

KERALA HIGH COURT

Board of Revenue

Vs

Sellwell Tea Agencies

C.M. Ref. No. 15 of 1982

(K. Bhaskaran, Ag. C.J., M.P. Menon and P.C. Balakrishna Menon, JJ.)

09.10.1984

JUDGEMENT

M.P. Menon, J.

1. This is a reference made by the Board of Revenue under Section 55(1) of the Kerala Stamp Act, 1959.
2. The Lord Krishna Bank Ltd. was the foreman of a Kuri and M/s. Sellwell Tea Agencies, a subscriber. The ticket was prized at the 25th installment. Under Section 27(1) of the Kerala Chitties Act, 1975 the foreman was bound to take reasonable security for the due payment of future subscriptions before allowing the subscriber to draw the prize amount. The security taken by the Bank from the Agencies was in the form of the following letter :-

Dear Sirs,

In consideration of the sum of Rs. 25,000/- paid by you to me (receipt whereof has been acknowledged in a separate receipt dated 18-2-1980 executed by me to you) towards the prize amount due to me in respect of ticket No. 27/27 subscribed to by me in the Chitty No. 1/78 conducted by you, in accordance with the terms and conditions of the variola, I do hereby, as beneficial owner, transfer to you all my rights in the debt due and owing by you on the fixed deposit receipt No. 8/80 dated 18-2-1980 for Rs. 17500/- issued by you to me on today and all interest due and/or to become due in respect of the said fixed deposit receipt and/or renewal of the said deposit and all thereof to hold the same as security for the due and regular payment of the future subscription payable by me to you in respect of the said ticket from 26th installment of the chitty till its termination in accordance with the terms and conditions of the said variola.

You may realize all or any amounts payable by me arising from my default in the due and regular payment of the subscriptions in accordance with the terms and conditions of the aforesaid variola in respect of the said chitty as a first charge on the amounts that may be due to me in respect of the said fixed deposit receipt and/or any renewal thereof. I do

hereby hand over to you the said fixed deposit receipt in token of the transfer.

Yours faithfully,

(Sd)

CochinFor Sellwell Tea Agencies

18-2-1980(Partner)

The Sub-Registrar thought that the letter was a "bond" within the meaning of Section 2(a) of the Stamp Act, chargeable with duty under Article 13 of the Schedule to the Act. The District Registrar caused enquiries to be made and found that the future instalments payable amounted to Rs. 8.750/-. In his opinion, the transaction was "a mortgage of moveables" for the said sum, and stamp duty was accordingly payable under Article 37. The Board of Revenue concurred with the above opinion, but wanted a decision from this Court as to whether the document could be construed as a mortgage deed for the purposes of Article 37 or Article 50, or as a bond for the purposes of Article 13.

3. The first question to be considered, therefore, is whether the letter could be treated as a "mortgage deed" under Section 2(n). The said sub-section reads : -

"(n) "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 engagement, one person transfers, or creates to, or in favor of, another, a right over or in respect of specified property;"

A mortgage deed is thus an instrument whereby a right over or in respect of specified property is transferred or created; and such transfer or creation must be for one or other of the following purposes : -

- (i) for securing money advanced or to be advanced by way of loan;
- (ii) for securing an existing or future debt; and
- (iii) for securing the performance of an engagement.

The letter in question, as already seen, was given for the purpose of securing "due payment of future subscriptions", as required by Section 27(1) of the Chitties Act-In view of the decision of bench of five judges of this Court in *Janardhana Mallan v. Gangadharan*¹ it must now be taken as settled law that a promise to pay future subscriptions by a prized subscriber of a chitty does not amount to a promise to repay a loan or a debt, because the transaction does not involve payment of a loan by the foreman or the incurring of a debt by the subscriber. This is what this Court had said (at p. 194) : -

"In the light of the above discussion we do not think it would be possible to say that on entering into the chitty agreement a debt is incurred by the subscriber for the amount of all the future installments and in respect of such amount there is a debtor-creditor relationship. As we have stated earlier in this judgment the chitty variola only embodies a promise to pay on future dates. That is not a promise to repay an existing debt, but to pay in discharge of a contractual obligation. For similar reasons neither the prizing of the chitty nor

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the execution of the security bond would give rise to a debt, for, the prize amount is not received as a loan, but as of right by virtue of the terms of the contract between the parties. We reiterate that the provisions of the relevant Acts relating to chitties to which we have made advertence also only indicate this."

It can therefore be safely said that even if the letter dated 18-2-1980 involved any transfer or creation of right in respect of property, that was not for purposes enumerated as (i) and (ii) above. At the most, it can only be treated as transferring or creating rights in favor of the foreman for securing the performance of an engagement i.e. for purpose No. (iii).

4. The next question is whether the letter had in fact transferred or created rights over or in respect of "specified property". The subscriber had no doubt stated that :-

"I do hereby transfer to you all my rights in the debt due on the fixed deposit receipt, and all interest due"

and that the foreman was to :-

"hold the same as security for the regular payment of the future subscriptions".

but what was really done was only to authorize the foreman bank to adjust amounts of future subscriptions, if and when defaulted, from the amount of Rs. 17500/- given on fixed deposit. The second paragraph of the letter contained a clear authorization to :-

"realize all or any amounts payable by me arising from my default.... as a first charge on the amounts that may be due to me in respect of the fixed deposit receipt"

The "property" over which or in respect of which rights were attempted to be transferred or created in favor of the foreman was thus money deposited with him or handed over to him.

5. In *Rishidev Sondhi v. Dhampur Sugar Mills*² It was contended that certain agreements relating to deposit of moneys in courts could be treated as instruments whereby rights over specified property were transferred or created. The contention was :-

"The specified property may be immovable or moveable. The latter includes cash or equivalent of cash. In the cases under consideration specific sums have been offered as security. The amounts deposited with the other party are, therefore, 'specified property' within the meaning of Section 2(17), Stamp Act, and the documents in question come under the category of mortgage deed for purposes of stamp duty."

The Allahabad High Court declined to accept this contention and held that money was

² AIR 1947 All 190 (FB)

not moveable property, and that the instruments in question were not mortgage deeds. This view

was endorsed by the Supreme Court in *Board of Revenue v. A. M. Ansari*³

6. In Reference under Stamp Act (1892) ILR 15 Madras 134 (FB) the question was whether an agreement by an arrack renter to abide by the terms and conditions of the license which required "deposit in cash, Government notes or stock notes" a sum equal to three months' rental as security for due performance, was a mortgage deed, for the purposes of the Stamp Act; and the Court held that as it created no interest in the deposit in favor of the Government, it could not be regarded as a mortgage deed. This view was also noticed with approval by the Supreme Court, in Ansari's case (AIR 1976 Supreme Court 1813).

7. As we read the letter dated 18-2-1980 it amounted to no more than authorizing the foreman to pay himself out of the money deposited with him, the amounts due from the subscriber by way of future subscriptions in the Kuri, in case payments were defaulted. The money was not moveable property, nor was there any transfer of any interest therein, in favor of the foreman. It was, on the authorities cited, not a mortgage deed.

8. The matter can be looked at from another angle also. Stamp duty chargeable under Articles 37 and 50 of the Schedule depends upon the amount secured by the mortgage deed. If the deed does not specify the amount, can it be said that there is a deed attracting the provisions of the two Articles? A person who executes such a document may be prosecuted under Section 60 or Section 63 of the Act, But has the Collector power under the Act to ascertain the amount secured, with a view to bring it to tax? In the absence of specific power under the statute can he do what, under the statute, the parties themselves must do? In the matter of Muhammed Mazaffar All (1922) ILR 44 Allahabad 339 : (AIR 1922 Allahabad 82 (2)) (FB) the "executant of a gift deed had not set forth the value of the property in the deed, and the Court held that such an instrument was not chargeable to duty. The court said : -

"According to Article 33 of the Schedule an instrument of gift, such as the one before us, should be stamped with the same duty as a conveyance, for a consideration equal to the value of the property set forth in such instrument. We are satisfied that the words "as set forth in such instrument" refer back to the word "value", and not to the word "property." We are confirmed in this view by the authority quoted in the reference before us, reported in (1885) ILR 8 Madras 453 (FB). In the present instance there is no "value" set forth in the said instrument. No doubt this is a contravention of section 27 of the Indian Stamp Act and, if it be found that the omission to state the value of the property conveyed was done with intent to defraud the Government, a prosecution will lie against the person who executed the instrument, under section 64 of the Indian Stamp Act. The case seems to us strictly analogous to one which would arise if the executant of a deed of gift chose to set a purely nominal value on the property conveyed and to stamp the instrument accordingly. For the purposes of the Stamp Law the valuation given in the instrument would have to be accepted. If there was an intentional

³ AIR 1976 SC 1813

undervaluation, then a prosecution would protect the Government against the attempted fraud There is no provision in the law authorizing the Collector to do what he has done in the present instance, namely, to ascertain the value of the property with a view to causing

the instrument to be stamped with reference to the value thus ascertained."

The instrument or the letter here had not obviously specified the amount for which security was offered; and if the above view is correct, even the estimate or assessment made by the District Registrar was incapable of bringing the document under Articles 37 and 50.

9. The letter cannot also be regarded as a 'bond' for the purposes of Article 13 because a bond, as defined in Section 2(a), is an instrument whereby an obligation to pay is created. The obligation of a prized subscriber to pay future instalments arises from the chitty variola; a pre-existing obligation cannot be the creation of an instrument subsequently executed.

10. The last question referred is whether the letter attracts no stamp duty at all. The point was not argued with reference to all the other relevant provisions of the Act. Nor are we inclined to answer such a general or omnibus question for which no foundation is seen laid in the statements of the case drawn up under Sections 54 and 55.

11. On the questions raised, therefore, our decision is that the letter dated 18-2-1980 cannot be regarded as a mortgage deed chargeable to stamp duty under Articles 37 and 50 of the Schedule or as a bond covered by Article 13. A copy of this judgment will be forwarded to the Board of Revenue under the Seal of the Court and the signature of the Registrar, as required by Section 57(2).

Reference answered accordingly.