

REFERENCE UNDER THE STAMP ACT.

Before Derbyshire C. J., Costello and Lord-Williams J.J.

1937

April 15.

In the matter of KAMALA RANJAN RAY*

Stamp—Equitable mortgage—Mortgage-deed, What is—Stamp duty—Transfer of Property Act (IV of 1882), ss. 58(a), 59—Bengal Stamp (Amendment) Act (Ben. III of 1922), Sch. IA, Arts. 23, 62(c)—Indian Stamp Act (II of 1899), ss. 2(17), 45(1) and (2), 57.

Where a document gave the mortgagee an equitable mortgage by deposit of title-deeds together with the right to appoint a receiver at any time without first having recourse to the Court and also gave the mortgagee the right to call upon the mortgagors at any time to execute a mortgage in the English form in favour of the mortgagee,

held that it came within the definition of "mortgage-deed" contained in s. 2(17) of the Indian Stamp Act, and so the proper stamp duty was Rs. 7-8 as provided for in Art. 62(c) of Sch. IA of the Bengal Stamp (Amendment) Act: that it was not a conveyance such as is provided for under Art. 23.

Per COSTELLO J. Such a document constitutes the bargain between the parties and is not one which merely records an already completed transaction: it is a mortgage not only for the purposes of the Stamp Act, but also for the purposes of the Transfer of Property Act [ss. 58(a) and 59].

Kedarnath Dutt v. Shamloll Khettry (1); *Subramonian v. Lutchman* (2) and *Imperial Bank of India v. U. Rai Gyaw Thu and Company, Ltd.*, (3) referred to.

REFERENCE under s. 57 of the Indian Stamp Act.

The facts of the case, in which this reference was made by the Board of Revenue, Bengal, are as follow:—

The petitioner, Kumar Kamala Ranjan Ray, had advanced Rs. 3,50,000 to one Kedareswar Datta and others on deposit of title-deeds by way of an equitable mortgage. A document, dated October 9, 1934, evidencing this transaction was stamped with a nominal stamp duty under Art. 6, Sch. IA of the

*Reference under s. 57 of the Indian Stamp Act.

(1) (1873) 11 B. L. R. 405.

(2) (1922) I. L. R. 50 Cal. 338;

L. R. 50 I. A. 77.

(3) (1923) I. L. R. 51 Cal. 86;

L. R. 50 I. A. 283.

Bengal Stamp (Amendment) Act. That document created very definite and valuable rights over the properties concerned in favour of the mortgagee amounting to a mortgage. Subsequently by a document, dated April 12, 1935, the petitioner transferred his rights and interest in the said equitable mortgage to his mother, Ranee Sarajini Debee, in lieu of her maintenance, this transfer-deed being stamped with a duty of Rs. 7-8 under the provisions of Art. 62(c). The Registrar of Deeds and Assurances, Calcutta, impounded this document and forwarded the same to the Collector of Stamp Revenue under s. 38(2) of the Stamp Act. By his order, dated June 1, 1935, the latter held that an agreement relating to the deposit of title-deeds chargeable under Art. 6 cannot be treated as a mortgage-deed (Art. 40) for the purpose of stamp duty, and that a document transferring such an interest cannot be adequately stamped with a nominal stamp duty under Art. 62(c). The Collector treated the transfer-deed as a conveyance chargeable under Art. 23 and levied a stamp duty of Rs. 5,242-8 and a nominal penalty of Rs. 5 only. On August 31, 1935, the applicant filed a petition of revision before the Board of Revenue, Bengal, under clauses (1) and (2), s. 45 of the Indian Stamp Act for a refund of the stamp duty and penalty realised from him. This petition having been summarily rejected, the applicant filed a petition of review on January 10, 1936, which was also rejected, declining to make any reference to the High Court. On June 2, 1936, on hearing an application for *mandamus*, the High Court directed the Board of Revenue, Bengal, to make a reference to it under s. 57 of the Indian Stamp Act and on July 29, 1936, pursuant to that order the following questions were referred by the Board to the Honourable High Court for decision :—

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“(1) Whether the expression ‘mortgage-deed’ mentioned in Art. 62(c) of Sch. IA of the Stamp Act refers exclusively to the mortgage-deed mentioned in Art. 10 ?

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“(2) Whether the expression ‘mortgage-deed,’ mentioned in Art. 62(c), includes instruments within the meaning of s. 2(17) of the Stamp Act ?

“(3) Whether the deed of October 9, 1934, mentioned above, is a ‘mortgage-deed’ within the meaning of Art. 62(c) ?

“(4) Whether the deed of April 12, 1935, mentioned above, is a transfer of a mortgage within the meaning of Art. 62(c), or a conveyance within the meaning of s. 2(10) of the Stamp Act and chargeable under Art. 23 ?”

S. N. Banerjee Sr. and *M. N. Dutt* for the petitioner.

Sir Asoka Roy, Advocate-General, and *S. M. Bose, Standing Counsel,* for the Crown.

DERBYSHIRE C. J. In my opinion, it is clear that the document of October 9, 1934, was executed contemporaneously with the deposit of title-deeds of the property concerned.

The document itself (at page 3) recites :—

The mortgagors have applied to the mortgagees to lend and advance them the sum of rupees three lakhs and fifty thousand which the mortgagee has agreed to do on having the repayment thereof with interest and costs secured in the manner hereinafter mentioned and referred to.

Later, the document recites :—

That in consideration of the sum of rupees three lakhs and fifty thousand by the mortgagee paid to the mortgagors as aforesaid the first party as the sole beneficial owners have this day deposited with the mortgagee at the residence of the mortgagee's solicitor at No. 10, Bala Ram Ghosh Street in the town of Calcutta the title-deeds relating to the said premises No. 13, Pagya Pati Street particularly specified in Part I of Sch. B hereunder written with the intent and effect of creating an equitable mortgage on the messuage, land, tenements and hereditaments and premises No. 13, Pagya Pati Street particularly described in Part I of Sch. A hereunder written and the second party as the sole beneficial owners have this day deposited with the mortgagee at the residence of the mortgagee's solicitor at No. 10, Bala Ram Ghosh Street in the town of Calcutta the title-deeds relating to the Old Court House Lane and Radha Bazar properties particularly specified in part 2 of Sch. B hereunder written with the intent and effect of creating an equitable mortgage on the said Old Court House Lane and Radha Bazar properties particularly described in part 2 of Sch. A hereunder written.

Then follow the provisions for the payment of interest by the mortgagors, payment of costs, for the loan not being called in before due time, stipulation as to the way in which the loan should be repaid, property kept in repairs, rates and taxes paid on the property, a stipulation that the loan should not be called in for two years and for the extension of the mortgagor's option for two years more. Then follows the further provision that, if the principal and interest which are due and payable by the mortgagors to the mortgagee be not paid on the due date, the mortgagee shall be entitled to recover them by enforcing his rights and remedies under the equitable mortgage including his right to appoint a receiver in respect of the said properties under the mortgage, to which appointment the mortgagors irrevocably consented, so as to render any further consent on their part unnecessary. There is a further provision later on in the document that the mortgagors whenever called upon by the mortgagee shall execute a mortgage in the form of an English mortgage in the terms hereinbefore and hereinafter mentioned in favour of the mortgagee.

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To my mind, it is quite clear that that document creates at the instance of the mortgagors very definite and valuable rights over the properties concerned in favour of the mortgagee. Shortly put, it gives the mortgagee a mortgage by the deposit of title-deeds together with the right to appoint a receiver at any time without first having recourse to the Court; and it also gives the mortgagee the right to call upon the mortgagors at any time to execute a mortgage in the English form in favour of the mortgagee. Consequently, it comes within the definition of "mortgage-deed" contained in the Stamp Act of 1899, s. 2(17), which enacts that unless there is something repugnant in the subject or context "mortgage-deed" includes 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

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engagement, one person transfers or creates to, or in favour of, another a right over or in respect of specified property. I can see nothing in the subject-matter of the document itself or the context which is repugnant so as to prevent this document from being a mortgage-deed within s. 2, sub-s. (17).

The benefit of that mortgage was transferred by the mortgagee to Ranee Sarojini Debee on April 12, 1935, by a document of that date. It is recited in that document that the transfer was made in consideration of arrears of maintenance payable by the transferor to transferee. The question is whether that document of transfer falls to be stamped under Art. 23 of Sch. IA of the Bengal Stamp (Amendment) Act, 1922, which is incorporated into the Stamp Act of 1899 or under Art. 62(c) of the same Schedule. It seems to me that this case is specifically provided for under Art. 62 of the Schedule which provides that where there is a transfer with or without consideration of any interest secured by a bond, mortgage-deed or policy of insurance (i) a duty of a sum not exceeding Rs. 5 is chargeable for such bond, mortgage-deed or policy of insurance and (ii) in any other case Rs. 7-8 as. As I have said, in my view, the document of October 9, 1934, is a mortgage-deed within the meaning of the Stamp Act. Under the document of transfer of April 12, 1935, the benefit of the interest secured by that deed has been transferred from the mortgagee to Ranee Sarojini Debee and, consequently, the document of transfer, in my view, falls to be stamped with a stamp of Rs. 7-8 as. It is quite clear that that document of transfer of April 12, 1935, is not a conveyance such as is provided for under Art. 23.

An argument has been addressed to us that the mortgage-deed (that is, the document of October 9, 1934) ought in the first instance to have been stamped under Art. 40 of the schedule instead of under Art. 6 of the schedule as, in fact, it was stamped. In my opinion, that is not a question which is to be decided

by us today. The only question with which we are concerned is whether the document which was impounded by the revenue authorities in order to be stamped under Art. 23 and was, in fact, stamped under protest under Art. 23¹ was correctly stamped or not.

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For the reasons I have given, as I have said, it was not correct to stamp the transfer of April 12, 1935, under Art. 23. The proper stamp is that provided for in Art. 62(c), namely, Rs. 7-8 as.

Mr. Banerjee's client will get his costs of this Reference as well as the costs of the *mandamus* proceedings.

COSTELLO J. The Board of Revenue had taken the view that the expression "mortgage-deed" as used in Art. 62(c), Sch. IA of The Bengal Stamp (Amendment) Act of 1922 refers only to a mortgage-deed in regard to which stamp duty is fixed under Art. 40 of that Schedule and that Art. 62(c) will have no reference to documents which have been treated as falling within the purview of Art. 6 of the Schedule. The document of October 9, 1934, was admittedly stamped upon the basis that it was an agreement of the kind contemplated by Art. 6.

At an early stage of the argument before us not only the learned counsel appearing on behalf of the petitioner but even the learned Advocate-General appearing on behalf of the Board of Revenue expressed the view that that procedure was correct. If that were the case it is, of course, arguable that the document was not excluded from the operation of Art. 40 by virtue of the opening words of that Article, which are as follows :—

Mortgage-deed, not being an Agreement relating to Deposit of title-deeds, pawn or pledge (No. 6), Bottomry Bond (No. 16), Mortgage of a crop (No. 41), Respondentia Bond (No. 56) or Security Bond (No. 57).

If the document of October 9, 1934, is really a mortgage-deed, it may well come within the main

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part of Art. 40. In my opinion, the document was the instrument by which the equitable mortgage was created in the sense contemplated by Couch C. J. in his judgment in the well-known case of *Kedarnath Dutt v. Shamloll Khettry* (1). It seems obvious, upon an examination of the precise terms and conditions of the document itself, that it was not a mere memorandum of a contract between the parties but that it constituted the contract between the parties—To apply the antithesis indicated in the judgment of Lord Carson in the case of *Subramonian v. Lutchman* (2)—the document of October 9, 1934, falls into the category of documents which constitutes the bargain between the parties and not into the category of documents which merely record an already completed transaction. It was argued in the well-known case of the *Imperial Bank of India v. U. Rai Gyaw Thu and Company, Ltd.* (3) that an equitable mortgage effected by deposit of title-deeds was not a mortgage in the sense used in the Transfer of Property Act. Their Lordships of the Privy Council were, however, of opinion that that was an untenable proposition in view of the words of s. 58(a) of the Transfer of Property Act. His Lordship said :—

Unless the deposit of title-deeds effects the transfer of an interest in a specific immovable property for the purpose of securing the payment of money advanced or to be advanced, it is absolutely nothing at all. Further the concluding words of s. 59 actually use the word "mortgage" to denote the security effected by delivery of documents of title.

Then he continued :—

The consideration, however, on which the appellants laid most stress was that it was evident that the legislature wished to preserve the system of mortgaging by deposit of title-deeds in the enumerated towns.

There can be no question, in my view, but that a so-called equitable mortgage, *i.e.*, a mortgage effected by deposit of title-deeds, but with the bargain between the mortgagee and the mortgagor enshrined in a

(1) (1873) 11 B. L. R. 405.

(2) (1922) I. L. R. 50 Cal. 338 (346);

L. R. 50 I. A. 77 (83).

(3) (1923) I. L. R. 51 Cal. 86 (98);

L. R. 50 I. A. 283 (293).

document, is not only for the purposes of the Transfer of Property Act a mortgage but also for the purposes of the Stamp Act and so it falls within the definition contained in s. 2(17) of the Stamp Act of 1899. That section says :—

Mortgage-deed includes 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 engagement, one person transfers, creates, to, or in favour of, another, a right over or in respect of specified property.

In the light of the words of Sir Richard Couch to which I have referred it would seem that fundamentally the document of October 9, 1934, created in favour of the person described as the mortgagee a right over or in respect of specified property, and having regard to the precise terms of the document it is equally apparent that it conferred rights over or in respect of specified property which ordinarily a mortgagee would not have by the mere deposit of title-deeds, that is to say, simply by the physical handing over of title-deeds without further agreement between the parties other than that those title-deeds should be security for the money lent.

Upon the assumption, therefore, that the document of October 9, 1934, was a mortgage-deed within the definition contained in s. 2(17) it follows, in my view, that it falls within the expression "mortgage-deed" as used in sub-head (c) of s. 62 of The Bengal Stamp (Amendment) Act of 1922. Art. 62, so far as it is material for our present purposes, may be taken as follows :—

Transfer (whether with or without consideration) (c) of any interest secured by a bond, mortgage-deed or policy of insurance,

Once one comes to the conclusion, as I do, that the document of October 9, 1934, was a mortgage-deed, it seems to be the irresistible conclusion that the document of April 12, 1935, was a transfer of the kind contemplated by the provisions of Art. 62(c). Speaking for myself, I have very great doubt whether

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rightly it can be said that the document of October 9, 1934, is a document of the kind specified or indicated by the provisions of Art. 6 of Sch. IA of The Bengal Stamp (Amendment) Act of 1922.

Once more bearing in mind the antithesis set up in the passage in the judgment of Lord Carson to which I have already referred, it may well be that because the document itself constitutes the bargain between the parties and not merely records an already completed transaction it cannot at one and the same time properly be regarded as a mortgage-deed and as an instrument evidencing an agreement relating to the deposit of title-deeds. It is not necessary that one should express a definite opinion on this point, but, in my view, the two ideas must be placed in juxtaposition. If an instrument is itself a mortgage-deed it cannot at the same time be an instrument evidencing an agreement relating to what is really an equitable mortgage. If the instrument itself constituted an equitable mortgage it is difficult to see how it can be an instrument evidencing an agreement. However, for the purposes of the present case, I am quite satisfied that, whatever may be the right view on the point whether or not the document of October 9, 1934, was properly stamped, the document of April 12, 1935, was one which ought to be dealt with upon the footing that it was a transfer of the kind contemplated by Art. 62(c).

LORD-WILLIAMS J. I agree that the document of transfer of April 12, 1935, was properly stamped under Art. 62(c) as being a transfer of an interest secured by a mortgage-deed, and that the document of October 9, 1934, was a mortgage-deed within the words of the definition contained in s. 2(17).

With regard to the arguments raised upon the other sections and Articles which have been referred to, it seems to me that a particular document may at the same time both satisfy the definition contained

in s. 2(17) and come within the specific words of Art. 6(1). Having regard to the fact that our decision is that the document in question on this reference was properly stamped under Art. 62(c), it is not necessary for me to pursue this part of the subject. But it is conceivable that a document may at the same time be intended both to evidence an agreement already made and to create rights over or in respect of specified property. Whether the document of October 9, 1934, fulfils this condition, it is not necessary now to decide.

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Reference answered against Crown.

Attorney for petitioner : *N. K. Sen.*

Attorney for Crown (or Board of Revenue):
Solicitor, Government of Bengal.

G.S.