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is entitled to the whole fund. He is only going against the petitioner who claims to be entitled to the whole fund by reason of his decree. To him the opponent's answer is "I have also applied for execution and I am entitled to rateable distribution along with you under s. 73." Therefore, the claim of the opponent is less than what he would be entitled to under the decree in suit No. 103 of 1940. Therefore, it is difficult to see how the opponent can be prevented from making a lesser claim than what he would be entitled to under the decree in suit No. 103 of 1940.

The result, therefore, is that the application fails. Rule discharged with costs.

Rule discharged.

M. W. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice, Mr. Justice Coyajee, and Mr. Justice Gajendragadkar.

THE CHIEF CONTROLLING REVENUE AUTHORITY *v.* NANABHAI HORMUSJI BHIWANDIWALA.*

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Indian Stamp Act (II of 1899), sch. I, art. 35—Lease—Whole rent paid in advance—Absence of covenant to pay rent—Whether lease chargeable with stamp duty under sub-cl. (a) (iii) or (b)—Reference to High Court by Stamp authorities—Costs of reference—Change in practice.

In order that a document of lease may fall under art. 35 (*a*) (*iii*) of Schedule I to the Indian Stamp Act, 1899, it is necessary that the annual rent must be reserved under that document. "Rent reserved" in this context means rent in respect of which there is a covenant on the part of the lessee to pay the amount stated in the document. Where there is no covenant to pay rent the whole amount having been paid in advance, and all that the lease provides is that there is an appropriation of the amount actually paid to rent which is stated as being for certain fixed amounts spread over the period of the lease, there is no reservation of rent under the lease. What the lessee really does in making the payment before he is liable to pay rent is to make an advance to the lessor, which advance would satisfy his liability from time to time as he becomes liable to pay rent. Such a case falls under art. 35 (*b*) and not under art. 35 (*a*) (*iii*) of the Stamp Act.

* Civil Reference No. 4 of 1951.

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In view of the decision of the Supreme Court in *The Chief Controlling Revenue Authority* v. *The Maharashtra Sugar Mills, Ltd.*,[1] whenever an application is made by a party to the Stamp authorities it is incumbent upon them to make a reference to the High Court under s. 57 of the Stamp Act, 1899, and it is no longer a matter of their discretion as was held to be prior to that decision. Therefore, the settled practice of the High Court that in all stamp references there should be no order as to costs has to be altered and the rule hereafter shall be that costs will ordinarily follow the event.

Stamp reference.

Khan Bahadur Seth Nanabhai H. Bhiwandiwalla (lessor) was the owner of certain salt pans and land known as Hormuzd Salt Pans situate in Dadar Taluka at Bombay. On August 12, 1943, he leased the said property to one Radhakisan Ramchandra (lessee) for the period commencing from September 20, 1946, to September 19, 1949, on certain terms and conditions.

On November 2, 1945, in consideration of the lessee having paid to the lessor the sum of Rs. 33,000 for rent for three years at the rate of Rs. 11,000 per year, the lessor agreed to give to the lessee a lease of the said salt pans for a further period of three years from September 20, 1949, to September 19, 1952, upon the terms and conditions contained in the earlier lease.

By another agreement, dated June 24, 1948, in consideration of the lessee having paid to the lessor the further sum of Rs. 22,000 made up of Rs. 11,500 as rent for the first year and Rs. 10,500 as rent for the next year, the lessor agreed to give to the lessee a lease of the said salt pans for a further period of two year from September 20, 1952, to September 19, 1954, upon the original terms and conditions.

In pursuance of the aforesaid two agreements, on December 9, 1949, the lessor executed a document of lease in favour of the lessee demising unto him the said salt pans for the term of five years from September 20, 1949, to September 19, 1954. The lease acknowledged receipt of the two sums of Rs. 33,000 and Rs. 22,000 paid by the lessee to the lessor on November 2, 1945, and June 24, 1948, respectively and then went on to recite a later agreement which had been arrived at between the parties with regard to their apportionment which was as under, namely, Rs. 9,500 to be apportioned as rent for the first year, Rs. 10,500 for the second year, Rs. 11,000 for the third year, Rs. 11,500 for the fourth year and Rs. 12,500 for the fifth year. The document as executed was stamped with stamps of Rs. 249 treating it as one falling under art. 35 (*a*) (*iii*) of the Schedule I to the Stamp Act.

[1] (1950) 52 Bom. L. R. 769, S. C.

When the lease was presented to the Sub-Registrar of Assurance for registration, the Sub-Registrar impounded the document and sent it to the Stamp Office for action. The Assistant Superintendent of Stamp treated the entire rent of Rs. 55,000 paid in advance as a premium and charged the document with a stamp duty of Rs. 3,297 under art. 35 (*b*) (*ii*) of the Schedule to the Stamp Act. This decision of the Assistant Superintendent of Stamps was confirmed in appeal by the Chief Controlling Revenue Authority. The lessor having applied for a reference under s. 57 of the Act, the following points were referred to the High Court:—

(1) Whether the lease dated December 9, 1949, is chargeable with the stamp duty of Rs. 3,297 under art. 35 (b) (*ii*) of the Schedule to the Act in accordance with the assessment of the Assistant Superintendent of Stamps and of the Chief Controlling Revenue Authority in appeal from the assessment of the Assistant Superintendent of Stamps or not?

(2) If the answer to the above question is in the negative, with what stamp duty is the said lease chargeable?

In his order of reference, the Chief Controlling Authority observed:

"If the whole of the rent for the period of the lease is paid in advance then there can be no covenant to pay rent and there can be no reservation of rent.....In the present case as the whole sum of Rs. 55,000 payable for the full term of the lease was paid in advance, I am of the opinion that the said sum is a premium and not rent and that the document is, therefore, chargeable under art. 35 (*b*) (*ii*) of Sch. I to the Act."

The reference was heard.

M. P. Amin, Advocate General, with *Messrs. Little and Co.,* for the Chief Controlling Revenue Authority.

P. P. Khambata with *Messrs Vachha and Co.,* for the lessor.

CHAGLA C. J. This is a reference made under s. 57 of the Stamp Act and the facts leading up to the reference are very brief. A lease was executed on December 9, 1949, whereby the lessor, one Khan Bahadur Seth Nanabhai Hormusji Bhiwandiwala, demised unto the lessee for a period of 5 years the salt pans and land known as Hormuzd Salt Pans situated in Dadar Taluka near Vadala station. In respect of this lease two amounts were paid: Rs. 33,000 on November 2, 1945, and Rs. 22,000 on June 24, 1948, and the question that arises for our determination is whether this is a lease falling under art. 35 (*a*) (*iii*) or under Art. 35 (*b*), and in order to decide that question what we have to determine is whether these two

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amounts paid constitute rent reserved under this lease or they constitute a fine or premium or money advanced, and no rent was reserved under the lease.

Now, neither "rent" nor "premium" is defined under the Stamp Act and, therefore, we have to turn to the Transfer of Property Act for the definitions of these two expressions. And when we turn to s. 105 we find that a lease is defined as "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, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms." And the second clause of s. 105 provides: "The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent." Therefore, the consideration for a lease may be either a price, which is called the premium, or it may be money, share, service or other things which are to be rendered periodically or on specified occasions, in which case the consideration is called the rent. Now, it will be noticed that when the consideration is rent, the money, share, service or other thing is to be rendered in future and it has got to be rendered either at stated periods or on specified occasions. In the case of a premium, it may be a price which is paid antecedent to the execution of the lease or it may be a price which may be paid in future, but in respect of which the promise has already been made antecedent to the execution of the lease. When we turn to the Stamp Act we find that the Stamp Act uses an expression which we do not find in s. 105 of the Transfer of Property Act. In order that a document may fall under Art. 35 (*a*) (*iii*) it is necessary that the annual rent must be reserved under that document. Mr. Khambata contends that all that the expression "reserved" means is that the rent must be provided for under the document. We are unable to accept that contention. "Rent reserved" in this context can only mean rent in respect of which there is a liability, rent in respect of which there is a covenant on the part of the lessee to pay the amount mentioned and stated in the document. When we turn to the lease we find that there is no covenant to pay rent and naturally there could be no covenant as the amount had already been paid but all that we find in the lease is that

there is an appropriation of the amount actually paid to rent which is stated as being for certain fixed amounts spread over the period of the lease. If, therefore, there is no reservation of rent under this lease, the document cannot fall under Art. 35 (*a*) (*iii*) of the Stamp Act.

The Advocate General has also drawn our attention to the fact that when these two sums of Rs. 33,000 and Rs. 22,000 were paid two documents were passed by the lessor and those two documents show how the sums of Rs. 33,000 and Rs. 22,000 were to be treated as rent for the period of the lease. And when we look at these amounts and compare these amounts with the amounts fixed for rent under the lease itself these amounts vary. Therefore, when the amount was actually paid by the lessee the intention of the parties was that this amount should be treated as rent on a certain basis; when the lease came to be executed that basis was altered and the contention of the Advocate General is that rent being an amount certain you cannot call this an amount certain when the parties themselves were not definite as to what the amount of the rent should be for the different periods during which the lease had to run. On the other hand, Mr. Khambata argues that the rights of the parties are to be determined by the terms of the lease itself; and we are prepared to assume in favour of Mr. Khambata that under the lease the amount of the rent was fixed as stated in that document and that we may not look at the earlier documents when the amounts were paid, which amounts were fixed by those documents. But even so, the only reason why the amount of the rent is mentioned in the lease is not for the purpose of fixing any liability upon the lessee to pay the amounts, but merely for the purpose of appropriating these amounts to the amounts already paid antecedent to the execution of the lease.

Mr. Khambata next contends that this is a case not of payment of fine or premium, but it is a case of rent being paid in advance, and according to him even if rent is paid in advance and the rent is stated in the lease, the document would fall under Art. 35 (*a*) (*iii*). Now, it is difficult to understand what exactly is the legal connotation of the expression "rent paid in advance." The liability to pay rent can only arise under the lease and at stated periods or specific occasions mentioned in the lease; till the stated period or specific occasion arrives there is no liability on the part of the lessee to pay rent. Therefore,

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if the lessee pays an amount in respect of the rent prior to the liability arising, that payment is nothing more than an advance made by the lessee to the lessor. He makes an advance, and the agreement is that the lessor will satisfy the lessee's liability out of that amount when that liability arises. But the legal character of that payment is not rent, but moneys advanced by the lessee to the lessor. The liability only crystallizes and takes on the character of rent when the stated period or the specific occasion arrives under the lease and the lessee becomes liable to pay rent. It could not possibly be stated that when the lessee paid the sums of Rs. 33,000 and Rs. 22,000 there was any liability upon him to pay rent; the liability would only arise in terms of the lease. But he chose to make the payment before he was liable to pay rent and in making the payment what he really did was to make an advance to the lessor, which advance would satisfy his liability from time to time as he became liable to pay rent. If that be the true position, then it is clear that the case would fall under art. 35 (*b*) because that sub-clause provides: "where the lease is granted for a fine or premium or for money advanced and where no rent is reserved". So really three possible cases can arise on the execution of a lease. The consideration of a lease may be a fine or a premium. The second case may be where rent is reserved under a lease, by which we mean that there would be a covenant on the part of the lessee to pay rent from time to time. The third case would be where the lessee would advance money to the lessor in satisfaction of his liability to pay rent under the lease; but in the third case no rent would be reserved and there would be no covenant to pay rent. We are prepared to concede in favour of Mr. Khambata that this is not a case of a fine or a premium. Even so, it may be a case of moneys advanced, and in any view of the case Mr. Khambata has failed to satisfy us that there is any rent reserved under this lease. Because, in order to come under Art. 35 (*a*) (*iii*) he has got to satisfy us that any rent is reserved under this lease. Reference was made to a decision of the Madras High Court reported in Reference under Stamp Act, s. 46[1]. In that case the document in question fixed an annual rent of Rs. 15 for four years and Rs. 50 were paid at the date of the execution of the lease and Rs. 10 were to be paid at the end of the four years, and the Madras High Court held, that the payment of Rs. 50 was a stipulation for the payment of rent in anticipation and not for the payment

[1] (1883) 7 Mad. 203.

of a premium or fine. It was unnecessary for the Madras High Court to consider whether the sum of Rs. 50 was rent or were moneys advanced because the decision can be explained on the fact that Rs. 10 were reserved under the lease and were payable after the execution of the lease. The result, therefore, is that we agree with the view taken by the Chief Controlling Revenue Authority that the document in question falls under Art. 35 (*b*) and not under Art. 35 (*a*) (*iii*). We answer the first question in the affirmative. Question No. 2 is unnecessary.

With regard to costs it has been the settled practice of this Court that in all stamp references there should be no order as to costs. The Advocate General draws our attention to the recent decision of the Supreme Court in *The Chief Controlling Revenue Authority* v. *The Maharashtra Sugar Mills, Ltd.*,[1] and he points out that whereas the view taken by the stamp authorities prior to that decision was that it was not obligatory upon them to make a reference but they only made a reference when they thought that the question required the adjudication by the Court now in view of this decision whenever an application is made by a party to the stamp authorities it is incumbent upon them to make a reference. Therefore, the principle underlying the practice with regard to costs should now be altered. There is force in the Advocate General's contention because if it is no longer left to the discretion of the stamp authorities to make a reference, but they are bound to make a reference whether they like it or not, whether they think the point requires the consideration of the Court or not, then we must follow the same principle that we apply to references made under the Income-tax Act. The principle there is that if the assessee fails he must pay the costs, if the Commissioner fails he must pay the costs. But we do not think that we should straightaway alter the practice which has prevailed in this Court for a long number of years. But we would make it clear that in future if any person affected by the order of the stamp authority wishes the authority to make a reference he would do so at his own risk as to costs; if he succeeds he will get the costs; if he fails he will have to pay the costs to the stamp authority unless, of course, in any given case there are special reasons to depart from this rule.

Rule absolute.

M. W. P.

[1] (1950) 52 Bom. L. R. 769, S. C.