a rule, bears the ad valorem duty as the "only or principal or primary security".

No doubt he proceeds to say--

In the case of a trust deed securing debentures, the debentures are as a rule "marketable securities", and payment of the ad valorem duty thereon

relieves the trust deed securing the debentures from payment of the 2 s. 6 d. per ₹½ 100 duty. In cases where the debentures or some of them are

not yet issued, the Commissioners allow the trust deed to be stamped with the 10 s. duty if the duty payable upon the debentures at the rate of 2 s.

6 d. per ₹½ 100 (to which the trust deed is prima facie liable) is deposited with the Commissioner, to be applied pro tanto in stamping the

debentures as and when issued.

These observations are made with reference to the structure and scheme of the English Stamp Act. which is not in our opinion, identical with the

provisions of the Indian Stamp Act. Apart from that, we are of opinion that the exemption under Article 27 itself is an indication of the Legislative

mind that a debenture of the type contemplated by the exemption should be free from charge under Article 27 itself. In effect, it amounts to as if a

debenture of the description contemplated by the exemption is not within the charging purview of Article 27. Further, that exemption itself points to

the fact that the debentures are issued by the incorporated company in terms of a registered mortgage deed duly stamped, that is to say, in such a

case, the principal instrument is the mortgage deed, which attracts stamp duty,

and when it is duly stamped, the debenture issued under and in terms of such a mortgage duly stamped attracts exemption and, therefore, such debentures will be free from charge under Article 27.

9. Mr. Ramakrishna, with great conviction in his own argument, also refers to certain observations of Monroe which are practically the same as we

have set out above from *Sergeant* and, therefore, do not require a separate treatment. Reliance was also placed on *Inland Revenue Commrs. v.*

Henry Ansbacher and Co., 1962-3 All ER 843. But we do not think that this is of assistance to us in answering the questions. The respondents in

that case by agreement under hand agreed to purchase all the ordinary stock of a company for a price payable in two instalments, the first of which

was duly paid, but the second of which remained outstanding as the amount due depended on the outcome of claims for compensation due by

reason of the acquisition by certain Governments of assets owned by the sellers. By Clause 11 of the sale agreement the respondents agreed to

procure that the sum payable as the second instalment should be guaranteed to the extent of ₹ 750,000 by a bank. The stamp duty payable on

this guarantee was assessed at ₹ 1875 on the ground that the guarantee came within the heading "mortgage, bond, debenture, covenant (1)

being the only or principal or primary security for the payment or repayment of money" in Schedule I to the Stamp Act, 1891. The House of

Lords held that although the guarantee came within the heading "Mortgage, bond, debenture, covenant" in Schedule I to the Stamp Act. yet it was

not caught by the words that followed, viz., "being the only principal or primary security for the payment or repayment of money" because, if

money became payable, the primary obligation for payment was that of the respondents under the sale agreement, which was a "security" for

payment within the words last quoted, although it was not a kind of security that attracted ad valorem duty under the heading "Mortgage, bond.

....." But in the instant case, the facts are different and as we have already mentioned, the debentures were issued under and in terms of the

mortgage, which formed the security therefore and the debentures were further guaranteed by the President's guarantee, who figured as the

original guarantor. The essence of the matter being that the company borrowed on security in the particular form contemplated by the exemption of

Article 27 , the principal instrument within the meaning of Section 4 of the Stamp Act, was the mortgage. Even apart from Section 4 of the Act. we would have come to the same conclusion that the principal instrument which attracted stamp duty is the deed of trust and mortgage. In that case, the document shall be chargeable under Article 40(b). We have, therefore, answered the questions as we have already done, that is to say, the first question is answered in favour of the Revenue and the second Question against the respondent. The Board will be entitled to its costs, which we fix at Rs. 5,000/-.