

SESHAMMA
v.
SURYA-
NARAYANA.
—
SADASIVA
AYYAZ AND
SPENCER, JJ.

rule 1 and clause (2) of Order XXII, rule 4] seem to make the matter quite clear and to prevent the bringing of the fresh suit as against a defendant who was not on the record at the time of the withdrawal.

We therefore reverse the learned District Judge's order and restore the Munsif's decision with costs in this and in the Lower Appellate Court in favour of the appellant.

APPELLATE CIVIL.

*Before Sir Charles Arnold White, Kt., Chief Justice, Justice
Sir Sankaran Nair and Mr. Justice Oldfield.*

1913.
October.
22 and 24.

THE SECRETARY TO THE COMMISSIONER OF SALT,
ABKĀRI AND SEPARATE REVENUE, REVENUE
BOARD, MADRAS (REFERRING OFFICER),

v.

MRS. E. M. ORR AND THE BANK OF MADRAS (THE EXECUTANT
AND EXECUTEE OF THE DOCUMENT IN QUESTION).*

*Indian Stamp Act (II of 1899), sec. 2 (17), and arts. 40 and 64—Mortgage-deed—
Hypothecation, letter of, accompanying a bill of exchange.*

Where a document ran as follows:—"The executant being desirous of carrying on her deceased husband's business of which she is now the owner declares a trust in favour of the Bank of Madras in respect of machinery, plant, fixture and furniture and stock-in-trade in consideration of advances of money to be made by the Bank from time to time not exceeding in all Rs. 4, 50,000 for the purpose of financing the business. All such advances carry interest at the rate of 6 per cent. per annum. The trustee has got full power to use, employ, sell or exchange or otherwise deal with the trust property in the ordinary course of business but should make good the property that may be sold with other goods of a similar nature and value; any goods so substituted shall be included in the security. The trustee may retain in his hands the sum of Rs. 20,000 annually in trust to pay and apply the same in payment of sums advanced by the Bank:"

Held, that the document created a trust in express language in respect of the machinery, etc., in or upon the business premises of the firm and that the object of the instrument was to give the Bank some rights by way of security and it was a mortgage-deed for the purpose of the Stamp Act.

* Referred Case No. 5 of 1913.

Reference under Stamp Act, sec. 46 (1888) I.L.R., 11 Mad., 216, referred to.

Semle.—The document is not a letter of hypothecation within the meaning of the exemption in article 40.

Obiter.—A fiscal enactment should be construed strictly and in favour of the subject.

CASE stated under section 57 of the Indian Stamp Act (II of 1899) for the decision of the High Court by H. H. F. M. TYLER, Secretary to the Commissioner of Salt, Abkārī and Separate Revenue.

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v.
MRS. ORR.

The facts of the case appear from the judgment of WHITE, C.J.

The *Government Pleader* for the referring officer.

W. Barton for the executant.

Executee not represented.

WHITE, C.J.—The question we have to consider is whether the instrument which has been submitted to us is a mortgage-deed within the meaning of section 2 (17) of the Indian Stamp Act (II of 1899). If so it is chargeable with stamp duty as such under article 40 of the first schedule to the Act. Mr. Barton has argued that the instrument in question is a declaration of trust and that it is chargeable as such under article 64. At the conclusion of his argument he suggested that the instrument might be construed as a letter of hypothecation accompanying a bill of exchange and therefore fell under the second exemption to article 40.

WHITE, C.J.

A mortgage-deed is defined for the purposes of the Stamp Act, and for the purposes of that Act only, as including “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.” The definition is almost as wide as the definition of a bill of sale in the English Bills of Sale Acts.

What are the material provisions of this deed? It is an instrument to which the parties are one Mrs. Orr and the Bank of Madras. It recites that probate of the will of the late Mr E. W. Orr was granted to Mrs. Orr as sole executrix thereof, that the late Mr. Orr was the sole proprietor of certain gold and silver smith’s business, that Mrs. Orr in order that certain

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creditors of the firm may be repaid their loans and with a view to certain other matters, has entered into an agreement with the Bank of Madras by which the Bank has agreed to advance to Mrs. Orr 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 declares that she holds the said machinery, plant, stock-in-trade, etc., on trust for and on behalf of the Bank. There is a provision as regards interest. There is then a provision that the trustee shall 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 that the substituted goods shall be included in the security; there is a provision for insurance. Then there is a declaration that the trustee stands possessed of the net profits, realised after payment of all expenses including the retention by the trustee 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. (The reference in the letter of the Board of Revenue to this part of the instrument is not quite accurate.)

Those are the covenants to which I need refer. In the schedule we have the headings "Machinery, plant, fixtures and furniture in Madras and Rangoon," and "Stock-in-trade, goods, chattels and effects in Madras and Rangoon." Under these headings are set out the various classes of articles with their respective values. By the instrument Mrs. Orr creates a trust, declares that she is the trustee and that certain property shall be trust property. She constitutes the Bank of Madras *cestuis que trust* in respect of the trust property. That is the object and purport of the deed. Whatever the precise rights of the *cestuis que trust* may be it is not for us to consider. But it seems to me anomalous for a party who sets up a case to say that the trust does not give a beneficial interest to the *cestuis que trust*, or that the *cestuis que trust* has not, in the language of section 2(17) any right in respect of the trust property. That is really what

Mr. Barton's argument comes to. It seems to me that there are two trusts created by the deed. Mr. Barton has argued that there is a trust in respect of the net profits in paragraph 5 of the deed, but there is also a trust in express language in paragraph 1 in respect of the machinery, plant, stock-in-trade, goods, chattels and effects in or upon the business premises of the firm.

It has been suggested that the definition is not satisfied because the trust property is not specified and could not be specified, since the trust property consists of the net profits. We have been referred to a Full Bench decision of this Court *Reference under Stamp Act, sec. 46(1)*. In that case there was an agreement between certain persons to transfer the future surplus profits of their respective trades to a trustee, in order that the trustee should hold the fund so to be created on certain trusts declared in the agreement. It was held that it was liable to stamp duty as a declaration of trust, and it was also held that the fund intended to be created under the agreement was not "specified property." In that case the learned Judges had to consider whether a certain sum of money which was to be accumulated by certain parties who were willing to contribute money for certain purposes was "specified property." It may be that the net profits here are not "specified property" within the meaning of the definition. But we have a trust declared by the instrument in respect of the machinery, plant, stock-in-trade, etc. With regard to them we have the schedule to which I have referred. It seems to me that so far as the stock-in-trade, etc., which are described in the deed as trust property are concerned, the trust property is specified. It is perfectly clear that the object of the instrument was to give the Bank some rights by way of security. They had their contractual rights on the promissory note—they wanted something more; and I see no reason for holding that the deed does not to some extent—to what extent it is unnecessary for us to consider,—carry out the object which was in the mind of the parties when the deed was prepared.

I need scarcely say that the fact that the instrument is a trust deed does not make it a mortgage. It is, in my opinion, a

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mortgage-deed, for the purposes of the Stamp Act, because it creates a right in respect of specified property for the purpose of securing money advanced or to be advanced.

I can deal shortly with Mr. Barton's second point. A hypothecation is not defined in the Stamp Act nor in the Transfer of Property Act either. Assuming that this instrument is a bill of exchange within the meaning of the definition in the Stamp Act, it seems to me it is not a letter of hypothecation within the meaning of the exemption. According to Mr. Barton the instrument is a formal declaration of trust. I do not think a formal declaration of trust can be treated as a letter of hypothecation within the meaning of the exemption. I quite agree that a fiscal enactment should be construed strictly and in favour of the subject, but it seems to me that whatever else the instrument may be, it is a mortgage-deed within the meaning of the definition in section 2 (17) of the Stamp Act.

SANKARAN
NAIR, J.
OLDFIELD, J.

SANKARAN NAIR, J.—I agree.

OLDFIELD, J.—I agree.

APPELLATE CIVIL.

Before Mr. Justice Miller.

M. R. SRINIVASA RAU (RESPONDENT), PETITIONER,

v.

PICHAJ PILLAI (PETITIONER), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 115—Civil Rules of Practice, Rule 277—Criminal Procedure Code (Act V of 1898), sec. 145—Pleader engaged in proceedings under —Whether disqualified to act for the other side in subsequent civil suit.

A pleader who had appeared for a party in proceedings under section 145 of the Code of Criminal Procedure must, before appearing for the opposite party in a subsequent civil suit flowing out of such proceedings, satisfy the Court that in acting in those proceedings he did not as a fact obtain from his then client any knowledge which would be of use to his present clients, or, that if he did obtain any such knowledge then, such knowledge is now, so to speak, public

* Civil Revision Petition No. 833 of 19 13.