Commissioner Of Income-Tax, Uttar ... vs Abdul Hai Azim Ullah on 5 September, 1968

Equivalent citations: [1969]74ITR747(SC), AIRONLINE 1968 SC 11

Bench: A.N. Grover, J.C. Shah

JUDGMENT

Grover, J.

1. These appeals are by certificate from the judgment of the Allahabad High Court, which arise out of the assessment of tax made for the assessment years 1952-53, 1953-54 and 1954-55, in an income-tax reference.

2. The facts may be shortly stated. The assessee was being assessed as an individual and derived income from property business and other sources. In the assessment for all the three years mentioned above the Income-tax Officer included a sum of Rs. 2,550 as income from other sources being rental of certain shops stated to have been let out by the assessee. The shops came into the possession of the assessee by virtue of a registered agreement dated January 2, 1947, the parties to that agreement being the assessee and one Jungle Koiri. A piece of land situated in village Sarso, District Azamgarh belonged to Jungle Koiri which had been mortgaged by him to a third party. By means of an agreement dated January 2, 1947, it was agreed between him and the assessee that the latter would pay up the earlier mortgage amounting to Rs. 1,400. The shops were to remain in the possession of the assessee for a period of 10 year who was entitled to rent them out or put them to his own use. After the expiry of that period the shops were to revert to Jungle Koiri or his successors free from all encumbrances. One of the clause of the agreement was that if a sum exceeding Rs. 1,000 was required for construction of the shop it would be provided by the assessee and for this additional payment the period of possession of the shops by the assessee would be extended the period of possession of the shops by the assessee would be extended in terms of the agreement to be made between the parties. As the assessee had spent an amount exceeding Rs. 1,000, another agreement was entered into between the parties on January 8, 1948, by which the period for which the assessee was entitled to remain in possession was extended by 10 years. There was a separate agreement dated June 19, 1947, on similar lines which had been entered into by the five sons of the assessee and the mutwallis of the mosque known as Garhewali Masjid. By virtue of that agreement the mutawallis of the mosque for which a sum of Rs. 8,000 was to be provided by the sons of the assessee. It was agreed that the shops would be mortgaged for a period of 8 years in favour of the five sons of the assessee who were free either to use the shops themselves or to rent them out. This period of 8 years was extended by 12 years under an agreement dated May, 31, 1948, against a sum of Rs. 4,000 paid by the five sons of the assessee to the mutawallis of the mosque. There was yet another item of Rs. 750 which had been included by the Income-tax Officer in the income of the

assessee as rent from a house. The assessees case with regard to that item was that, though the house originally belonged to him, he had, in lieu of dower debt, transferred the same to his wife in the year 1937.

3. Having failed before the departmental authorities and the Income-tax Appellate Tribunal the assessee moved an application under section 66 (1) of the Act and the Tribunal submitted the statement of the case referring only one question of law which was as follows :

> "Whether on the facts and circumstances of the case the income of Rs. 2,550 derived as rent from the shops on the lands belonging to the other parties was a revenue receipt assessable to income-tax ?"

4. Subsequent to the reference made by the Tribunal an application was filed in the High Court purporting to be under section 66 (2) and section 66 (4) of the Act. That application came up before a Bench of that court which made an order on March 24, 1959, directing the Tribunal to submit a further statement of the case refer the following additional question to the High Court :

> "Whether there was any material for the finding that the house alleged to have been gifted by the assessee to his wife was still the property belonging to him so that the income from that the income from that property was liable to be assessed as the income of the assessee ?"

5. The Tribunal submitted a further statement of the case. When the reference finally came up before the High Court an objection was raised by the counsel for the revenue that the High Court had no jurisdiction under section 66 (4), to call for a further statement of the case and direct the Tribunal to refer another question of law. The High Court was of the view that in the order dated March 24, 1959, it had nowhere been said that power was being exercised under section 66 (4) and not under section 66 (2) of the Act. The other objection on the ground of limitation was also repelled.

6. On the first question after referring to the terms of the agreements entered into with Jungle Koiri, the High Court expressed the opinion that the entire transaction was in the nature of self-liquidating or self-effacing mortgage; in other words there was to be no annual return on the capital but the capital itself was to be appropriated within a period of 10 years by use on the part of the assessee. The other agreements between the sons of the assessee and the mutawallis were also considered and it was held that they partook of the nature of self-liquidating mortgages. The first question was consequently answered in favour of the assessee but the second question was answered was answered against him, the view of the Tribunal and the departmental authorities having been accepted as correct.

7. Before us counsel for the appellant has challenged the correctness of the decision of the High Court on the first question. It had been contended that the agreements in question created leases and not usufructuary mortgages. It is pointed out that in the agreement the following elements were missing : (1) there was no provision for payment of interest and (2) there was no provision for

redemption. The points which prevailed before the Tribunal were pressed before us. It is regrettable that in the printed appeal record here the appellate order of the Tribunal has not been included. There is however, a passage which has been extracted by the High Court from that order according to which the most important requisite of a usufructuary mortgage is that some interest in immovable property must be passed to the transferee by virtue of the deed and the mortgage from the deeds under consideration. Moreover, according to the Tribunal, there was no provision or safeguard in the event of the transferee not constructing the shops nor was there any guarantee furnished to the mortgage for realisation of their money in case they were dispossessed from the lands.

8. Usufructuary mortgage is defined by section 58(d) of the Transfer of Property Act, hereinafter called the Act, in the following terms :

> "Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgage, and authorities him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage money or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgage an usufructuary mortgage."

9. The section relating to leases on which reliance has been placed by the counsel for the appellant is section 105. According to the definition therein a lease of immovable property is a transfer of a right to enjoy such property made a for a certain time express or implied or in perpetuity in consideration of a price paid or promised or of money or in perpetuity in consideration of a price paid or promised or of money etc., to the transferor by the transferee. The transferor is called the lessor, the transferee is called the lessee and the price is called the premium and the money etc., or other thing to be so rendered is called the rent.

10. On behalf of the appellant strong reliance has been placed on the observations of the Privy Council in Nidha Sah v. Murlidhar. In that case one Indarjit Lal executed an instrument purporting to be a mortgage with possession in respect of proprietary right in certain villages for a period of 14 years. It was provided that on the expiration of the terms the mortgagor, "shall come in possession of the mortgaged village without settlement of accounts..... that on the expiration of the terms..... the mortgagee shall have no power whatever in respect of the said estate..... and after the expiration of the term this mortgage- deed..... shall be returned to the mortgagor without his accounting for (paying) the mortgage money....."

11. Their Lordships observed :

> "This instrument through it is called a mortgage and though it will be convenient to follow the nomenclature used in the document itself and in the pleadings and judgments in the courts below, is not a mortgage in any proper sense of the words. It

> is not a security for the payment of any money or for the performance of any engagement. No accounts were to be rendered or required. There was no provision for redemption expressed or implied. It was simply a grant of land for a fixed terms free of rent in consideration of a sum made up of past and present advances."

12. When the term expired the mortgagee refused to give up the possession on the ground that he had not been able to get possession owing to the misrepresentation of the mortgagor and had not received the full benefit purported to be given by the mortgage. In a suit by the mortgagor to recover possession it was held by the Judicial Committee that the plaintiff was entitled to rely on his proprietary right and in the absence of any stipulation express or implied in the mortgage- deed depriving him of the right to recover possession he was entitled to succeed.

13. On behalf of the respondent reliance has been placed on Ishan Chandra v. Sujan Bibi. In that case, consideration of a loan received, a party agreed that his property should remain in the hands of the lender for a term of years by which time it was understood the whole amount borrowed would be liquidated, the transaction was held to be Bhoghundhuk or usufructuary mortgage and not a lease.

14. In Tukaram Bin Mairal v. Ramchand Malukchand, a Full Bench had to consider a document which was described in the heading as a mortgage deed. There was a provision that the debt was not to bear interest but towards liquidation of it the creditor was to appropriate the income of the land described which was given for enjoyment for a period of 10 year. The deed went on to state that when the creditor had managed the land and appropriated the produce the debtor would understand that the money due had been paid off and would take a receipt and thereafter the person to whom the document was passed would have no right over the land. No mention had been made of any premium or periodical payment of rent or share of the produce. It was contended that the transaction in that case could not be one of usufructuary mortgage as set forth in section 58 (d) of the Act because that provision did not contain mention of any fixed terms. The Full Bench observed :

> "That, no doubt, is so, but the law contemplates the property remaining in the possession of the mortgagee, who is authorised to retain it until payment of the mortgage money and to appropriate the rents and profits in lieu of interest or in payment of principal or both and the nature of the contract is not altered by the fact that the calculation is made beforehand of the period for which the rents and profits will be sufficient to pay off both principal and interest. There is no apparent reason why such a contract as the present should not come within the category of anomalous mortgages as defined in section 98 of the Transfer of Property Act..... ".

15. The ratio of the Full Bench decision was applied in Mahmad Muse Umarji v. Bagas Amanji Umar, where by a deed it was provided that in consideration of a certain amount advanced to the plaintiff the defendant was to take possession of lands belonging to the plaintiff for 199 years and to apply its profits in liquidation of the debt. The deed was headed "lease in respect of valatd an." Before the expiration of the period the plaintiff brought a suit for redemption of the mortgage and for possession of the land alleging that the transaction evidenced by the deed was a mortgage. It was

held that reading the deed as a whole and in view of the decision of the Full Bench, the transaction was one of mortgages. The parties clearly intended that the relations between them should be that of mortgagor and mortgagee.

16. It is unnecessary for us to decide any other point except the narrow question whether the transactions embodies in the deeds referred to were to leases or of mortgages. The Privy Council decision was based on different facts and is clearly distinguishable. There was a no question there of the liquidation of debt by the receipt of rents and profits thereof by the mortgagee. The deed was interpreted as containing a simple grant of land for a fixed terms free of rent in consideration of a sum made up of past and present advances. The deeds, in the present case when examined closely, fall more appositely within the type of instruments which came up for consideration in the other three cases on which reliance was placed by counsel for the respondent.

17. The decision of the High Court is consequently affirmed and the appeals are dismissed with costs. One hearing fee.

18. Appeals dismissed.