

Rajinder Parshad
and another

v.
The Punjab State
and others

Pandit, J.

ORDER OF THE FULL BENCH ORDER.

In view of the majority opinions, this appeal is allowed, reversing the judgment of the learned Single Judge, and the petition of the appellants is accepted, with the result that the impugned order of respondent 2, with which the orders of respondents 3 to 5 also go, is quashed, and the direction under Articles 226 and 227 of the Constitution is that the Assistant Collector, respondent 5, will now proceed, in the applications of the appellants for eviction of the tenant, to a decision in accordance with law. There is no order in regard to costs in this appeal.

B.R.T.

FULL BENCH

Before D. Falshaw, C. J., S. S. Dulat and Shamsheer Bahadur, JJ.

KAMLA DEVI,—Petitioner.

versus

THE CHIEF CONTROLLING REVENUE AUTHORITY, DELHI,—
Respondents.

Civil Reference No. 1-D of 1964.

1965

November, 12th.

Stamp Act (II of 1899)—S. 35 and Arts. 40 and 57 of Schedule I—Mortgage deed executed by surety to guarantee the performance of the contract entered into by the assessee with the Commissioner of Income-tax to pay the arrears or income-tax in monthly instalments—Whether to be stamped under Article 40 or Article 57 of Schedule I—Maximum penalty—When to be imposed.

Held, that the mortgage deed in this case was executed by the wife of the assessee as surety to guarantee the performance of his contract with the Commissioner of Income-tax to pay the arrears of income-tax due from him in monthly instalments and it was properly stamped under Article 57 of Schedule 1 of the Stamp Act.

Held, that any one who is to contribute to the revenue by payment of stamp duty is entitled at least to try to pay as little as possible. The execution of a document ought not to be subjected to the maximum penalty, even if the document is found to be under-stamped, unless an attempt has been made to evade the payment of the proper stamp duty by trying to disguise the true nature of the document by drafting it in misleading terms. Where the document has been drafted in a completely straightforward manner and no attempt has been made to disguise its true nature and the question of the applicability of one article or the other is debatable, the proper penalty to be levied in case the document is found to be under-stamped is the minimum penalty of Rs. 5.

Reference under Section 57 of the Indian Stamp Act (II of 1899) referred to this Hon'ble Court by Shri V. R. Bapat, Chief Controlling Revenue Authority, Delhi, for decision as to whether the document annexure 'A' (List of shares and property) of the deceased, is chargeable to duty under Article 40 or Article 57 of Schedule I-A of the Indian Stamp Act.

G. S. PATHAK WITH S. N. ANDLEY AND B. D. DUTTA, ADVOCATES,
for the Petitioner.

S. N. SHANKER WITH DALJIT SINGH, ADVOCATES, for the Respon-
dent.

JUDGMENT

FALSHAW, C.J.—These are four references made under section 57 of the Indian Stamp Act by the Chief Controlling Revenue Authority, Delhi, in the following circumstances :— Falshaw, C.J.

Prem Nath, who has died since the references were made, had incurred outstanding income-tax liabilities in respect of the assessment year 1945-46 to 1956-57 amounting to Rs. 2,57,313.94 nP. He was unable to pay this amount within the fixed time and he applied to the Commissioner of Income-tax to be allowed to discharge the liability by instalments. His offer was embodied in a letter addressed to the Commissioner dated the 29th of December, 1958 for the payment of monthly instalment of Rs. 6,000 subject to a minimum of Rs. 75,000.00 being made up in each year ending on the 31st of March. From the fact that the four documents which form the subject of the reference were also executed on the 29th of December, 1958, it is to be inferred that the terms had already been discussed and agreed on and the four documents were in the form of bonds executed by Prem Nath himself, his wife Shrimati Kamla Devi and his sons Narinder Nath and Surinder Nath. In each of these documents the executant pledged that in the event of Prem Nath's failure to discharge the income-tax liability on the terms contained in his letter, the Commissioner would be entitled to realise the sum from the various properties mentioned in the schedule attached to each of the bonds, the property mentioned in the different schedules including both movable property in the form of shares and insurance policies and immovable property situated at various places.

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These documents were handed over to the Commissioner, who, however, desired that they should be registered. They were accordingly presented before the Sub-Registrar, New Delhi, for registration on the 30th of December, 1958, but on a perusal of them the Sub-Registrar was of the opinion that they were insufficiently stamped. They had in fact been stamped with sums of Rs. 10.00 each under the provisions of Article 57 of the Stamp Act, but the Sub-Registrar was of the opinion that they should be stamped in accordance with the provisions of Article 40, and he, therefore, impounded them under section 33 of the Act and sent them in the original to the Collector of Stamps under section 38(2).

The Collector issued notices to the executants of the documents and after hearing them passed orders in each case on the 26th of May, 1959, holding that each of the documents was insufficiently stamped to the extent of Rs. 2,565.00, and he ordered the payment of this sum in each case together with a penalty of 10 times the deficiency, i.e., Rs. 25,650.00 under section 40 of the Act.

All the four executants went in revision to the Chief Controlling Revenue Authority under section 56 (1) of the Act and by his orders dated the 3rd of August, 1959, the Chief Controlling Revenue Authority upheld the orders of the Collector in all respects. Request were then made before the Chief Controlling Revenue Authority to make references to this Court under the provisions of Section 57 of the Act, but he declined to do so. Since section 57 does not contain any provision corresponding with section 66(2) of the income-tax Act, the four executants filed petition in this Court under Articles 226 and 227 of the Constitution which were allowed by my learned brother Dulat J. by his orders dated the 26th October, 1962. He ordered that a direction should issue to the Chief Controlling Revenue Authority in each case that the case should be stated to enable this Court to decide the amount of duty and penalty properly payable in each case. In pursuance of these orders the Chief Controlling Revenue Authority has stated facts of the cases and forwarded them to this Court together with his own opinion.

The finding has been given by the Collector and the Chief Controlling Revenue Authority that the documents

in question are mortgage deeds falling under Article 40 of the Schedule which reads—

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“Mortgage deed, not being an agreement relating to deposit of title deeds, pawn or pledge (No. 6), Bottomry Bond (No. 16), Mortgage of Crop (No. 41), Respondentia Bond (No. 56), or Security Bond (No. 57).”

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On the other hand it is the case of the opposite parties that the documents fall under Article 57 which reads—

“Security bond or mortgage deed executed by way of security for the due execution of an office, or to account for money or other property received by virtue thereof or executed by a surety to secure the due performance of a contract.”

It has now been virtually conceded that the case of Prem Nath himself is distinct from the remaining cases and that the document executed by him will not be covered by Article 57, and I am citing the relevant portion from the document executed by his wife Shrimati Kamla Devi. It reads—

“KNOW ALL MEN BY THESE PRESENTS that I, Kamla Devi, wife of Prem Nath, residing at 8, Scindia House, New Delhi, am held and firmly bound unto the Commissioner of Income-tax, Central Board of Revenue Building, New Delhi, in the sum of Rs. 2,57,313.94 (Rs. Two Lakhs Fifty-seven Thousand Three Hundred Thirteen and Ninety-four nP. only) of good and lawful money to be paid to the said Commissioner of Income-tax for which payment I do hereby charge the various properties belonging to me and detailed in the Schedule hereunder and do bind myself, my heirs, executors and administrators unto the said Commissioner of Income-tax.

Signed this the 29th day of December, in the Christian year 1958.

The condition of the above written “obligation is such that if the said Prem Nath do perform the

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terms and conditions of and make payment in accordance with his letter dated 29th December, 1958, addressed to the said Commissioner of Income-tax then this obligation will be void and of no effect, else it will remain in full force and virtue and upon default being committed by the said Prem Nath of any terms or condition of the said letter dated 29th February, 1958, the said Commissioner of Income-tax shall be entitled to recover the amount remaining due under the terms of the said letter from me and my aforesaid properties and until payment of the entire amount under the said letter by the said Prem Nath, I shall not alienate any of my aforesaid properties."

It would seem from the orders of the Collector and Chief Controlling Revenue Authority that the nature of the documents has been determined on the basis that the Commissioner of Income-tax was in the position of a Court in whose favour a surety bond has been executed, and there is no doubt that while the view has been taken by the Lahore High Court as well as one time by the Oudh Chief Court that such surety bonds fall under Article 57, the view of almost all other High Courts has been that there can be no such thing as a contract with a Court and that a surety bond by which property is pledged is a mortgage deed covered by Article 40. This view has been taken in *Akshay Zemindari Limited Rama Nath Barman* (1), *Abubacker Labbai v. Chinnathambi Rowther* (2), *Stamp Reference in re. Jandilal* (3), *Gauri Shanker Jhunjunwala v. Baldeo Sahujee* (4) and *H. Hunter, Liquidator of Bank of Upper India v. Emperor* (5) (an earlier decision of the Court which was distinguished).

Some reference may be made to the two decisions of the Lahore High Court which were cited before the Chief Controlling Revenue Authority, but not followed. The first of these is firm *Tullah Shah Ram Saran Shah y.*

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- (1) I.L.R. 1937 (1) Cal. 375.
 (2) A.R. 1938 Mad. 262 (F.B.).
 (3) A.I.R. 1931 All. 189 (F.B.).
 (4) A.I.R. 1953 Patna 210.
 (5) A.R. 1942 Andh, 371.

Ghulam Hussain and others (6). In that case a security band filed in connection with some execution proceedings was referred to the High Court by the Collector of Mianwali under section 61 of the Stamp Act. The matter arose in connection with a first appeal which was pending in the High Court in which the judgment debtor-appellant's application for stay of execution of a money decree was refused, but the decree-holders were ordered to furnish security for restitution in the event of the success of the appeal. The bond filed by the decree-holders was stamped with a stamp of Rs. 7/8 which appears to be the stamp duty in those days under Article 57 and the executing Court accepted it, but the judgment-debtor objected and caused the reference by the Collector. The High Court had directed the Advocate-General to obtain instructions from the Chief Revenue Authority and at the hearing it was stated that the instructions of the Financial Commissioner were that the bond was properly stamped, and Tek Chand and Jai Lal JJ. passed orders accordingly.

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In the other case, a reference *in the matter of Stamp Duty on security bond executed by Murad Ali* (7), the bond in dispute was simply a surety bond in the sum of Rs. 500 for the appearance in Court of one Pir Baksh, who had filed a petition to be adjudicated as insolvent. It was held by the three learned Judges of the Special Bench that it was properly stamped under Article 57 with a one-rupee stamp.

This case has been distinguished by the Chief Controlling Revenue Authority on the ground that the bond in question did not charge any property, but that in my opinion does not take anything away from the fact that it was held by the learned Judges that the bond was one executed for due performance of a contract made by the insolvent to appear and the surety to produce him in Court under the provisions of section 21 of the Insolvency Act, and under the terms of Article 57 itself even a mortgage bond executed for this purpose is to be stamped

(6) A.I.R. 1933 Lah. 1004.

(7) A.I.R. 1936 Lah. 45.

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under this Article. The other decision was virtually ignored, simply because the learned Judges decided the matter in favour of the executant of the document on the admission of the Financial Commissioner that it had been properly stamped under Article 57. I do not see that this in any way detracts from its weight as an authority, and these decisions have held the field in the Punjab and are binding on this Court unless and until they are over-ruled either by the Supreme Court or by a larger Bench of this Court.

However, the main argument of the learned counsel for the executants was that in fact in a matter of this kind the Commissioner was not in the position of a Court. It was contended that the liability of the assessee was determined in judicial or quasi-judicial proceedings at the stage of the assessment by the Income-tax Officer, the appeal to the Appellate Assistant Commissioner, the appeal if any, to the Appellate Tribunal and perhaps a reference to the High Court under section 66, but once the liability of the assessee had been finally determined the realisation of any sum found to be due from him was purely an executive matter falling under section 46 of the Income-tax Act. Hence it was argued that if the Commissioner agreed to allow payment of the assessee's liability by instalments on the condition that other persons, his wife and sons in the present case, furnished security bond creating a charge on their individual properties in the event of any default in payment of the agreed instalments, the agreement between the Commissioner and the assessee was not between the Court and a party, but between party and party being, as it were, between decree-holder and judgment-debtor, and therefore, the security bonds were clearly covered by Article 57 as mortgage deeds executed by sureties to secure the due performance of the contract between the Commissioner and the assessee. It was even suggested in the orders of the Collector and Chief Controlling Revenue Authority that there could not be a contract because there was no consideration, but clearly the consideration for the execution of the bonds by the wife and sons was the agreement to allow the payment by the assessee of his liability of Rs. 2,57,000 by instalments spread over a period between three and four years.

In my opinion there is considerable force in this argument since clearly any order passed by the Commissioner or any concession granted by him in the matter of payment of income-tax liability is purely an executive matter and it seems clear that an agreement in the nature of a contract was entered into whereby discharge of the liability by instalments was allowed on the condition of the execution of surety bond by the assessee himself as well as his wife and sons. If any authority is needed for the proposition that in such matters the Commissioner is acting purely in executive capacity it is to be found in *Commissioner of Income-tax, Punjab v. Lala Rajeshwar Parshad* (8), in which G. D. Khosla, J. and my learned brother Dulat J. held that granting extension of time to the assessee for payment of tax or permitting him to pay the tax in instalments was a matter purely administrative or executive. One matter to which reference was made in the course of the arguments was the fact that after the decisions of the Special Full Benches in U.P. and Bengal the provincial Legislatures amended Article 57 by adding the words 'or other liability' after the word 'contract'. It was argued on behalf of the State that this amendment showed that the Article as it stood clearly did not cover surety bonds executed in favour of Courts, but in my opinion it can be equally forcefully argued that the amendment shows that the Legislature was anxious to resolve doubts and expressed what its intention had been all along. It would appear that in Punjab the Government accepted the view of the High Court and did not consider any amendment to be necessary until very recently. We have been informed that such an amendment was made by the State of Punjab in April, 1965. In the circumstances I am of the opinion that the bonds executed by the wife and sons of the assessee are clearly covered by Article 57 and are mortgage deeds executed by sureties to secure the due performance of the contract between the Commissioner and the assessee.

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In view of this finding the question of penalty would hardly arise, but nevertheless, I feel constrained to observe that in my opinion the imposition of the maximum penalty of 10 times the deficiency in stamp duty was not

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at all justified in these cases. The view has been expressed in the orders that a deliberate attempt was made by the executants to evade the payment of the proper stamp duty first by presenting them direct to the Commissioner instead of getting them registered before presentation and then, after the Sub-Registrar had impounded them, by trying to get the documents back on some pretext or other. As I have already pointed out, the documents were executed on the same day as the letter by which the proposed instalments were conveyed to the Commissioner and the documents would certainly have to be handed over to the Commissioner in the first instance for him to be satisfied regarding their terms. There can be no doubt that the documents themselves are drafted in a completely straightforward manner and no attempt has been made to disguise their true nature, and in my opinion any one who is to contribute to the revenue by payment of stamp duty is entitled at least to try to pay as little as possible. I consider that the executant of a document ought not to be subjected to the maximum penalty, even if the document is found to be under-stamped, unless an attempt has been made to evade the payment of the proper stamp duty by trying to disguise the true nature of the document by drafting it in misleading terms. In the present case the question of the applicability of Article 40 or Article 57 to the documents in dispute was certainly debatable, as can be seen from the fact that the order of the Chief Controlling Revenue Authority fills 8 pages of the printed book. In the circumstances even if I had been compelled to hold that the orders of the Collector and Chief Controlling Revenue Authority were correct, I should have expressed the opinion that it was not a proper case for imposing more than the minimum penalty of Rs. 5. As it is I am of the opinion that the documents were correctly stamped under Article 57 of Schedule I of the Stamp Act and order that the costs of the references be paid by the Chief Controlling Revenue Authority except in the case of Prem Nath, himself.

Dulat, J.

S. S. DULAT, J.—I agree.

Shamsher Bahadur,
J.

SHAMSHER BAHADUR, J.—I also agree.

B.R.T.