

In Re: Anonymous

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SooperKanoon Citation : sooperkanoon.com/851689

Court : Kolkata

Decided On : Jan-17-1884

Reported in : (1884)ILR10Cal274

Judge : Richard Garth, C.J.;Mitter and ;Field, JJ.

Appellant : In Re: Anonymous

Judgement :

Richard Garth, C.J.

1. I am of opinion that each of the deeds submitted for our consideration comes under Clause (6) of the Article 44 of the Stamp Act, and should be stamped accordingly.
2. I consider that Clause (a) applies only to those deeds, in which possession of the mortgaged property is given, or agreed to be given at the time of the execution of the deed; or, in other words, where immediate possession of the property is given, or agreed to be given, by the terms of the deed to the mortgagee.
3. It seems to me that this is the only construction of Clause (a) by which any meaning can be given to the words 'at the time of execution,' because the agreement to give possession must of course be made in and by the deed itself; and therefore if Clause (a) is to be read, as the learned Advocate-General contends, the clause would mean the same without the words 'at the time of execution,' as with them. Again, if the Advocate-General's view were correct,

Clause (a) would be applicable in all cases where possession of the property is agreed to be given at any distance of time, or under any conditions, even temporarily for non-payment of interest. I cannot think that the Legislature meant to extend so largely or so unreasonably the class of mortgages which are to be chargeable with the higher duty. Under Act XVIII of 1869 those deeds only were so chargeable where possession was actually given at the time of the mortgage; and the spirit of this rule might have been, and probably was, evaded by possession not being taken for some time after the execution of the deed, although an agreement for immediate possession was contained in the deed itself.

4. I think that the change in the language of the Act was merely intended to prevent any such evasion of the law, and not to make the higher duty chargeable upon a large class of mortgages of a totally different character.

5. The principle of the distinction between the two classes of mortgages was clear enough under the Act of 1869; namely, 1st, those which were accompanied by possession; and, 2ndly, those which were not. According to the construction which I would put upon the present Act, the same distinction is maintained, but only with a safeguard against the evasion of the higher duty; whereas, according to the other construction, the distinction is altogether lost sight of; and the principle of this distinction, as I understand it, appears to me to be founded on good sense. Where the title to the land, and the possession or immediate right to the possession of it, both pass to the mortgagee by virtue of the deed, the same duty is charged as upon a conveyance by way of sale, because in that case the mortgagee gets the same potentiary interest in the land, which a sale would give him; but when the title only passes, and possession, or the right to the possession, does not, the interest which he gets is not necessarily a potentiary interest at all, and possibly may never become so. In such a case the lower duty is chargeable.

6. It seems to me that this is an easy and reasonable solution of the doubt which has arisen; and, as I consider that immediate possession of the mortgaged property is not given, or agreed or intended to be given, in any of the cases submitted to us, I am of opinion that the lower duty [under Clause (b)] is chargeable in each of those cases.

7. I would add that I consider my views upon this subject are strongly confirmed by the fact, which appears to be admitted that, since the passing of the last Stamp Act in 1879, it has been the constant practice to stamp deeds of the nature of those submitted to us with the lower duty under Clause (b). When a particular construction has for some years been put upon a fiscal enactment in favour of the public, and that construction has been generally acted upon and acquiesced in by the Government, I think that a strong presumption arises in favour of that construction; and I consider, moreover, that no other construction, unfavourable to the public, should afterwards be put upon the enactment, except for some very cogent reason indeed.

8. This principle has been acted upon by the High Court on more than one occasion; and notably in the late case of *Kishori Lal Roy v. Sharut Chunder Mozoomdar* I.L.R. 8 Cal. 593.

Mitter, J.

9. I am of opinion that Clause (a) of Article 44 of Schedule I of the Stamp Act of 1879, covers only those mortgage deeds in which as security for the money advanced on mortgage, possession of the property, or any part of the property mortgaged, is actually given or agreed to be given. But it does not include mortgage deeds in which it is stipulated that the mortgagee could be entitled to take possession of the property, or any portion of the property mortgaged in case there should be any breach of the covenants of the deed. The word 'given' in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security of the mortgage money. But where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply, because there it cannot be said that the mortgagor consents to give possession.

10. If this construction of the clause in question is correct, none of the documents referred to us falls under it. It is true that under the first two deeds the mortgagee may exercise his right of entry upon possession immediately in consequence of the form in which they are executed, but there is no agreement on the part of the mortgagor to give possession of the mortgaged premises as part of the security. Such agreement exists only in those cases where it is agreed that the rents and profits of the mortgaged premises are to be enjoyed by the mortgagee, or taken by him in satisfaction of his debt. There is no such agreement to be found in these deeds. As regards the other two deeds it is clear from their terms that the mortgagee would be entitled to enter upon possession in case of default in payment.

Field, J.

11. This is a reference under Section 46 of the Indian Stamp Act (Act I of 1879). The question referred to us is, whether four deeds of mortgage ought to be stamped under Clause (a) or under Clause (b) of Article 44 of the first schedule to the Act. Clause (a) is as follows: 'When at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given'--and the stamp duty upon the mortgage deed in this case is the same as for a conveyance for a consideration equal to the amount secured by the mortgage deed. Clause (b) is as follows: 'When at the time of execution possession is not given or agreed to be given as aforesaid.' In this case the duty is the same as on a bond for the amount secured by the mortgage deed.

12. In the second case the stamp duty is very much less than in the first case, and in this consists the interest which the matter has for the public generally. A large number of mortgage deeds similar to those which form the subject of this reference have been stamped under Clause (b), and these deeds will have been insufficiently stamped if we hold that Clause (a) applies.

13. Clause (a) is divisible into two propositions which are as follow: First, 'when at the time of execution possession of the property, or any part of the property comprised in such deed is given by the mortgagor,' I may at once say that this

proposition is not applicable in the present case, there being no suggestion that possession of the property or any portion of it has been given. The second proposition is: when at the time of execution possession of the property, or any part of the property comprised in such deed, is agreed to be given.' The point to be determined really comes to this, whether by the mortgage deeds which form the subject of the reference, or any of them, it was at the time of execution agreed that possession of the property should be given. I understand this to mean given at any time. I take it that the words 'at the time of execution' must be construed with 'agreed' and not with 'given.' Now the Stamp Act is a Revenue Act, an Act which imposes pecuniary burdens; and the rule of construction in respect of such Acts is that in case of a doubt the construction most beneficial to the subject is to be adopted. The subject is not to be taxed, and therefore not to be compelled in this case to pay the higher duty, unless the language is clear and unambiguous. I am of opinion that the words 'agreed to be given' can only apply where there is an express agreement to give possession-an agreement, that is, in so many words - or an agreement, to be gathered by necessary implication from the whole contents of the documents. I think that Clause (a) of Article 44 does not apply when there is no such agreement, express or implied, but the effect of the document between the parties is such that the mortgagee would have a right, that is a right which he could enforce in a Court of law, to obtain possession if he desired to have possession.

14. Applying this principle to the four deeds in question, I come then to the following conclusion as regards each of them. The first deed of mortgage contains the following provisions: 'And this indenture also witnesseth that, for the consideration aforesaid, the mortgagor doth hereby grant and assign unto the Bank and its assigns all and singular, etc., together with all buildings, fixtures, rights, easements, advantages and appurtenances whatsoever to the said hereditaments appertaining, or with the same held or enjoyed or reputed as part thereof or appurtenant thereto, and all the estate, right, title and interest of the mortgagor in and to the said premises...to hold the said premises unto and to the use of the Bank and its assigns subject nevertheless to the proviso for redemption hereinafter contained.' Then the mortgagee is empowered to sell the mortgaged premises or any part of them without the further consent of the mortgagor, and

then we have a covenant for quiet enjoyment. Under this deed it may well be that the mortgagee has a legal right to take possession, but I think we cannot say that possession of the property or any part of it is agreed to be given within the meaning of Clause (a), Article 44 of Schedule I of the Stamp Act.

15. The second mortgage deed which forms the subject of the reference is marked No. 1a, and is generally similar to the first instrument, save that it contains no covenant for quiet enjoyment. I think we cannot say that possession of the property is agreed to be given by this instrument.

16. The third deed forming the subject of the reference is marked No. 2, and is of a more complicated nature. It recites that the mortgagees, their heirs, executors, etc., shall stand 'seized and possessed' of the mortgaged premises. I think that upon the construction of the entire contents of this document it is clear that the words 'seized and possessed' are used in the sense merely of English legal phraseology, and that it is not meant by these words that the mortgagees should enter into possession. This would appear to be clear from a subsequent provision of the deed which authorizes the trustees or trustee upon the happening of certain events to enter upon and take possession of the mortgaged premises. This instrument also contains a covenant for quiet enjoyment. Now, although there is an authority to the mortgagees and trustees to take possession upon the happening of certain events, I think it impossible to say that there is any agreement by the mortgagor to give possession. This instrument therefore comes, in my opinion, under the provisions of Clause (b) of Article 44.

17. The fourth deed which forms the subject of the reference is marked No. 3. It declares that it shall be lawful for the mortgagee, his successors, assigns, etc., upon a breach of the covenants to enter into and upon the said mortgaged premises, but here also there is no agreement by the mortgagor to give possession, and I think that this instrument also comes under Clause (b).

18. The result is, that in my opinion, all four instruments should be stamped under Clause (b), Article 44, Schedule I of the Stamp Act.

