

MADRAS REFINERIES LTD.

v.

CHIEF CONTROLLING REVENUE AUTHORITY, BOARD OF
REVENUE, MADRAS

January 5, 1977

[A. N. RAY, C.J., M. H. BEG AND P. N. SHINGHAL, JJ.]

Indian Stamp Act, 1899—Loan Agreement and Deed of Trust and Mortgage executed on the same day—Payment of stamp duty on which document to be paid—Tests for deciding.

The appellant company executed a Loan and Note Purchase Agreement with a foreign bank. Under that agreement the appellant was to authorise the creation and issuance of secured notes, Series A and B, and the Notes were to be issued under and secured by a Deed of Trust and Mortgage between the Company and the Bank. The Deed of Trust and Mortgage stated that as the appellant was in the process of constructing a refinery for the refining of crude oil and deemed it necessary to borrow money from time to time to finance such construction and to issue its Notes therefor, and to mortgage and charge its properties to secure the payment of such Notes, it executed the Deed of Trust and Mortgage as Security in accordance with the terms and conditions of Article 2 of the Deed of Trust and Mortgage to secure the due payment of the principal and the premium, if any, and the interest on the Notes, and of all other monies for the time being and from time to time owing on the security of the indenture and on the Notes and the performance by the Company of all of its obligations thereunder. It was also agreed that the Notes shall be secured and shall have the other terms and conditions provided in the agreement and shall be guaranteed by the President of India pursuant to the terms of the Guarantee Agreement. The Guarantee Agreement states that the President of India, as the guarantor, unconditionally guaranteed as primary obligor and not as surety merely, the due and punctual payment from time to time of the principal as well as interest stated in the Agreement. The obligations of the guarantor were absolute and unconditional under any and all circumstances and were not to be to any extent or in any way discharged, impaired or otherwise affected, except by performance thereof in accordance with the terms thereof. It was also provided that each and every remedy of the Trustee shall be cumulative and shall be in addition to any other remedy given therein or under the mortgage or any of the other collateral or now or hereafter existing at law or in equity or by statute. The Guarantee Agreement was executed on the same day as the Deed of Trust and Mortgage between the President of India and the foreign bank as a Trustee.

The High Court decided that stamp duty was chargeable on the Trust and Mortgage Deed under Art. 40(b) of Schedule I to the Act.

In appeal to this Court it was contended that it was the Guarantee Agreement which was the principal and primary security and that the Deed of Trust and Mortgage was a collateral or auxiliary security and as such stamp duty was payable under Art. 40(c) and that the Guarantee Agreement was exempt from duty under s. 3 and debentures under Art. 27.

Dismissing the Appeal,

HELD : (1) It is the real and true meaning of the deed of Trust and Mortgage and the Guarantee Agreement which has to be ascertained irrespective of the description given by the parties. [568 E]

(2) The Trust and Mortgage Deed was executed before the execution of the Guarantee Agreement though both of them were executed on the same day. It was the Deed of Trust and Mortgage which was the security for the

A loan though the loan was also guaranteed by the President in terms of the Guarantee Agreement. [568 G-H]

(3) The terms and conditions of the Guarantee Agreement cannot detract from the basic fact that the Deed of Trust and Mortgage was executed first in point of time and was the principal or the primary security for the loan. The Deed of Trust and Mortgage was clearly the principal or the primary security and could not be said to be a collateral agreement. [569-H]

B (4) The Deed of Trust clearly stated that the terms "Collateral Agreements" shall mean the Guarantee Agreement and the Undertaking. [570 A-B]

(5) The Guarantee Agreement was not an instrument of sale, mortgage or settlement and did not fall within the purview of s. 4(1) of the Act. [571 E-F]

C (6) There is no justification for the contention that the debentures were the principal instruments and not the Deed of Trust and Mortgage. The secured notes were issued under and secured by the Deed of Trust and Mortgage. The notes were issued in consequence of and on the security of the Deed of Trust and Mortgage. [571 H, 572 A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 709 of 1975.

D (Appeal by Special Leave from the Judgment and Order dt. 9-10-74 of the Madras High Court in Referred Case No. 4 of 1968)

P. Ram Reddy, C. Ramakrishna and A. V. V. Nair, for the Appellant.

V. P. Raman, A. V. Rangam and Miss A. Subhashini, for the Respondent.

E The Judgment of the Court was delivered by

SHINGHAL J.—This appeal by special leave arises out of the decision of the Madras High Court dated October 9, 1974, on a reference by the Chief Controlling Revenue-authority under section 57 of the Indian Stamp Act, 1899, hereinafter referred to as the Act. The Board of Revenue, Madras, which was the Chief Controlling Revenue-authority, initially stated the case raising the following questions for decision,—

F (a) Whether the decision of the Board of Revenue that the instrument relating to the Deed of Trust and Mortgage would attract the levy of a Stamp Duty as laid down in Article 40(b) of Schedule I of the Indian Stamp Act and that the debentures would be exempted from the levy of stamp duty is correct or not; and

G (b) Whether the claim of the Respondent herein that the stamp duty is payable on the debenture under Article 27(a) and on the Deed of Trust and Mortgage under Article 40(c) is tenable or not?

H The High Court directed the Board of Revenue to refer three additional questions, but ultimately took the view that the additional questions did not really arise in the case. It answered the first question in

favour of the Revenue and the second question against the Madras Refineries Limited, hereinafter referred to as the Company. The Company feels aggrieved and has come up in appeal to this Court. It will be enough to state those facts which bear on the controversy before us.

The Company was incorporated under the Indian Companies Act, 1956, as a public limited company. An agreement known as the Loan and Note Purchase Agreement was executed between the Company and the First National City Bank and six others on December 20, 1966, by which the Company agreed to authorise the creation and issuance of \$ 14,880,000 (U.S.) principal amount of its 5% secured notes Series 'A', and \$ 7,440,300 (U.S.) principal amount of its 5½% secured notes Series 'S', and the sale of, or the borrowing to be evidenced by such Notes in accordance with the terms and provisions of the agreement. The Notes were to be issued under and secured by a Deed of Trust and Mortgage between the Company and the First National City Bank. It was also agreed that the Notes shall be secured and shall have the other terms and provisions provided in the agreement and shall be guaranteed by the President of India pursuant to the terms of a "Guarantee Agreement", in the prescribed form. We shall have occasion to refer to the relevant clauses of the Loan and Note Purchase Agreement, the Deed of Trust and Mortgage and the Guarantee Agreement as and when necessary. The Deed of Trust and Mortgage and the Guarantee Agreement were executed between the President and the First National City Bank (as Trustee) on June 15, 1967. In the meantime the Company made an application to the Collector under section 31 of the Act for opinion as to the stamp duty with which the Deed of Trust and Mortgage was chargeable, and the Collector referred the matter to the Board of Revenue. The Board decided on June 28, 1967 that the duty was chargeable on the Trust and Mortgage Deed under Article 40(b) of Schedule I to the Act. The Company paid Rs. 37,66,500/- as stamp duty under protest, stating that it would move the Board for a reference of the controversy to the High Court. The Trust and Mortgage Deed was registered on June 30, 1967, and the 'A' series debentures were issued the same day. The Company applied to the Board of Revenue to state the case to the High Court. 'B' series debentures were issued on June 28, 1968. The case was stated on March 28, 1969 and was decided by the impugned decision of the High Court dated October 9, 1974.

It has been argued by Mr. Ram Reddy for the appellant Company that the Guarantee Agreement was the principal and primary security, and the Deed of Trust and Mortgage was a collateral or auxiliary security and that the stamp duty on the Deed of Trust and Mortgage was payable in accordance with article 40(c). It has been urged that Guarantee Agreement was exempt from duty under section 3 of the Stamp Act and the debentures were exempt under article 27.

The controversy centres round the question whether the Guarantee Agreement could be said to be principal or primary security?

- A** Mr. Ram Reddy has invited our attention to the following passage in Sergeant on Stamp Duties and Companies Capital Duty, sixth edition, page 6,-

B "Leading and principal object.—With reference to the stamp duty upon instruments generally, it is a well settled rule of law that an instrument must be stamped for its leading and principal object, and the stamp covers everything accessory to that object.

In *Limeer Asphalte Paving Co. v. I. R. C.*(¹) it was stated :—

C "In order to determine whether any, and if any, what stamp duty is chargeable upon an instrument the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although they may have believed that its effect and operation was to create a security mentioned in the Stamp Act, and they so declare."

D This appears to be a correct statement of the law. We have therefore to determine the real and true meaning of the Guarantee Agreement and to decide whether it could be said to be the principal and primary security.

E The Loan and Note Purchase Agreement was executed on December 20, 1966, between the Company and the first National City Bank and others. Under that agreement, the Company was to authorise the creation and issuance of secured notes, series A and B, referred to above, and the notes were to be "issued under and secured by the Deed of Trust and Mortgage between the Company and the first National City Bank". It was then stated in the Loan and Note Purchase Agreement as follows,—

F "The Notes shall be dated, shall mature, shall bear interest, shall be payable, shall be secured and shall have such other terms and provisions as provided in the Mortgage and shall be guaranteed by the President of India Pursuant to the terms of a Guarantee Agreement (the "Guarantee Agreement) in the form attached hereto as Exhibit 3."

G It would thus appear that it was the Deed of Trust and Mortgage which was the security for the loan, although the loan was also guaranteed by the President in terms of the Guarantee Agreement.

H As has been stated, the Guarantee Agreement was made between the President of India and the first National City Bank. It was clearly stated in that agreement that the First National City Bank executed it "As Trustee under a Deed of Trust and Mortgage dated as June 15, 1967." The Trust and Mortgage Deed was thus executed before

(1) (1872) I.R. 7 Ex. 211.

the execution of the Guarantee Agreement, even though both of them were executed on the same day, namely, June 15, 1967.

It is true that it has been stated in the Guarantee Agreement that the President of India, as the guarantor, unconditionally guaranteed "as primary obligor and not as surety merely, the due and punctual payment from time to time" of the principal as well as the interest etc. stated in the agreement. And it was for that purpose that the guarantor agreed to "endorse upon each of the Notes at or before the issue and delivery thereof by the Company its guaranty of the prompt payment of the principal, interest and premium thereof and of the other indebtedness." It is also true that as stated in paragraph 10 of the Guarantee Agreement, the obligations of the guarantor were "absolute and unconditional under any and all circumstances, and shall not be to any extent or in any way discharged, impaired or otherwise affected, except by performance thereof in accordance with the terms thereof." We have also noticed the further stipulation that "Each and every remedy of the Trustee shall, to the extent permitted by law, be cumulative and shall be in addition to any other remedy given hereunder or under the Mortgage or any of the other collateral or now or hereafter existing at law or in equity or by statute."

Mr. Ram Reddy has relied heavily on these averments in the Guarantee Agreement, but they cannot detract from the basic fact that the Deed of Trust and Mortgage was executed first in point of time and was the principal or primary security for the loan according to the terms and conditions of the agreement between the parties. It was that document which constituted the First National City Bank as the Trustee, and enabled it to enter into the Guarantee Agreement with the President, and the President guaranteed the due performance of the obligations undertaken by the Company thereunder.

The Deed of Trust and Mortgage, which was executed between the Company and the First National City Bank as a national banking association incorporated and existing under the laws of United States of America, stated that as the Company was in the process of constructing a refinery for the refining of crude oil and deemed it necessary to borrow money from time to time to finance such construction and to issue its notes therefor and to "mortgage and charge its properties hereinafter described to secure the payment of such notes" it executed the Deed of Trust and Mortgage as security in accordance with the terms and conditions of Article 2 of the Deed of Trust and Mortgage to secure the due payment of the principal of and the premium, if any, and the interest on the Notes and of all other moneys for the time being and from time to time owing on the security of that Indenture and on the Notes and the performance by the Company of all of its obligations thereunder. The Deed of Trust and Mortgage was therefore clearly the principal or the primary security and could not be said to be a "collateral agreement". The parties in fact clearly

A stated in Article I, section 1.01 of the Deed of Trust and Mortgage as follows,—

“Collateral Agreements :

B The term “Collateral Agreements” shall mean the Guarantee Agreement and the Undertaking, hereinafter defined.”

It was therefore specifically agreed between the parties that the Deed of Trust and Mortgage was not a collateral agreement.

C In all these facts and circumstances it is futile to contend that the Deed of Trust and Mortgage was not the principal or primary security. As was stated in Article 9 of that document, that security became enforceable in case of any or more “events of default”, and it cannot be said that merely because the Guarantee Agreement contained the stipulation that the President, as the Guarantor, unconditionally guaranteed the due and punctual payment of principal and interest etc. “as primary obligor and not as surety merely” that agreement become the principal or the primary security. It is the real and true meaning of the Deed of Trust and Mortgage and the Guarantee Agreement which has to be ascertained, and this leaves no room for doubt that the view taken by the High Court in this respect is correct and does not call for interference. Mr. Ram Reddy relied on some decisions to support his argument that the Guarantee Agreement was the security for the loan and was the principal or the primary document, but those cases were decided on different facts and have no real bearing on the controversy before us.

F The Guarantee Agreement was executed for and on behalf of the president by his Authorised Representative, and no stamp duty was chargeable for it by virtue of the proviso to section 3 of the Act. That in fact appears to be the reason why counsel for the appellant strenuously argued that we should hold it to be the principal instrument, for he has next argued that the case falls within the purview of section 4(1) of the Act and the “Principal instrument” only would be chargeable with the duty prescribed in Schedule I, and deed of any trust and mortgage would be chargeable with a duty of Rs. 4.50 p. instead of the duty prescribed for it in that Schedule. We find however that there is no merit in this argument also. Sub-section (1) of section 4 of the Act reads as follows,—

G “4. Several instruments used in single transaction of sale, mortgage or settlement.—(1) Where, in the case of any sale, mortgage or settlement several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I, for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of four rupees fifty naye paise instead of the duty (if any) prescribed for it in that Schedule.”

It is nobody's case that the Guarantee Agreement was an instrument of sale, for it did not transfer the ownership of anything in exchange for a price paid or promised or part-paid and part-promised. It was also not an instrument of mortgage because it is nobody's case that there was any transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan or an existing or a future debt or the performance of an engagement which could give rise to a pecuniary liability. The expression "settlement" has been defined in clause (24) of section 2 of the Act as follows :—

"Settlement" means any non-testamentary disposition in writing, of movable or immovable property made—

(a) in consideration of marriage,

(b) for the purpose of distributing property of the settlor among his family or those for whom he desires to provide, or for the purpose of providing for some person dependent on him, or

(c) for any religious or charitable purpose;

and includes an agreement in writing to make such a disposition and where any such disposition has not been made in writing, any instrument recording, whether by way of declaration of trust or otherwise, the terms of any such disposition).

The term "disposition" has been defined in Strouds Judicial Dictionary as a devise "intended to comprehend a mode by which property can pass, whether by act of parties or by an act of the law" and "includes transfer and charge of property". As the Guarantee Agreement did not have any such effect, it did not constitute a "settlement" also. That document was not therefore an instrument of sale, mortgage or settlement and did not fall within the purview of sub-section (1) of section 4 of the Act.

It was the Deed of Trust and Mortgage which was a "Mortgage deed" within the meaning of clause (17) of section 2 of the Act, and it was therefore clearly chargeable with stamp duty at the rate prescribed in article 40(b) of Schedule I to the Act.

We have examined the other argument of Mr. Ram Reddy that even if the Guarantee Agreement was not the principal instrument, within the meaning of sub-section (1) of section 4 of the Act, we should hold that the debentures which were issued by the Company were the principal and primary security, and that the Deed of Trust and Mortgage was the "other instrument" within the meaning of that sub-section and was chargeable with a duty of Rs. 4.50 p. instead of the duty prescribed for it in the Schedule. This argument is also futile for we find that the secured Notes (Series A and B) were issued under and were secured by the Deed of Trust and Mortgage. As

A such, the Notes were issued in consequence and on the security of the Deed of Trust and Mortgage and there is no justification for the contention that the debentures were the principal instruments, and not the Deed of Trust and Mortgage.

As the High Court has rightly answered both the questions, we find no force in this appeal and it is dismissed with costs.

B

P.B.R.

Appeal dismissed.