

## FULL BENCH.

*Before Mr. Justice Wazir Hasan, Chief Judge, Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.*

THE JUNIOR SECRETARY TO THE BOARD OF REVENUE, UNITED PROVINCES AT ALLAHABAD.  
IN THE MATTER OF A DEED EXECUTED BY ONE  
THAKUR LALTA BAKHSH SINGH.\*

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15.

*Stamp Act (II of 1899) schedule I, articles 40 and 57—  
Security Bond—Surety executing bond in pursuance of  
order of appellate court undertaking to pay a certain sum  
in default of decree—Order carrying out the order in appeal  
and also hypothecating immovable property for its due  
performance—Stamp duty chargeable on such instru-  
ment.*

A court of appeal passed an order under order 41 rule 6(1), Civil Procedure Code, requiring security to be taken from the decree-holder for the restitution of any property which might be taken in execution of the decree and for the due performance of the decree or order of the appellate court. In compliance with the requisition made by the Court the security-bond in question was executed by the surety who hypothecated landed property to secure payment of a particular sum in case the decree-holder was made liable by the decree of the appellate court to pay means-profits and in case of his failure to discharge the liability.

*Held*, that the instrument must be deemed in the very nature of it to contain a personal covenant on the part of the executant to pay the sum stipulated in case the decree-holder failed to pay the same in pursuance of an order of the appellate court, if any. In addition to this covenant immovable property of the executant is also made security for the due performance of the covenant. This instrument therefore is a security-bond and is chargeable with a stamp duty of Rs. 5 under Article 57 of the Stamp Act even though the security-bond may also be a deed of mortgage. Article 40 of the Act is inapplicable *ex facie* because that Article relates to a mortgage deed simpliciter and by its own terms excludes a "security bond" from its operation and therefore

\*Civil Reference (Under Stamp Act) No. 1 of 1930.

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a mortgage-deed which is also a security bond is clearly not chargeable under Article 40 of the First Schedule of the Indian Stamp Act, 1899. *Lal Harihar Pratap Bakhsh Singh v. Bisheshar Bakhsh Singh* (1).

(*Per* RAZA, J. Article 57 of the Stamp Act should be read as making a special concession in favour *inter alia*, of mortgage deeds executed by sureties to secure the due performance of a contract. Such deeds have always been treated in this Court as security bonds liable to pay stamp duty under Article 57. To construe Article 57 otherwise would be subversive of the accepted legal principle that penal statutes and taxing statutes or fiscal Acts must be construed strictly and in aid of the subject and not against him.

The Government Advocate (Mr. *H. K. Ghosh*) for the Junior Secretary to the Board of Revenue-United Provinces.

Messrs. *D. K. Seth* and *K. N. Tandon*, for Thakur Lalta Bakhsh Singh.

HASAN, C. J :—The Board of Revenue under section 57 of the Indian Stamp Act, 1899 has stated a case and referred it to this Court for decision as to the amount of stamp duty chargeable on a security bond executed by one Lalta Bakhsh Singh on the 11th of March, 1927 in favour of the Registrar of this Court. The bond bears a stamp of Rs. 5. The Board of Revenue is of opinion that the bond in question is chargeable with *ad valorem* duty under Article 40 of the Indian Stamp Act, 1899. We have to decide as to whether the view taken by the Board of Revenue as to the amount of the stamp duty is correct and if it is not we have further to decide under what article of the same Act duty is chargeable on the bond in question.

The circumstances of the case are as follows :—

One Arjun Singh obtained a decree for possession of certain immoveable property against Jagmohan Singh from the original side of this Court. Jagmohan Singh preferred an appeal to this Court from the decree

mentioned above. The decree-holder initiated proceedings in execution for recovery of possession of the property decreed. Thereupon on the 25th of January, 1927, the judgment-debtor, Jagmohan Singh, made an application to the court of appeal praying that the property in dispute might be placed in charge of a receiver and the execution of the decree might be stayed. The court of appeal disposed of this application by requiring security to be taken from the decree-holder for the restitution of any property which might be taken in execution of the decree and for the due performance of the decree or order of the appellate court. This was done in accordance with rule 6(1) of Order XLI of the Code of Civil Procedure, 1908. In compliance with the requisition made by the Court the security-bond now in question was executed. Lalta Bakhsh Singh has hypothecated landed property to secure payment of the sum of Rs. 45,000 in case Arjun Singh was made liable by the decree of the appellate court to pay mesne-profits and in case of his failure to discharge the liability.

The question of law involved in the reference is the same which was involved in a previous reference by the Board of Revenue and which was decided by a Bench of three Judges of this Court consisting of my distinguished predecessor Sir LOUIS STUART, the late Mr. Justice GOKARAN NATH MISRA and myself. On that occasion the Court decided that the duty payable on such a bond was the duty prescribed by Article 57 of the Indian Stamp Act, 1899, and that the bond did not fall under Article 40 of the same Act—Vide *Lal Harihar Pratap Bakhsh Singh v. Bisheshar Bakhsh Singh* (1). In ordinary circumstances I should have thought that so far as this Court was concerned the matter was set at rest by the decision in that case but the Board of Revenue has again chosen to make a similar reference and the reason for this extraordinary

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action is that subsequent to the decision mentioned above which is dated the 8th December, 1927, the Board referred a similar case to the High Court of Judicature at Allahabad for decision. The reference was accordingly heard and decided on the 20th of March 1929 by the Honourable Mr. Justice KENDALL, the Honourable Mr. Justice YOUNG and the Honourable Mr. Justice KING. The learned Judges disagreed with the view which this Court had taken in the case mentioned above and came to the conclusion that a bond of such a nature as this was chargeable with duty under Article 40 of the First Schedule of the Indian Stamp Act, 1899, and not under Article 57 of the same Schedule. The object of the present reference therefore in substance is to obtain a review and a reversal of our previous decision.

A copy of the judgment of the learned Judges of the High Court at Allahabad has been placed before us. This judgment so far has not been published in any authorized law reports, but that is immaterial. Greatest respect is due to the opinion of the learned Judges and with a view to find grounds of concurrence with their judgment and of disagreement with my own in the previous case I have read the judgment of the learned Judges more than once but with due reference I am unable to accept their view and I still adhere to the opinion which I had formed on the previous occasion.

As already stated, the Board of Revenue is of opinion that Article 40 is applicable to this case and this is the view taken by the High Court at Allahabad also. It appears to me that the said article is inapplicable *ex facie*. The article relates to a mortgage deed simplicitor and by its own terms excludes a "security-bond" from its operation. Therefore a mortgage-deed which is also a security bond is clearly not chargeable under Article 40 of the First Schedule

of the Indian Stamp Act, 1899. The instrument before us must be deemed in the very nature of it to contain a personal covenant on the part of the executant to pay the sum of Rs. 45,000, in case the decree-holder. Arjun Singh, failed to pay the same sum of money in pursuance of an order of the appellate court, if any. In addition to this covenant immovable property of the executant is also made security for the due performance of the covenant. This instrument therefore is a security-bond.

At the hearing of this reference it was conceded that if the duty is not chargeable under Article 40 it is chargeable under no other Article than Article 57. Now Article 57 is as follows:—

“Security-bond . . .

“*or* mortgage-deed. . . . executed by a surety to secure the due performance of a contract.” It will be seen that a mortgage-deed of the nature described in the Article is mentioned only by way of an alternative to a security bond. It follows in my judgment that if the instrument in question is a security-bond it is chargeable with duty under Article 57 and this result is not affected by the fact that the security bond may also be a deed of mortgage. It is not every deed of mortgage which is chargeable with duty under Article 57. Only such a deed of mortgage is chargeable under that Article with duty as is of the nature described therein, but every security bond is chargeable under that Article alone. It may be mentioned that the amount of duty is the same whether the instrument is a security-bond or is a deed of mortgage of the nature described in the Article.

In the case previously decided by this Court the instrument then in question was treated as a mortgage-deed and the question raised for decision was as to whether it was “executed by a surety to secure the due performance of a contract.” In expressing my

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own opinion on that occasion I analysed the true nature of the whole transaction and came to the conclusion that there was a contract between the court and the decree-holder to secure the due performance of which the mortgage-deed was executed by the surety.

The learned Judges of the High Court in the case mentioned above seem to me to hold that there may be an agreement but there was no contract for the reason that the agreement was not enforceable by law. In support of the view that the agreement was not enforceable by law the learned Judges have stated two main reasons. The first is that in case an order for stay of execution upon furnishing security is made *ex parte* the order is liable to be set aside subsequently and it is also liable to be set aside or modified by way of review. But if there were a contract, the contract could not be rescinded or modified at the discretion of one party and without the consent of the other. The second reason is that neither the Judge personally nor the Secretary of State for India in Council could be sued for any relief arising out of that contract.

I presume that it will be readily admitted that there is nothing in the intrinsic nature of the agreement which would make it unenforceable by law. Clause (h) of section 2 of the Indian Contract Act, 1872, says :—

“An agreement enforceable by law is a contract.”  
Section 10 of the same Act is as follows :—

“All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.”

The agreement in the present case does not contain any element which may militate against the provisions of section 10 quoted above. There were competent parties, there was a free consent, there was

a lawful consideration, and there was a lawful object and no provision of the Indian Contract Act expressly declares such an agreement to be void. The agreement is therefore a contract within the meaning of section 10 of the Indian Contract Act, 1872.

As to the first reason given in the judgment of the learned Judges of the High Court it would suffice to say that the power of the court to rescind or modify the contract on sufficient causes being shown must be accepted as an implied term of the contract and the second party to the contract must be understood to have given his consent to the agreement on that term. The second reason is based on an assumption, if I may respectfully say so, that an occasion may arise for enforcing the contract by means of a suit or for claiming damages for the breach of it. In the circumstances of such a case as this, to my mind, no such occasion can ever arise. So far as the court is concerned it shall have performed its part of the agreement as soon as the security bond was executed and accepted and simultaneously the other party shall have performed its part of the agreement. The contract therefore becomes wholly executed and there can be no question of a suit for specific performance. To my mind we are not justified in assuming that the court will act capriciously. For the same reasons there can be no occasion for a claim for damages.

I have already said that when the court rescinds or modifies the contract it does so in the exercise of its power inherent in the contract itself. Reference is made to the provisions of the Judicial Officers' Protection Act, 1850, with a view to show that the Judge entering into the contract is protected from being sued in any civil court for any act done by him in the discharge of his judicial duty. To my mind the fact that the Judge cannot be sued in any civil court by reason of the provisions of a special statute does not at all affect the legal character of the contract. In my judgment the Act has no bearing whatsoever on the case of a contract into

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which a Judge may enter according to the general law of the land. It is further pointed out in the judgment of the High Court at Allahabad that a suit founded on such a contract could not be instituted against the Secretary of State for India in Council. Here again I am unable to see how the immunity of the Secretary of State for India in Council from being sued on a contract like this affects the question whether this transaction in its nature is a contract or not.

It will be readily admitted that in all events the matter is not free from doubt and difficulty. As observed by Sir LOUIS STUART in the case mentioned above, "the practice in this Court and in the court of Judicial Commissioner has been uniform upon this point. Both courts have always treated such mortgage-deeds as liable to pay stamp duty under article 57." I am therefore not prepared to overrule the existing practice and set a new line of action on a question purely of fiscal interest to the Crown.

My answer to the reference again is that the instrument in question is chargeable with duty under Article 57 and not under Article 40 of the First Schedule of the Indian Stamp Act, 1899.

RAZA, J.—I am in full agreement with the judgment of the Hon'ble the CHIEF JUDGE. In my opinion also the instrument in question is a security bond chargeable with duty under Article 57 and not under Article 40 of the First Schedule of the Indian Stamp Act, 1899. A security bond chargeable with duty under Article 57 may or may not be a mortgage-deed. A mortgage-deed of the nature described in Article 57 is mentioned only by way of an alternative to a security bond. Every deed of mortgage is not chargeable with duty under Article 57. That mortgage-deed only is chargeable under that Article which is of the nature described therein. Every security bond is however chargeable under the said Article. I am not prepared to hold that a security



bond chargeable with duty under Article 57 has nothing to do with a mortgage although called a mortgage-deed. Article 57 should, in my opinion, be read as making a special concession in favour *inter aliu*, of mortgage-deeds executed by sureties to secure the due performance of a contract. Such deeds have always been treated in this Court and also in the late Court of the Judicial Commissioner of Oudh as security bonds liable to pay stamp duty under Article 57. To construe Article 57 otherwise would, in my opinion, be subversive of the accepted legal principle that penal Statutes and taxing Statutes or fiscal Acts must be construed strictly and in aid of the subject and not against him.

I would, therefore, answer the reference in the manner in which it has been answered by the Hon'ble the Chief Judge.

SRIVASTAVA, J. :—It seems to me very doubtful if an order of the Court directing the respondent to be given possession of the property decreed in his favour on his furnishing security for a certain amount fixed by the Court, can be properly regarded as constituting or giving rise to a contract between him and the Court. If it cannot be so regarded then it is not possible to treat the mortgage-deed executed by a surety in pursuance of the aforesaid order as one "to secure the due performance of contract" within the meaning of Article 57 of the Stamp Act. But I feel weighed down by the consideration referred to by Sir LOUIS STUART, C.J. in *Lal Harihar Pratap Bakhsh Singh v. Bisheshar Bakhsh Singh* (1) that it has been a long established practice in this province both in the late Judicial Commissioner's Court and in this Court to treat such deeds as governed by Article 57 of the Stamp Act. I also feel that the Stamp Act being a fiscal enactment, its provisions should, as far as possible, be construed in favour of the subject. Under the circumstances and being in the

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minority of one in the present Bench, I do not feel sufficiently strong to record my dissent from the decision of the Full Bench of this Court in *Lal Harihar Pratap Bakhsh Singh v. Bisheshwar Bakhsh Singh* (1).

With these remarks I concur in the order proposed by the Hon'ble CHIEF JUDGE.

BY THE COURT:—The answer to the reference is that the bond in question is chargeable with stamp duty under Article 57 of the First Schedule of the Indian Stamp Act, 1899.

(1) (1927) I.L.R., 3 Luck., 298.

### APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Chief Judge, and Mr. Justice Bisheshwar Nath Srivastava.

SANT BAKHSH AND ANOTHER (PLAINTIFFS-APPELLANTS) v. BHAGWANDIN SINGH APPLICANT AND ANOTHER, (DEFENDANT) (RESPONDENTS.)\*

*Civil Procedure Code (Act V of 1908), order XXXIV, rules 2(2) and 3(1)—Mortgage—Foreclosure decree in 1897—Defendant allowed to deposit mortgage money within six months and in default plaintiff entitled to apply for final decree—Application for final decree not made by plaintiff—Defendant offering in 1929 to deposit mortgage money and praying for delivery of possession—Application, maintainability of.*

Held, that under the old provisions of the Code of Civil Procedure a defendant could ask for extension of time upon good cause being shown in case the plaintiff made an application for a final decree debarring the defendant from all right to redeem, but now, when no such application is made, the defendant can make an application for a final decree in his favour at any time before a decree, debarring him from all right to redeem, is passed.

Where, therefore, a mortgagee obtained a decree for foreclosure in 1897 in terms of section 86 of Act IV of 1882 and under that decree the defendant was allowed to deposit the mortgage money within a period of 6 months and in default

\*Second Civil Appeal No. 135 of 1930, against the decree of Pandit Bansidhar Misra, Subordinate Judge of Bara Banki, dated the 10th of March, 1930, reversing the decree of Babu Tirbeni Frasad, Munsif, Fatehpur at Bara Banki, dated the 19th of October, 1929.

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