Board Of Revenue Etc vs A. M. Ansari Etc on 17 March, 1976

Equivalent citations: 1976 AIR 1813, 1976 SCR (3) 661, AIR 1976 SUPREME COURT 1813, 38 STC 577, 1976 SCC (TAX) 350, 1976 UPTC 700, 1976 3 SCR 661

Author: Jaswant Singh

Bench: Jaswant Singh, A.N. Ray, M. Hameedullah Beg

PETITIONER:
BOARD OF REVENUE ETC.

Vs.

RESPONDENT:
A. M. ANSARI ETC.

DATE OF JUDGMENT17/03/1976

BENCH:
SINGH, JASWANT
BENCH:
SINGH, JASWANT
RAY, A.N. (CJ)
BEG, M. HAMEEDULLAH

CITATION:
1976 AIR 1813 1976 SCR (3) 661
1976 SCC (3) 512
CITATOR INFO :
R 1976 SC1860 (10)
E&D 1985 SC1293 (115)
R 1988 SC1845 (11)

ACT:
Indian Stamp (Andhra Pradesh Extension and Amendment) Act XIX of 1959-Arts. 31(c) and 35(c)-Scope of-Lease and licence-Distinction.
Sales Tax-Whether payable on annual auction Sales.

HEADNOTE:
Under the terms and conditions of sale the respondents, who were the highest bidders at an auction of forest produce, were called upon to pay stamp duty on the agreements to be executed by them as if they were leases of immovable property falling under Art. 31(c) and on the

deposits of security as mortgages under art. 35(c) of the Indian Stamp Act, 1899 as also sales tax on the bid amounts. In a petition under art. 226, the respondents contended that the right to pluck, collect and take away the forest produce was not a right or interest in immovable property within the meaning of art. 31(c) of the Stamp Act , the security deposits were not mortgages nor did the Government carry on any business of sale and, as such, they were not liable to pay the amounts demanded. The High Court allowed the petitions.

Dismissing the State's appeal,

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HELD : The acquisition by the respondents not being an interest in the soil but merely a right to cut the fructus naturales, the agreements possessed the characteristics of licences and did not amount to leases so as to attract the applicability of art. 31 (c) of the Stamp Act. [667D]

Firm Chhotabhai Jethabai Patel & Co. & Ors. v. The State of Madhya Pradesh, [1953] S.C.R. 476 and Mahadeo v. State of Bombay 1959 S.C.J. 1021: A.I.R. 1959 S.C. 735 referred to.

(1) A study of the definitions of immovable property occurring in the Transfer of Property Act, the Registration Act and the General Clauses Act shows that it is the creation of an interest in immovable property or a right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. In the case of a lease there is transfer of a right to enjoy the property. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential to look to the substance and essence of the agreement and not to its form. [665F-G]

Associated Hotels of India Ltd. v. R. N. Kapoor A.I.R. 1959 S.C. 1262; Kauri Timber Company Limited v. The Commissioner of Taxes, [1913] A.C. 771 (776) Marshall v. Green (1875) L.R.I.C.P.I.D. 35 and Firm Chhotabhai Jethabai Patel & Co. & Ors. v. The State of Madhya Pradesh [1953] S.C.R. 576 referred to.

Mahadeo v. State of Bombay 1959 S.C.J. 1021: AIR 1959 S.C. 735 distinguished.

In the instant case the salient features emerging from the agreements are (i) that they were made for a short duration of 9 to 10 months; (ii) they did not create any estate or interest in the land and (iii) the respondents were not granted exclusive possession and control of the land but were merely granted the right to pluck, cut, carry away and appropriate the forest produce, present or future. The right to go on the land was only ancillary to the real purpose of the contract. [667C-D]

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(2) The respondent could not be called upon to pay stamp duty under Art. 35(c) of the Stamp Act. For an instrument to fall within the definition of mortgage deed

contained in s. 2(17) of the Stamp Act it is necessary that it should satisfy the essential conditions by creating a right over or in respect of a specified property in favour of another person. [671D; 670G]

In the instant case there is nothing in the relevant clause of the sale notice to indicate that any right over or in the security deposits was created in favour of the State Government. [671A]

Reference under Stamp Act, Section 46 15 I.L.R. Mad. 134 and Rishidev Sondhi v. Dhampur Sugar Mills A.I.R. 1947 All. 190 F.B. approved.

(3) (a) The respondents were not liable to pay sales tax. It cannot be said that the Government, by holding auction of forest produce, carried on business in the sale of that class of goods, which is an essential condition to make the respondents liable to pay sales tax. [670D]

State of Gujarat v. Raipur Manufacturing Co. Ltd. (1967) 19 S.T.C. 1(S.C.) followed.

(b) The consideration of profit motive cannot be regarded as an essential ingredient of the term 'business' in view of the amendment in the definition of 'dealer' in 1966. The auctions were carried on only annually and not at frequent intervals. The important element of frequency being lacking it cannot be held that the Government was carrying on the business of sale of forest produce. [669D-E]

P.T.C.C.S. Merchants Union v. State of A.P., (1958) 2 An. W.R. 100: (1958) 9 S.T.C. 723; Raja Bhairabendra v. Superintendent of Taxes (1958) 9 S.T.C. 60; Orient Paper Mills Ltd. v. The State of Madhya Pradesh and Ors. (1971) 28 S.T.C. 532; Deputy Commissioner of Agricultural Income-Tax and Sales Tax, Quilon v. Travancore Rubber and Tea Co. (1967) 20 S.T.C. 520 (S.C.); Deputy Commissioner of Agricultural Income-tax and Sales Tax, Quilon v. Midland Rubber and Produce Co. Ltd. [1970] 25 S.T.C. 57 (S.C.) Ramakrishna Deo v. The Collector of Sales Tax, Orissa (1955) 6 S.T.C. 674 referred to.

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeals Nos. 67 to 122 and 238 of 1969.

From the Judgment and Decree dated the 21-8-67 of the Andhra Pradesh High Court in Writ Petitions Nos. 489, 491, 537, 538, 539, 540, 541, 561, 635, 636, 638, 639, 677, 684, 686, 688, 695, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 811, 812, 813, 830, 831, 832, 853, 854, 855, 867, 870, 1146, 1216, 1219, 1260, 1261, 1265, 1284, 1285, 1292, 1293, 1294, 1309, 1310, 1340, 1446, 1447, 1697 and 687 of 1967 respectively.

P. Ram Reddy, B. Parthasarthi for the Appellants. K. J. John and J. B. Dadachanji for Respondent in CAs. 67, 78, 79, 100, 101, and 103 of 1969.

G. Narayana Rao for Respondent in CAs. 69-73/69. H. K. Puri and R. V. Pillai for Respondents in CAs Nos. 77, 83, 89, 90, 93, 95, 96, 102 and 120/69.

The Judgment of the Court was delivered by JASWANT SINGH, J.-This bunch of Civil Appeals Nos. 67- 122 238 of 1969 by certificate granted under Article 133(1)(b) of the Constitution by the High Court of Judicature of Andhra Pradesh at Hyderabad by its order dated June, 28, 1968 against its common judgment and order dated August 21, 1967, passed in Writ Petition Nos. 489, 491, 537 to 541, 635, 684, 685, 687, 688, 830 to 832, 561, 1219, 715 to 719, 812, 813, 1216, 677, 638, 639, 695, 853 to 856, 636, 867, 870, 1146, 1285, 1260, 1261, 1284, 1292, 1293, 1294, 1309, 1310, 1340, 1447, 1697 and 1265 of 1967 which raise interesting questions of law relating to the interpretation of some of the provisions of the Indian Stamp Act, 1899 and the Andhra Pradesh General Sales Tax Act, 1957 shall be disposed of by this judgment.

The facts giving rise to these appeals are: The Forest Department of the Government of Andhra Pradesh after giving a sale notice held, in accordance with the terms and conditions thereof, an auction in 1967 in respect of various items of forest produce viz. timber, fuel, bamboos, minor forest produce, beedi leaves, tanning barks, parks mohwa etc. Clause 23 of the notice inter alia required the contractors to pay within 10 days of the receipt of the confirmation orders of the competent authority: (a) the balance of the 1st instalment amount, as might be fixed by the Divisional Forest Officer, (b) 6 1/4% of the bid amount as security deposit; (c) sales tax on the bid amount at the rates current at the time of the sale. Clause 60 of the notice provided that the contractors would at all times comply with the provisions of the Indian Stamp (Andhra Pradesh Extension and Amendment) Act XIX of 1959, and the Andhra Pradesh Court Fees and Suits Valuation Act, 1956, and all the rules that might, from time to time, be in force thereunder.

The respondents herein being the highest bidders in respect of some items of the forest produce were called upon to pay in terms of the above noted conditions the stamp duty on the agreements to be executed by them as if they were leases of immovable property falling under Article 31 (c) of the Indian Stamp Act, 1899. They were also called upon to pay sales tax on the bid amount in terms of clause (23) of the sale notice. They were further called upon to pay stamp duty on the deposits made by them by way of security as mortgages, falling within Article 35(c) of the Stamp Act. Aggrieved by the said notices, the respondents filed the aforesaid petitions under Article 226 of the Constitution for issue of appropriate writs etc. declaring the aforesaid demand notices as illegal and void and restraining the appellants from enforcing or taking any proceeding for the levy and recovery of the amounts mentioned therein. The respondents contended before the High Court that as the right to pluck, collect and take away beedi leaves and to cut and carry away bamboos, standing timber etc. was not a right or interest in immovable property so as to attract Article 31(c) of the Stamp Act, there could be no question of payment by them of the stamp duty. The respondents also challenged the demand made from them for payment of sales tax on the bid amount on the ground that as the Government did not carry on any business of sale, the demand was illegal. They further challenged the demand of stamp duty under Article 35(c) of the Stamp Act pleading that the security deposits were not mortgages so as to attract the provisions of the said Article of the Stamp Act.

The petitions were contested by the appellants herein who contended inter alia that pursuant to clause (60) of the terms and conditions of the sale notice, the respondents were bound to pay the stamp duties that were chargeable in view of the extension of the Indian Stamp Act to the whole of the State of Andhra Pradesh by the Indian Stamp (Andhra Pradesh Extension and Amendment) Act XIX of 1959 with effect from April 1, 1959, and repeal of the Hyderabad Stamp Act, and the rules, notifications, instructions etc. made or issued thereunder: that the right acquired by the respondents was not merely a right to collect, appropriate and sell beedi leaves that had already grown but also the right to collect, use and sell beedi leaves that would subsequently grow on the standing trees and their branches taking nourishment from the land during the period of lease which showed that the respondents obtained under the agreement an interest in immovable property. The appellants further contended that the respondents were, according to the sale notice, liable to pay sales tax on the bid amount as also the stamp duty on security deposits which fell within the definition of mortgages as contemplated by the Stamp Act.

On a careful consideration of the respective stands of the parties, the High Court negatived the contentions of the appellants and allowed the petitions. Aggrieved by the Judgment and order of the High Court, the appellants applied for certificate under Article 133(1)(b) of the Constitution which, as already stated, was granted to them. This is how the appeals are before us.

Three questions fall for consideration in these appeals. The first question that we are called upon to determine is whether the agreements which the respondents were called upon to execute in respect of the aforesaid rights relating to forest produce were in the nature of leases or licences.

It is necessary in this connection to notice at the outset the distinction between a lease and a licence by reference to the relevant Acts. Section 2 (16) of the Stamp Act defines the lease as meaning a lease of immovable property but this definition, it would be noted, is neither exhaustive nor self-explanatory. We are, therefore, driven to find out the true meaning of the term by turning to the Transfer of Property Act. Section 105 of the said Act defines 'lease' as follows :-

> "A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity in consideration of a price paid or promised, or of money."

'Licence' is defined in section 52 of the Easement Act, 1882 as under:-

> "Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence".

The expression 'immovable property' is not defined in the Stamp Act but is defined in section 3 of the Transfer of Property Act, section 2(6) of the Registration Act and section 3(26) of the General Clauses Act. An idea as to the meaning of the expression can also be gleaned from section 2(7) of the

Sales of Goods Act. According to learned counsel for the appellants, it is the definition of 'immovable property as given in section 3 (26) of the General Clauses Act that has to be applied in determining. whether the agreements in question fall within the definition of 'lease' or not. It would be useful at this stage to set out in juxtaposition the definitions of 'immovable property' as contained in the aforesaid Acts, as also the definition of goods as given in the Sale of Goods Act:-

Section 3(26) of General Clauses Act.	Section 3 of Transfer of Property Act.	Section 2(6) of Registration Act.	Section 2(7) of Sale of Goods Act.
"Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.	In this Act, unless there is anything repugnant in the subject or context, "immovable property" does not include standing timber, growing crops or grass.	In this Act, unless there is anything repugnant in the subject or context, "immovable property" includes land, buildings hereditary allowances, rights to ways, lights, ferries, or any other benefits to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth.	In this Act, unless there is anything repugnant in the subject or context, "goods" means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before or under the contract of sale.

A close study of the above definitions shows that it is the creation of an interest in immovable property or right to possess it that distinguishes a lease from a licence. A licence does not create an interest in the property to which it relates while a lease does. There is in other words transfer of a right to enjoy the property in case of a lease. As to whether a particular transaction creates a lease or a licence is always a question of intention of the parties which is to be inferred from the circumstances of each case. For the purpose of deciding whether a particular grant amounts to a lease or a licence, it is essential, therefore, to look to the substance and essence of the agreement and not to its form. We are fortified in this view by the decision of this Court in Associated Hotels of India Ltd. v. R. N. Kapoor where Subba Rao, J. (with whom Das, J. agreed) observed:

> "If a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the

> property, but the licensee is permitted to make use of the premises for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is therefore, clear distinction between the two concepts. The dividing line is clear though sometimes it becomes very thin or even blurred. At one time it was thought that the test of exclusive possession was infallible and if a person was given exclusive possession of a premises, it would conclusively establish that he was a lessee. But there was a change and the recent trend of judicial opinion is reflected in Errington v. Errington [1952] 1 All ER 149, wherein Lord Denning reviewing the case law on the subject summarizes the result of his discussion thus at p. 155:
>
> "The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy."

The Court of Appeal again in Cobb v. Lane [1952] I All ER 1199, considered the legal position and laid down that the intention of the parties was the real test for ascertaining the character of a document. At p. 1201, Somervell L.J., stated:

> "..... The solution that would seem to have been found is, one would expect, that it must depend on the intention of the parties".

Denning L.J. said much to the same effect at p. 1202:

> "The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all that was intended was that the occupier should have a personal privilege with no interest in the land?"

The following propositions may, therefore, be taken as well-established: (1) To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form: (2) the real test is the intention of the parties-whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, 'prima facie' he is considered to be a tenant, but circumstances may be established which negative the intention to create a lease." The crucial tests to be employed in cases of the present nature can be gathered from the observations made by Lord Shaw while delivering the judgment of the Board in Kauri Timber Company Limited v.

The Commissioner of Taxes(1). According to those observations, in order, an agreement can be said to partake of the character of lease, it is necessary that the grantee should have obtained an interest in and possession of land. If the contract does not create an interest in land then to use the words of Lord Coleridge, C.J. in Marshall v. Green(2) the land would be considered as a mere warehouse of the thing sold and the contract would be a contract for goods.

For the purpose, therefore, of ascertaining the intention of the parties and finding out the character of the agreements in question, it is necessary to notice the salient features of the agreements. The first salient feature of the agreements is that they were for a short duration of nine to ten months. The second important feature of the agreements is that they did not create any estate or interest in land. The third salient feature of the agreements is that the respondents were not granted exclusive possession and control of the land but were merely granted the right to pluck, cut, carry away and appropriate the forest produce that might have been existing at the time of the contract or which might have come into existence during the short period of the currency of the agreements. The right to go on the land was only ancillary to the real purpose of the contract. Thus the acquisition by the respondents not being an interest in the soil but merely a right to cut the fructus naturales, we are clearly of the view that the agreements in question possessed the characteristics of licences and did not amount to leases so as to attract the applicability of Article 31(c) of the Stamp Act.

The conclusion arrived at by us gains strength from the judgment of this Court in Firm Chhotabhai Jethabai Patel and Co. & Ors. v. The State of Madhya Pradesh where contracts and agreements entered into by person with the previous proprietors of certain estates and mahals in the State under which they acquired the rights to pluck, collect and carry away tendu leaves, to cultivate, culture and acquire lac, and to cut and carry away teak and timber and miscellaneous species of trees called hardwood and bamboos were held in essence and effect to be licences.

There is, of course a judgment of this Court in Mahadeo v. State of Bombay(4) where seemingly a somewhat different view was expressed but the facts of that case were quite distinguishable. In that case apart from the bare right to take the leaves of tendu trees, there were further benefits including the right to occupy the land, to erect buildings and to take away other forest produce not necessarily standing timber, growing crop or grass and the rights were spread over many years.

For the foreging reasons, the first question has to be decided in favour of the respondents.

The second question that falls for consideration is whether the respondents could be validly called upon to pay the sales tax. For the decision of this question, it is necessary to examine a few provisions of the Andhra Pradesh General Sales Tax Act, 1957. The charging section is section 5 which in so far as it is relevant for the purpose of these appeals runs thus:-

> "5. Levy of tax on Sales or Purchases of Goods:-
>
> (1) Every dealer (other than a casual trader and an agent of a non-resident dealer) whose total turnover for a year is not less than Rs. 25,000 and every agent of a nonresident dealer whatever be his turnover for the year, shall pay a tax for each year, at the rate of four paise on every rupee of his turnover:
>
> "Every casual trader shall pay a tax at the rate of four paise on every rupee of his turnover:

> Provided that a dealer in jaggery shall pay a tax at the rate of two paise on every rupee upto the 31st March 1966 and at the rate of three paise on every rupee on and from the 1st April 1966, of his turn-over irrespective of the quantum of turnover".

The term 'dealer' has been defined in section 2(e) of the Act as follows:-

> "dealer" means any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise, whether for cash, or for deferred payment, or for commission, remuneration or other valuable consideration, and includes (i) the Central Government, a State Government, local authority, a company, a Hindu undivided family or any society (including a co-operative society), club, firm or association which carries on such business ....."

The term 'business' has been defined in section 2(bbb) of the Act as follows:-

> " 'business' includes-(i) any trade, commerce, or manufacture or any adventure or concern in the nature of trade, commerce or manufacturing whether or not with trade, commerce, manufacture, adventure concern is carried on or undertaken with a motive to make gain or profit and whether or not any gain or profit accrues therefrom; and
>
> (ii) any transaction in connection with, or incidental or ancillary to, such trade, commerce, manufacture, adventure or concern".

'Sale' is defined in section 2(n) thus:

> 'Sale' with all its grammatical variations and cognate expressions means every transfer of the property in goods by one person to another in the course of trade or business, for cash, or for deferred payment, or for any other valuable consideration, and includes any transfer of materials for money consideration in the execution of a works contract provided that the contract for the transfer of such materials can be separated from the contract for the services and the work done, although the two contracts are embodied in a single document or in the supply or distribution of goods by a society (including a co-operative society), club, firm or association to its members, but does not include a mortgage, hypothecation or pledge of, or a charge on, goods".
>
> In order that the sales tax should be payable by the respondents in accordance with the obligation imposed on them by clause (23) of the sale notice, it is necessary that the Government of Andhra Pradesh should have been carrying on the business of selling the forest produce. In State of Gujarat v. Raipur Manufacturing Co. Ltd., this court while examining the term 'business' in another context observed that 'whether a person carries on business in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of

goods and the transactions must ordinarily be entered into with a profit motive. The Court further went on to observe that when a subsidiary product is turned out in the factory of the assessee regularly and continuously and it is being sold from time to time, an intention to carry on business in such product may be reasonably attributed to the assessee. As the consideration of profit motive cannot be regarded an essential constituent of the term 'business' in view of the amendment introduced in the definition of the term 'dealer' in 1966, what we are left to consider is whether the other ingredients of the term 'business' viz. volume, frequency, continuity and regularity of transactions of sale and purchase are satisfied in the instant cases. The auctions of the forest produce by the Government of Andhra Pradesh are admittedly carried on only annually and not at frequent intervals. Thus the important element of frequency being lacking in the instant cases, it cannot be held that the said Government was carrying on the business of sale of forest produce. In P. T. C. C. S. Merchants Union v. State of A.P. where a person who grew agricultural products and incidentally sold the same, it was held that no sales tax was payable as it could not be said that the person carried on business. A similar view was expressed in Raja Bhairabendra v. Superintendent of Taxes where standing sal trees grown spontaneously in his Zamindari were sold by the Zamindar by auction and the purchasers were permitted to fell the trees and sell them after sawing and other processes.

In Orient Paper Mills Ltd. v. The State of Madhya Pradesh & Ors. it was held that the State Government or the forest department could not, merely by selling the forest produce grown on their land, be regarded as carrying on any business of buying, selling, supplying or distributing goods and therefore in respect of mere sales of forest produce, neither the State Government nor the forest department was a dealer within the meaning of the definition in section 2(d) of the M.P. General Sales Tax Act, 1958. In Deputy Commissioner of Agricultural Income-tax and Sales Tax, Quilon v. Travancore Rubber and Tea Co. and Deputy Commissioner of Agricultural Income-tax and Sales Tax, Quilon v. Midland Rubber and Produce Co. Lt. where the only facts established were that the assessee converted the latex tapped from its rubber trees into sheets and effected a sale of those sheets to its customers and the conversion of latex into sheets was a process essential for the transport and marketing of the produce, it was held that the department had not been able to discharge the onus of proving that the assessee was carrying on business and was, therefore, a dealer within the meaning of section 2(b) of the Central Sales Tax Act, 1956. In Ramakrishna Deo v. The Collector of Sales Tax, Orissa where Maharaja of Jeypore had sold the sal trees from his forest for preparing sleepers, it was held that he was not a dealer within the meaning of the Orissa Act because he was not carrying on the business of selling or supplying the goods for the reason that the element of purchase, one of the necessary ingredients of the business was absent.

In view of the foregoing discussion, we find ourselves unable to hold that the Government of Andhra Pradesh by holding auction of forest produce carried on

> business in the sale of that class of goods. As such, the respondents could not be made liable to pay the sales tax.
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> There now remains for consideration only the last question as to whether the security deposits made by the respondents were in the nature of mortgages so as to make the respondents liable to pay the stamp duty under Article 35(c) of the Stamp Act. For the determination of this question, it is necessary to scrutinize the definition of 'mortgage deed' as contained in section 2(17) of the Stamp Act which runs thus:-
>
> "2(17). 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 favour of, another, a right over or in respect of specified property".

A bare perusal of the above definition makes it clear that in order that an instrument should fall within the above definition, it is necessary that the instrument should satisfy the essential conditions by creating a right over or in respect of a specified property in favour of another person.

Bearing in mind the above mentioned essential requisites of a deed of mortgage let us examine clause (17) of the sale notice to which alone our attention has been invited. Clause (17) runs thus:-

> "Earnest money deposit to be returned-The earnest money deposits of all bidders except those of the successful bidders collected at the time of sale according to condition 5 above, will be returned to the depositors, on the conclusion of the sales provided that the officer conducting the sale, may if he considers it advisable, retain the deposits of any bidders".

There is nothing in the above clause to indicate that any right over or in the security deposits was created in favour of the State Government.

In Reference under Stamp Act, section 46(1) where a licence issued to an arrack renter expressly required as one of its conditions that the licensee should deposit a sum equal to three months' rental as a security for the due performance of the contract and the licensee executed a muchalka stating that he agreed to all the terms and conditions mentioned in the licence, it was held that neither the licence nor the muchalka taken separately or together fulfilled the conditions of a mortgage as defined in the Stamp Act i.e., neither thereby actually created an interest in the deposit in favour of the Government.

In Rishidev Sondhi v. Dhampur Sugar Mills it was held that an instrument in which specific sums have been offered as security is not a mortgage deed within the meaning of section 2(17) as money is not `specified property'.

In view of the above we have no manner of doubt that the respondents could not be called upon to pay the stamp duty under Article 35(c) of the Stamp Act.

In the result the appeals fail and are hereby dismissed with costs.

P.B.R. Appeals dismissed.