

A.F.R.
RESERVED

Case :- REFERENCE AGAINST MISC. ACTS. No. - 1 of 2016

Applicant :- Kotak Mahendra Bank Ltd.

Opposite Party :- State Of U.P. And Others

Counsel for Applicant :- Nimai Das,S.C.

Counsel for Opposite Party :- Apoorva Tiwari,A.K.Rai,Sudeep
Harkauli

Hon'ble Bharati Sapru,J.

Hon'ble Suneet Kumar,J.

Hon'ble Saumitra Dayal Singh,J.

This is a reference made by the Chief Controlling Revenue Authority under Section 57 of the Indian Stamp Act, 1899¹. On the consent of the parties, the questions referred were remoulded as follows:

“Whether the deed executed by the applicant with the underlying securities taken for consideration would be chargeable with duty under Article 62(c) of Schedule 1-B of the Indian Stamp Act or not ?

Or

Whether it would be covered under Article 23 (a) or (b) of the Schedule 1-B of the Act ?”

Statement of the case submitted by the Board of Revenue shows that the document under reference is a Deed of Assignment (**Instrument**) executed at Mumbai, between Kotak Mahindra Bank, a banking company within meaning of the Banking Regulation Act, 1949², registered under the Companies Act, 1956 (**Assignee**) and State Bank of India, a statutory corporation incorporated under the provisions of State Bank of India Act, 1955 (**Assignor**);

Assignor in the course of its business advanced financial facilities to various borrowers, who in turn executed agreement/instrument (s) of mortgage in lieu thereof.

1 Stamp Act

2 B.R. Act 1949

Debts at Rs.177.49 crore were outstanding towards principal, interest and other amount due and payable by the borrowers to the **Assignor**. The **Assignee** agreed to purchase and acquire the debts from the **Assignor** with all rights title and interest of the **Assignor** and underlying financial instruments, for a consideration agreed by the parties.

By the **Instrument**, the **Assignor** transferred 48 debts of defaulting borrowers to the **Assignee** at Rs.31.06 crores along with the underlying securities detailed in Schedule “A”, “B” and “C” to the **Instrument**. When a photocopy of the **Instrument** was brought to the notice of the Collector, a doubt arose about its true nature. Thereupon, the matter came up before the Board of Revenue. Having found that an important question of law was involved, the case was referred to the High Court under the Stamp Act for decision on the question already mentioned.

Before proceeding to decide the question referred to us, it appears appropriate to mention, briefly, the principles applicable to interpretation of a document/**Instrument** required to be stamped. In order to determine whether a **Instrument** is sufficiently stamped, the Court must look at the entire document as a whole for finding out the true character and the dominant purpose of the instrument³.

We have perused the **Instrument** with the assistance of learned counsel for the parties. Its relevant portion is extracted:

1.1 The Assignor hereby covenants that it owns the Debts

3 Hamdard Dawakhana (Wakf). Delhi vs. State of Delhi, AIR 1968 Delhi 1 (FB);
Balkrishna Bihari Lal vs. Board of Revenue M.P. and others, AIR 1970 (MP) 74 (FB)

and all the right, title and interest alongwith underlying assets and security conferred by the Financial Instruments, free and clear of all liens, charges, and other encumbrances, free from any right, title or interest of any other person in any manner.

1.2 In consideration of the Assignee having paid to the Assignor the consideration, as mentioned in the Agreement to Assign on or before the execution of these presents the Assignor doth hereby irrevocably, unconditionally and absolutely assign, transfer and release without recourse unto the Assignee and the Assignee hereby acquires and takes over from the Assignor:

1.2.1 the Debts and all the Assignor's right, title or interest and benefit in and to the Debts and all the rights, title and interest of the Assignor under the Financial Instrument (if any), whether by way of first or second charge, if any (in any form and in any manner whatsoever), or by way of hypothecation or mortgage, or by way of absolute or pari passu charge, absolutely and forever to the end and intent that the Assignee hereafter shall be the full and absolute legal and beneficial owner thereof and legally and beneficially entitled to demand, receive and recover the Debts in its own name and right.

1.2.2 all legal proceedings by the Assignor relating to the Debts and pending on the date hereof, shall stand assigned to the Assignee and shall continue as per the directions of the Assignee at the cost and risks of assignee and from the date hereof shall be enforceable by the Assignee. On such transfer, the Assignee shall stand subrogated in place of the Assignor in respect of the Debts.

1.2.3 It is clarified that the liabilities that may arise in future on account of action or omission of

the Assignor (in relation to the Debts), prior to the date of this Agreement are not acquired by the Assignee.

The learned Senior Counsel appearing for the Kotak Mahindra Bank would submit that the **Instrument** is in consonance with the banking policy framed by the Reserve Bank of India (RBI) permitting transfer of debts, inter se, between banks. The **Assignee** has acquired a right by transfer of “account receivable”, an asset in the hands of **Assignor**. Reliance was placed on *ICICI Bank Limited vs. Official Liquidator of APS Star Industries Ltd. & others*⁴, to contend that the debt at the hands of the Bank is an asset. The Bank (**Assignor**) can transfer it along with the mortgagee's rights in the mortgaged property without in any manner affecting the rights of the borrower. Relevant paragraph is extracted:

“46. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the borrower(s). The moment ICICI Bank Ltd. transfers the debt with underlying security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee). At this stage, we wish to once again emphasize that debts are assets of the

4 (2010) 10 SCC 1

assignor bank. The High Court(s) has erred in not appreciating that the assignor bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned Deed of Assignment transfers any obligations of the assignor towards the assignee.”

(emphasis supplied)

A single instrument may embody several purposes. But what is relevant for the purpose of the Stamp Act, is the dominant purpose of the instrument. If we look at the **Instrument**, before us, it is clear that the dominant purpose was to transfer/assign the debts along with the underlying securities, thereby, entitling the **Assignee** to demand, receive and recover the debts in its own name and right. The question that would arise is under which Article of Schedule 1-B of the Stamp Act, as amended in its application to Uttar Pradesh, the instrument would be charged to stamp duty i.e. Conveyance {No. 23} or Transfer {No. 62(c)}.

Article 11 would imply that an instrument of “assignment” can be charged to stamp duty either as:

- (i) Conveyance (No. 23)
- (ii) Transfer (No. 62)
- (iii) Transfer of Lease (No. 63)

The agreement is not a 'Transfer of Lease', therefore, it is either 'Conveyance' or 'Transfer'.

Conveyance is defined under Section 2(10) which for our purpose is as follows:

“**Conveyance**”.— “Conveyance” includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for [by Schedule I, Schedule I-A or Schedule I-B] [as the case may be];

[Explanation.— xxx xxx xxx xxx
Conveyance is chargeable to stamp duty under Article 23 which
reads as follows:

- 23. Conveyance** [as defined by Section 2(10) not being a
Transfer charged or exempted under No. 62—
- (a) xxx xxx xxx xxx
 - (b) xxx xxx xxx xxx

Transfer charged or exempt under Article 62, therefore, is not
charged to stamp duty as conveyance. Transfer reads as follows:

- 62. Transfer** (whether with or without consideration)—
- (a) xxx xxx xxx xxx
 - (b) xxx xxx xxx xxx
 - (c) of any interest secured by a bond, mortgage-deed
or policy of insurance—
 - (i) xxx xxx xxx
 - (ii) xxx xxx xxx
 - (d) xxx xxx xxx xxx
 - (e) xxx xxx xxx xxx

The term 'Conveyance' denotes an instrument in writing by
which some title or interest is transferred from one person to other. It
would appear from the definition that actual transfer of property is an
essential feature of “conveyance”. The present case does not appear to
be of that type. Emphasis may be laid on the words “on sale” and “is
transferred” used in the definition of the expression “Conveyance”.
These words are significant. They denote that the document itself
should create or vest a complete title in the subject matter of the
transfer, in the vendee.

A perusal of the various clause of the instrument would show
that the debt which is an asset in the hands of the **Assignor** was sold
and assigned absolutely to the **Assignee**. The deed stipulated, inter

alia, that the **Assignee** shall have all the rights and obligations under the financial instruments relevant to such debts as if they were executed by the debtors concerned in its favour. Under the instrument in question, in substance and purpose, primarily the rights of the **Assignor** to recover the debts secured by the underlying securities has been transferred. The requirement of conveyance or sale could not be said to be satisfied.

Debt is purely an intangible property, like, intellectual property right or goodwill, as against documentary intangibles, viz., bill of lading, promissory note or bill of exchange, which has to be claimed or enforced by action and not by taking physical possession thereof, in contrast to immovable and movable property.

On a plain reading of Article 23, it is evident that the said Article is applicable in the cases where any immovable or movable property is sought to be transferred. The restricted applicability of Article 23 is explicitly clear from opening words of the entry, whereby, transfers charged or exempt under Article 62 of Schedule 1-B are excluded from the purview of Article 23. Thus, where a transaction does not affect the transfer of any immovable or movable property under Article 23 of Schedule 1-B cannot have any applicability. Article 62(c) deals with chargeability of stamp duty on transfer of an interest secured by a bond or mortgage deed. In the instant case, debt along with underlying securities is an interest secured by bonds and/or mortgages. Thus, transfer of debts along with underlying securities would, in our considered opinion, be chargeable under Article 62(c).

The next argument of the State that is required to be considered is whether transfer of debts, accompanied by underlying securities is

sale/transfer of immovable property. The agreement in the instant case, is an “**Instrument**” defined in Section 2(14) of the Stamp Act, seeks to transfer the debts along with rights/interest in the security underlying such debts. No immovable property has been transferred or sold. Merely the right under the contract to recover the debts has been transferred by way of assignment deed. The **Assignor** could have transferred only those rights, it had in the underlying securities. Since the borrower(s) had never transferred the title in the immovable property given in security to the **Assignor**, therefore, the latter, (by the instrument in question), could merely transfer its rights i.e. mortgagee's rights in the property to recover the debts.

The **Assignor** never had any title to the underlying securities. It merely had the right to enforce the security interest upon default of the borrower(s) in repayment of secured debts on being classified by the **Assignor** as Non Performing Asset (NPA). In assigning the debts with underlying security, the **Assignor** only transferred that asset for a particular price whereafter it no longer remained entitled to enforce its rights or recover anything from the borrower(s) against the debt/s. The right so transferred was primarily the right to recover the debts, in accordance with law, by proceeding against the underlying security furnished by the bonds/mortgage-deed(s). Under the **Instrument** that right could be exercised only in the event of default committed by the debtor to discharge the debt, to the **Assignor**.

An argument was sought to be advanced by the learned Additional Advocate General for the State that at the time of registration of the Deed under the Bombay Stamp Act, Rupees One lakh was paid towards stamp duty under the said Act, on the basis of

remission notification which treated the transfer in question to be a transfer of movable property. Therefore, the assignee bank i.e. Kotak Mahindra Bank cannot now contend that the instrument in question is chargeable under Article 62(c).

Submission of the State, in our opinion, is misconceived and unsustainable. In construing a fiscal statute, one must have regard to the strict letter of the law and not to the spirit of the statute or the substance of law. If the revenue satisfies the Court, the case falls strictly within the strict language of the charging provision, the subject will be taxed; if on the other hand the case is not so covered, no tax can be imposed on inference or trying to probe into the intention of the legislature (*vide AV. Fernandez Vs. State of Kerala*⁵). There can be no presumption or assumption as to tax (*vide Sales Tax Commissioner Vs. Modi Sugar Mills*⁶). In absence of any bad faith or fraud and the parties having acted in terms of the document, the taxing statute has to be applied in accordance with the legal rights of the parties to the transaction. In this case the transaction is embodied in a document namely the **Instrument**. As noted above, it cannot be said that the transaction was adopted as a cloak to conceal a different transaction of sale of any property. Duty has to be charged in accordance with the legal rights of the parties to the transaction. “Substance of the matter” has to be distinguished from the strict legal position (*vide CIT Vs. Motors & General Stores (P) Ltd.*⁷)

The instrument is either chargeable to duty or not. There is no equity or estoppel as to tax (*vide Commissioner of Income Tax,*

5. AIR 1957 SC 657

6. AIR 1961 SC 1047

7. AIR 1968 SC 200

*Madras Vs. V. Mr. P. Firm Muar*⁸) No liability of tax or fee can be imposed on alleged consent or acquiescence in absence of statutory sanction for imposition of tax (vide *District Magistrate, Haridwar Vs. Harish Malhotra*⁹). The law on the subject of stamp is all together, the matter of positive juris which involves nothing by principle or by reason, but depends all together on the language of the legislature.

For the reasons, herein above, we answer the question by holding that the document(s) under reference is an instrument of assignment chargeable with stamp duty under Article 62(c) of Schedule 1-B of the Stamp Act.

Let papers be returned to the Board of Revenue with the above answer. Parties shall bear their own costs.

Reference answered.

Order Date :- 9 February 2018

Mukesh Kr.

(Saumitra Dayal Singh,J.) (Suneet Kumar,J.) (Bharati Sapru,J.)

8. AIR 1965 SC 1216 Para 13

9. (2015) 11 SCC 513 Para 14