

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor,  
and Mr. Justice Heaton.*

1909.  
March 26.

THE HITWARDHAK COTTON MILLS Co., LIMITED, APPLICANT, v.  
SORABJI DINSHAW KARAKA.\*

*Indian Stamp Act (II of 1899), section 2 (5) (b)—Transactions comprised in a document—Agreement to lend money for improvement, additions and repairs and for working mortgaged mills—Agreement to lend money to partnership not capable of specific performance—Breach of the agreement—Claim for damages—Stamp duty to the document.*

The transactions comprised in a document consisted of a transfer of a mortgage secured on a cotton mill and an agreement that the transferee should lend money at the request of the transferor to the mortgaged mill for making improvements, additions and repairs and for the working of the mill.

A question having arisen as to what was the proper stamp duty payable on the document,

*Held* that the document was only liable to stamp duty as a transfer of mortgage and as an agreement, that is, to Rs. 5-8-0 in all.

An agreement to lend money does not create an obligation to pay money within clause (5) (b) of section 2 of the Indian Stamp Act (II of 1899).

An agreement to lend money to a partnership is not capable of specific performance and it creates no debt although the breach of it may give rise to a claim for damages.

REFERENCE by R. P. Barrow, Commissioner, Northern Division, under section 57 (a) of the Indian Stamp Act (II of 1899).

The terms of the reference were :—

An instrument, which the parties thereto meant to be a partition deed was drawn up on the 29th June 1907 between the Directors of the Ahmedabad Fine Spinning and Weaving Company, Limited, and the Firm of Sorabji Dinshaw Karaka and Company.

The Firm of Sorabji Dinshaw Karaka and Company entered into an agreement with the Hitwardhak Cotton Mills Company, Limited, on the 6th April 1904 by which the firm was appointed the Agents of the Company on certain conditions.

In pursuance of the said agreement the firm from time to time advanced money aggregating Rs. 4,08,085-4-2 to the Company, repayment of the sum

\* Civil Reference No. 6 of 1908.

being made a first charge on the property of the Company. The instrument mentioned in the first para shows that the greater part of this money was borrowed from the Ahmedabad Fine Spinning and Weaving Company, Limited, by Mr. Sorabji Dinshaw Karaka who was also the Managing Agent thereof. By this instrument the firm transferred to the Ahmedabad Fine Spinning and Weaving Company, Limited, its interest in the first charge over the property of the Hitwardhak Cotton Mills Company, Limited, which had been acquired under the agreement of April 1904. The firm further bound itself to pay to the Ahmedabad Fine Spinning and Weaving Company, Limited, one-half of the commission from the Hitwardhak Cotton Mills Company, Limited, to which it was entitled under the aforesaid agreement. In consideration of this transfer of interest the Ahmedabad Fine Spinning and Weaving Company undertook (1) to confirm the loan already advanced by the firm to that Company and (2) to advance a further loan up to Rs. 4,50,000 if required by Mr. Sorabji Dinshaw Karaka for additions to or improvements in the machinery or plant and building, &c., and (3) to advance such money as working capital as might be required by Mr. Sorabji in the working of the mill. The instrument embodying these conditions which purports to be a deed of partnership bears a stamp of Rs. 15. The Sub-Registrar of Ahmedabad before whom the document was produced for registration held that the transfer of interest secured by the firm by way of first charge over the Hitwardhak Mill and half commission came under Article 62 (c) 2 of the first Schedule of the Stamp Act of 1899 and required a stamp of Rs. 5. As regards the advance of up to Rs. 4,50,000 he considered that it fell under the definition of a bond and that the duty leviable was that chargeable on a bond under clause 15 of the Schedule. Being in some doubt however as to the correctness of his opinion he referred the question for decision to the Collector. The Collector then consulted the Government Pleader as to the amount of the duty leviable and the latter has advised that the document should be taken to be a transfer under Article 62 (c) 2 of the Schedule and an agreement as regards the three conditions—

- (1) Transfer of half commission,
- (2) Advance of Rs. 4,50,000,
- (3) Advance as working capital made.

According to his opinion the stamp duty leviable would be Rs. 6-8-0 in all.

The Collector then, holding that since the document embodies various conditions of transfer of interest secured by the firm and an undertaking on the part of Ahmedabad Fine Spinning and Weaving Company, Limited, to advance money, it should be taken as a transfer under Article 62 (c) 2 and a bond under Article 15, as regards the sum of Rs. 4,50,000, referred the question for decision to the Commissioner under section 56 of the Stamp Act.

The Inspector-General of Registration whose opinion has since been taken refers to the decision of the Full Bench of the Madras High Court in Indian Law Report 15 Madras, page 193, and agrees with the Collector except with

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regard to that part of the instrument which contains an agreement to advance money for working capital. He considers that since the amount was not ascertainable when the deed was drawn up the duty should be 8 annas only under Article 5 (b), Schedule I, the total duty leviable being Rs. 5 + 2,250 + annas 8, or Rs. 2,255-8-0.

The Commissioner's opinion was that the Inspector-General's view was apparently correct, but as the amount of duty involved was large and agreements of the nature referred to were not uncommon, the present reference was made under section 57 (a) of the Indian Stamp Act (II of 1899) for an authoritative decision.

*M. B. Chaubal*, Government Pleader, appeared for the Government.

There was no appearance for the parties.

SCOTT, C. J.:—The transactions comprised in the document which is the subject of this reference consist of a transfer of mortgage by S. D. Karaka to the Ahmedabad Fine Spinning and Weaving Company and an agreement *inter alia* that the company shall lend money at the request of S. D. Karaka for making improvements, additions and repairs to the building and machinery of the Hitawardhak Cotton Mills up to an unascertained though ascertainable amount and also such money as may be required for working the said mills.

It has been argued on behalf of the Revenue Authorities that the agreement to lend money for repairs and improvements is a bond within the meaning of the Indian Stamp Act, 1899, section 2 (5) (b).

By that clause it is provided that "bond" shall include any instrument attested by a witness and not payable to order or bearer whereby a person obliges himself to pay money to another.

In our opinion an agreement to lend money does not create an obligation to pay money within the meaning of this clause. An agreement to lend money to a partnership is not capable of specific performance (see *Sichel v. Mosenthal*<sup>(1)</sup>); and it creates

(1) (1862) 30 Beav. 371.

no debt though the breach of it may give rise to a claim for damages: see *South African Territories v. Wallington*<sup>(1)</sup>.

We hold that the document is only liable to duty as a transfer of mortgage and as an agreement, *i. e.*, to Rs. 5-8-0 in all.

*Order accordingly.*

G. B. R.

(1) [1898] A. C. 309.

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

TRIMBAK MAHADEV TILAK (ORIGINAL OPPONENT NO. 3), APPLICANT,  
v. NABAYAN HARI LELE AND ANOTHER (ORIGINAL PETITIONER AND  
OPPONENT NO. 1), OPPONENTS.\*

1909.

April 2.

*Indian Trusts Act (II of 1882), section 3A—Executor—Trustee—Advice of Court as to administration of property—Executor continuing as such—Administration suit.*

So long as an executor occupies that position, he cannot claim the advantages provided for trustees by section 34 of the Indian Trusts Act (II of 1882). If he feels any doubt as to the manner in which he should administer the estate come to his hands, his remedy is to file an administration suit.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of C. A. Kincaid, District Judge of Poona.

The facts of the case were that on the 25th April 1900 one Vishnu Mahadev Tilak made a will appointing under it Narayan Hari Lele and Ganesh Narayan Khare executors and his brother Lakshman Mahadev Tilak *alias* Anna Tilak residuary legatee. In the will the property of the testator was valued at Rs. 7,100 and the directions as to its disposal were as follows:—

Rs. 2,000 for the marriage of the testator's daughter  
Varubai.

\* Application No. 72 of 1909 under Extraordinary Jurisdiction.