

A.F.R.

Reserved on 26.04.2024.

Delivered on 30.05.2024

Court No. - 2

Case :- WRIT - C No. - 41122 of 2019

**Petitioner :-** Housing Development Finance Corporation Ltd.

**Respondent :-** State Of U.P. And 2 Others

**Counsel for Petitioner :-** Gunjan Jadwani

**Counsel for Respondent :-** C.S.C.

**Hon'ble Mahesh Chandra Tripathi,J.**

**Hon'ble Saumitra Dayal Singh,J.**

**Hon'ble Siddharth,J.**

**(Delivered by Hon'ble Saumitra Dayal Singh, J.)**

1. Present reference (to a full bench) has arisen on a doubt expressed by a learned single judge, to the correctness of the ratio contained in a division bench decision of the Court in **HDFC Ltd. Vs Assistant Commissioner Stamps, Ghaziabad, 2015:AHC:125281-DB; (2015) 129 RD 208; (2015) 113 ALR 483; (2016) 2 ALJ 87; 2015 SCC Online All 8079**. In that, the division bench reasoned as below:

*“In the case in hand also, the instrument, namely, agreement executed between the petitioner and its borrowers does not, in itself, evidences or contain terms regarding the deposit of title deed. The loan agreement only provides for a future eventuality requiring the giving of security, which necessarily would not fall within the ambit of Article 6 of Schedule 1-B of the Act. The Stamp Act is a fiscal statute and its provisions are to be strictly construed. No stamp duty is liable to be charged on assumptions and conjectures or surmises. The stamp duty is to be paid on the tenor of instrument and not at any future possibility. The Article meant in the agreement for security does not spell out even the nature of the security that may be required to be furnished sometimes in future. Stamp duty also cannot be charged on an assumptions that at any future time, the security by creation of equitable mortgage by deposit of title deeds would be executed. An equitable mortgage created by simply depositing the title deed without there being any instrument, letter, note, memorandum or*

*writing evidencing such an agreement relating to deposit of title deeds, is also not subject to payment of stamp duty.*

*In view of the aforesaid settled legal positing, petitioner cannot be forced to mention in the loan agreement the fact that title document has been deposited with the Bank as it is open in between the Bank and the borrower to either create an oral equitable mortgage by deposit of title deed as provided under Section 58 (F) of the Transfer of Property Act or execute a document in that regard by way of an instrument, letter, note and only in the eventuality of execution of an instrument, memorandum, undertaking, letter, the same would be chargeable with duty under Article 6 of Schedule 1-B. In case, the loan agreement executed between the parties, does not contain stipulation in writing about creation of a mortgage by the deposit of title deed, the stamp duty would not be chargeable under Article 5 of Schedule 1-B of the Act.”*

2. The reference was made at the admission stage of the writ petition. At that stage, the State had not filed its Counter Affidavit. It had opposed the writ petition on the strength of instructions. Even those are not on record. In such circumstances, relying on the document that may have been produced by the State (at that stage) and referring to Clauses 10.5(f), and 10.5(h) read with Clause 13(d) of the Loan Agreement, the learned single judge observed as below, in the order dated 19.12.2019:

*“9. Learned Standing Counsel, who was earlier given time by this Court to seek instructions, on the basis of instructions, has informed this Court that in the loan agreement signed between the bank and the loanee, there is a Clause 10.5(f) and 10.5(h), which was not pointed out at the time of decision of the Court rendered on 31.8.2015. The emphasis is on these two clauses and therefore, they are being quoted hereinbelow:*

*“10.5(f). The Borrower alone shall be responsible to bear and pay the Stamp Duty, all charges levied by the Central Registry of Securitization Asset Reconstruction and Security Interest of India, as well as all other statutory/regulatory charges/levies/taxes as may be applicable to the Loan, the Security, this Agreement as well as on all other instruments in relation to the Loan/Security (to the extent as may be applicable during the pendency of the Loan).*

*10.5(h) The Borrower further agrees that the terms and conditions of the Offer Letter, the loan application and the related documents executed/ to be executed shall be read and form part and parcel of this Agreement. In case of any inconsistency, in any of the stated documents, the terms and conditions of this Loan Agreement shall prevail.”*

*10. It has been submitted on the basis of these two clauses that once the loan agreement is signed by the loanee, the title deed to the property mortgaged as security of the loan are also deposited by the loanee with the bank.*

*11. Learned Standing Counsel has pointed out a clause in the loan agreement which says that such title deed shall only be released after repayment of the entire loan amount i.e. Clause 13(d). It amounts to an equitable mortgage created on the property of which, the loan has been taken. It has been submitted that these clauses of the agreement were not brought to the notice of the Division Bench when it decided the case on 31.8.2015.”*

3. Consequently, the following reference was made by the learned single judge:

*“In the light of the submissions regarding the loan agreement contained Clause 10.5(f), 10.5(h) and 13(d), whether the agreement signed between the bank and the loanee would be chargeable as an equitable mortgage created on the property for which the loan is taken?”*

4. The Chief Justice constituted this full bench to answer that reference. After that, a Counter Affidavit (sworn by Shri. Yogendra Singh, Assistant Registrar, Sadar, Gorakhpur dated 24.09.2020), was filed. It did not bring the Loan Agreement (noticed by the learned single judge), on record. On that being pointed out by us on 05.04.2024, the State craved leave to file a Supplementary Counter Affidavit. We granted that indulgence and adjourned the hearing. Accordingly, a Supplementary Counter Affidavit (sworn by Shri. Pradeep Rana, Assistant Inspector General (Stamp), Gorakhpur), dated 22.04.24 has been filed. Learned counsel for the petitioner proposed, not to file a Rejoinder Affidavit.

5. Since the reference has arisen at the instance of the State, we heard Shri Manish Goel learned Additional Advocate General assisted by Shri A.K. Goyal learned Additional Chief Standing Counsel for the State first, and Shri Anurag Khanna learned Senior Advocate, assisted by Ms. Gunjan Jadwani for the petitioner, in reply.

6. The document described as a true copy of the Loan Agreement (annexed to the Supplementary Counter Affidavit), does not contain Clause 13(d). The learned Additional Advocate General states, there is a typographical error in the reference order. The relevant Clause is Clause 13(iii)(b) of the Most Important Terms & Conditions (hereinafter referred to as MITC). In the absence of any challenge to that statement, we have no reason to doubt its correctness. Accordingly, we read the reference made to us as below:

*In the light of the submissions regarding the loan agreement contained in Clause 13(iii)(b) whether the agreement signed between the bank and the loanee would be chargeable as an equitable mortgage created on the property for which the loan is taken?"*

7. Article 10.5(f), 10.5(h) of the Loan Agreement, Clauses 7, 10(a), 11, and 13 of the MITC, appended to the Loan Agreement read as below:

*"10.5(f). The Borrower alone shall be responsible to bear and pay the Stamp Duty, all charges levied by the Central Registry of Securitization Asset Reconstruction and Security Interest of India, as well as all other statutory/regulatory charges/levies/taxes as may be applicable to the Loan, the Security, this Agreement as well as on all other instruments in relation to the Loan/Security (to the extent as may be applicable during the pendency of the Loan).*

*10.5(h). The Borrower further agrees that the terms and conditions of the Offer Letter, the loan application and the related documents executed/ to be executed shall be read and form part and parcel of this Agreement. In case of any inconsistency, in any of the stated documents, the terms and conditions of this Loan Agreement shall prevail."*

**7. Security/Collateral for the loan [ \* ]**

*Security of the loan would generally be security interest on the property being financed and/or any other collateral/interim security as may be required by HDFC.*

*(a) Property description : House on Plot on Arazi No. 7Mi, Mouza Dariya Chak, Pargana Haveli, Tappa Kasba, Tehsil Sadar, Bd By: N, W:Road, E: House, S:Plot, situated at Gorakhpur, 273001 and construction thereon present and future.*

*(b) Guarantee: Names of the Guarantor/s (if any): Not Applicable*

*(c) Other Security Interest (If any): Not Applicable*

**10. Conditions for disbursement of the loan**

*The Borrower shall:*

*a. submit all relevant documents as mentioned in the Sanction Letter/Loan Agreement.*

**11. Brief Procedure to be followed for Recovery of overdue:**

*Customers are explained the repayment process of the loan in respect of, tenure, periodicity, amount and mode of repayment of the loan. No notice, reminder or intimation is given to the customer regarding his/her obligation to pay the EMI or PEMI regularly on due date.*

*On non-payment of Pre-EMI/EMI by the due dates, HDFC shall remind the customers by making telephone calls, sending written intimations by post and electronic medium or by making personal visits by HDFC's authorized personnel at the addresses provided by the customer. Costs of such calls/communication/visits shall be recovered from the customer.*

*Notwithstanding what is stated herein, it shall be the liability of the customer to ensure that the Pre-EMI/EMIs are regularly paid on the due dates.*

*Credit information relating to any customer's account is provided to the Credit Information Bureau (India) Limited (CIBIL) or any other licenced bureau on a monthly basis. To avoid any adverse impact on the credit history with CIBIL, it is advised that the customer should ensure timely payment of the amount due on the loan amount.*

*The recovery process of enforcement of mortgage/securities, including but not limited to, taking possession and sale of the mortgaged property in accordance with the procedure prescribed under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) or under any other law, is followed purely as per the directions laid down under the respective law.*

*Intimation/Reminders/Notice(s) are given to customer prior to initiating steps for recovery of overdues, under the Negotiable Instruments Act, Civil Suit as well as under the SARFAESI Act.*

**13. Customer Services**

*(i) Customer Service Queries including requirement of documents can be addressed to HDFC through the following channels*

*Write to us through our website: [www.hdfc.com](http://www.hdfc.com) or notify us at:*

*HOFC Lid, HDFC House, HT Parekh Marg, 165-166, Backbay Reclamation, Churchgate, Mumbai 400 020.*

*(ii) Visiting hours and the details of person to be contacted for customer service with respect to all branches of HDFC are available at [www.hdfc.com](http://www.hdfc.com).*

*(iii) Contact HDFC Customer Service Officer at your nearest branch within the working hours as mentioned in the Loan Application form for:*

*a. Photo Copies of documents, which can be provided in 7 working days from date of placing request.*

*Necessary administrative fees shall be applicable.*

*b. Original documents will be returned within 10 working days from the date of closure of loan. Necessary administrative fee shall be applicable if documents collected beyond due date of release of documents.*

*c. Loan Account statement (time line) : Within 3 working days of the receipt of request.”*

8. The reference has arisen in the statutory context of the Indian Stamp Act, 1899 (hereinafter referred to as the ‘Stamp Act’), as applicable in the State of Uttar Pradesh. The provisions of sections 2(14) and 3 of the Stamp Act read as below:

*“2(14) **“Instrument”** - “Instrument” includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.*

***3. Instruments chargeable with duty.** Subject to the provisions of this Act and the exemptions contained in Schedule I, the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor, respectively, that is to say,-*

*(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;*

*(b) every bill of exchange payable otherwise than on demand, or promissory note drawn or made out of India on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated in India; and*

*(c) every instrument (other than a bill of exchange, or promissory note) mentioned in that Schedule, which not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in India and is received in India:*

*Provided that, except as otherwise expressly provided in this Act, and notwithstanding anything contained in clauses (a), (b) and (c) of the section or in Schedule I or I-A, the following instruments shall, subject to the exemptions contained in Schedule I-A or I-B be chargeable with duty of the amount indicated in Schedule I-A or I-B as the proper duty therefor, respectively, that is to say,-*

aa) every instrument mentioned in Schedule J-A or B which not having been previously executed by any person was executed in Uttar Pradesh,-

(i) in the case of instruments mentioned in Schedule I-A on or after the date on which the U.P. Stamp (Amendment) Act, 1948, came into force; and

(ii) in the case of instruments mentioned in Schedule I-B on or after the date on which the U.P. Stamp (Amendment) Act, 1948, came into force;

(bb) every instrument mentioned in Schedule I-A or I-B which not having been previously executed by any person, was executed out of Uttar Pradesh,-

(i) in the case of instruments mentioned in Schedule I-A on or after the date on which the U.P. Stamp (Amendment).

(ii) in the case of instruments mentioned in Schedule I-B, on or after the date on which the U.P. Stamp (Amendment) Act, 1952, comes into force, and relates to any property situated, or to any matter or thing done or to be done in Uttar Pradesh, and is received in Uttar Pradesh:

Provided also that no duty shall be chargeable in respect of,-

(1) any instrument executed by or on behalf of, or in favour of, the Government in cases where, but for this exemption Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer of other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part, interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act, 1894, or under Act No. XIX of 1838, or the Indian Registration of Ships Act, 1841 (X of 1841), as amended by subsequent Acts;

[(3) Any instrument executed, by, or, on behalf of, or, in favour of, the 'developer', or 'unit' or in connection with the carrying out of purposes of the special economic zone.

**Explanation.-** For the purposes of this clause, the expressions "Developer", "Special Economic Zone" and "Unit" shall have meanings respectively assigned to them in clauses (g), (za) and (zc) of Section 2 of the Special Economic Zones Act, 2005.]

**Explanation.-** Where the amount of duty prescribed in Schedule I-B contains any fraction of a rupee below twenty-five paise, or above twenty-five paise, but below fifty paise, or above fifty paise, but below seventy-five paise, or above seventy-five paise but below one rupee, the proper duty shall be an amount rounded off to the next higher quarter of a rupee as hereinafter appearing in the said Schedule.”

9. Then, Articles 5(c), 6, and 40 of Schedule I-B to the Stamp Act read as below:

<i>Description of Instrument</i>	<i>Proper Stamp-duty</i>
<b>5.Agreement or memorandum of an agreement-</b>	

<p><i>(c) if not otherwise provided for</i></p> <p><i>Exemption</i></p> <p><i>Agreement or memorandum of agreement-</i></p> <p><i>(a) [Deleted by U.P. Act No. 14 of 1963]</i></p> <p><i>(b) made in the form of tenders to the Central Government for, or relating to, any loan;</i></p> <p><b>6. Agreement relating to deposit of title, deeds, pawn or pledge, that is to say, any instrument evidencing an agreement relating to -</b></p> <p><i>(1) the deposit of title deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security);</i></p> <p><i>or</i></p> <p><i>(2) the pawn or pledge of movable property, where such deposit, pawn or pledge has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt -</i></p> <p><i>[(a) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement-</i></p> <p><i>For every Rs. 1,000 or part thereof of the amount of loan or debt.</i></p> <p style="text-align: center;"><b>Explanation</b></p> <p><i>For the purposes of clause (1) of this Article, any letter, note or memorandum or writing, relating to the deposit of title deeds, whether written or made before, or at the time of, or after, the deposit of title deeds is effected, and whether it is in respect of the first loan or any subsequent loan, such letter, note, memorandum or writing shall, in the absence of any separate agreement</i></p>	<p><i>One hundred rupees.</i></p> <p><i>Twenty rupees</i></p>
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<p><i>relating to deposit of title deeds, be deemed to be an instrument evidencing an agreement relating to the deposit of title deeds.]</i></p> <p><i>(b) if such loan or debt is repayable not more than three months from the date of such instrument.</i></p> <p style="text-align: center;"><b>Exemption</b></p> <p><i>Instrument of pawn or pledge of agriculture produce, if unattested.</i></p> <p><b>40. Mortgage-deed</b> not being an Agreement relating to Deposit of Title-deeds, Pawn or Pledge (No.6), Bottomry Bond (No.16), Mortgage of a Crop (No.41), Respondentia Bond (No.56) or Security Bond (No. 57)-</p> <p><i>(a) when possession of the property or any part of the property comprised in such deeds is given by the mortgagor or agreed to be given</i></p> <p><i>(b) when possession is not given or agreed to be given as aforesaid</i></p> <p style="text-align: center;"><b>Explanation</b></p> <p><i>A mortgagor who gives to the mortgagee a power of attorney to collect rents or a lease of the property or part thereof, is deemed to give possession within the meaning of this Article.</i></p> <p><i>(c) when a collateral or auxilliary or additional or substituted security, or by way of further assurance for the abovementioned purpose where the principal or primary security is duly stamped-</i></p> <p><i>for every sum secured not exceeding Rs. 1,000</i></p> <p><i>and for every Rs. 1,000 or party thereof secured in excess of Rs. 1,000</i></p> <p style="text-align: center;"><b>Exemptions</b></p> <p><i>(1) Instruments executed by persons taking advances under the Land</i></p>	<p><i>Half the duty payable on a loan or debt under Clause (a) for the amount secured.</i></p> <p><i>The same duty as a Conveyance [No.23 clause (a)] for a consideration equal to the amount secured by such deed.</i></p> <p><i>The same duty as a Bond (No.15) for the amounts secured by such deed.</i></p> <p><i>[Ten rupees]</i></p> <p><i>[Ten rupees]</i></p>
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<p><i>Improvement Loans Act, 1883, or under the Agriculturists' Loans Act, 1884, or by their sureties as securities for the repayment of such advances.</i></p> <p><i>(2) Letter of hypothecation accompanying a bill of exchange.</i></p>	
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10. The Stamp Act is a fiscal statute<sup>1</sup>. Therefore, the rule of strict interpretation must be applied to its charging section - Section 3 read with the Schedules to that Act<sup>2</sup>. There is no room or permission to interpret/read the charging section, liberally<sup>3</sup>. The Courts may only look at what is clearly said; there is no room for intendment; there is no equity about tax; there is no presumption as to tax; nothing may be read into, and nothing may be implied to bring a subject to tax<sup>4</sup>.

11. To define a 'taxing event' falls within the competence of the legislature<sup>5</sup>. It is an artificial legislative construct. It arises upon a levy created by the legislative law, on a person transaction, event, or activity, performed by natural or other persons. Therefore, it (taxing event) may arise strictly in terms of the express words used by the legislature. If literal reading leads to non-taxability of the transaction, no levy may arise<sup>6</sup>. If there exists a doubt/ambiguity about whether a transaction, event or activity falls within the four corners of the

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1. District Registrar and Collector Vs. Canara Bank (2005) 1 SCC 496

2. Board of Revenue Vs Rai Saheb Sidnath Mehrotra, AIR 1965 SC 1092

3. Commissioner of Sales Tax, U.P. Vs Modi Sugar Mills Ltd., (1960) SCC OnLine SC 118

4. Polester Electronic (P) Ltd. Vs Addl. Com. Sale Tax (1978) 1 SCC 636

5. Rai Ram Krishna & Ors. Etc. Vs State of Bihar (In Both the Appeals), (1963) SCC OnLine SC 31

6. CIT Vs Maharashtra Sugar Mills Ltd., (1971) 3 SCC 543

charging section, the taxing event does not exist. Consequently, the levy of tax cannot arise<sup>7</sup>.

12. For a valid levy of a tax to arise, there must exist four components of tax namely, the character of the impost i.e. the description of the taxable event; a clear indication of the person on whom the levy is imposed; the rate of tax; and the measure or value to which the rate of tax is to be applied<sup>8</sup>. The burden to establish the occurrence or existence of a taxing event rests on the revenue<sup>9</sup>. Therefore, unless the revenue first discharges that burden, the taxpayer may not be burdened to prove the negative.

13. Section 3 of the Stamp Act seeks to charge stamp duty on an 'instrument'. Thus, the taxing event is the execution of an 'instrument'. The person on whom such duty liability arises is specified under Section 29 of the Stamp Act. The rate and measure of duty to be charged is to be found - as 'indicated' under any of the Schedule to the Stamp Act. Before us, there exists neither any doubt as to the person on whom stamp duty is to be levied nor to the existence of the rate or measure of stamp duty specified by the Stamp Act.

14. The doubt is whether the 'instrument' executed by the petitioner falls under Article 6(1) of Schedule 1-B to the Stamp Act. Unless that 'instrument' exists, the rate and measure of tax prescribed may not come to life. Thus, for any charge of stamp duty to arise there must exist an 'instrument' on which such duty may be charged. Under separate entries (described as Articles), enumerated under each of the Schedules appended to the Stamp Act, the exact rate of stamp duty

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7. Central India Spg., Wvg. & Mfg. Co. Ltd. Vs Municipal committee, AIR 1958 SC 341

8. Govind Saran Ganga Saran Vs. CST, 1985 Supp SCC 205

9. Union of India Vs Garware Nylons Ltd., (1996) 10 SCC 413

must be found prescribed on the subject 'instrument'. Under the scheme of the Stamp Act, those have been categorised by nature of the rights and liabilities that an 'instrument' may seek to create, alter or deal with 'indicating' the stamp duty to be charged thereon. Unique rates of tax have been specified for each such 'instrument', together with the method/mode of computation i.e. fixed rate or *ad valorem* base.

15. Section 2(14) of the Stamp Act includes and thus describes an 'instrument' as 'every document' etc. by which any 'right or liability' is, or purports to be, amongst others 'created' or 'recorded'. The dictionary meaning of the word 'instrument' would commend its construction - a written document of a formal legal kind<sup>10</sup>. In any case, Section 3(18) of the General Clauses Act, 1897 defines a 'document' thus:

*"3(18). "document" shall include any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means which is intended to be used, or which may be used, for the purpose of recording that matter.*

16. Section 4(13) of the Uttar Pradesh General Clauses Act, 1904 incorporates a *pari materia* definition of the word 'document'. Similarly, Section 3 of the Indian Evidence Act 1872 defines 'document' thus:

*"3. Document. —Document means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter."*

17. On a conjoint reading of Sections 3 and 2(14) of the Stamp Act read with Section 3(18) of the General Clauses Act, 1897 and Section 4(13) of the U.P. General Clauses Act, 1904, a charge of stamp duty may arise - as to amount 'indicated' in any of the Schedules to the Stamp Act on an 'instrument' i.e. a 'document' that must be writing,

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10. Shree Mohan Chowdhury Vs K.C. Dhulia AIR 1964 SC 173

expressed or described by letters, figures or marks, etc., placed with an intention to be used or for actual use to record that matter. That may never be anything but writing whether on paper or electronic mode etc. In whatever form it may exist, its visibility to the naked eye (both as to the writing and the intent or use), is a *sine qua non*, to be fulfilled, before such ‘document’ may ever be described as an ‘instrument’. Therefore, for the charging section to attract and a valid levy of stamp duty to arise, there must not only exist an ‘instrument’ (as defined), but also a specified rate of tax on such ‘instrument’, under any one of the Schedules to the Stamp Act<sup>11</sup>.

18. Read in the context of the duty Entry/Article 6(1) of Schedule 1-B to the Stamp Act, that ‘instrument’ i.e. writing must further fulfill the requirement of being an “agreement relating to deposit of title deeds”, etc. For an ‘agreement’ to exist, it must involve a meeting of minds<sup>12</sup>. Therefore, the writing that must be proved (by the revenue), must show that the parties (that executed the same), had agreed to provide for the deposit of the title deed in any immovable property, etc., by way of security for the repayment of money already advanced or to be advanced by the person receiving such deposit.

19. Also, that ‘agreement’ must be specific. It must satisfy the exact terms of Article 6(1) to Schedule 1-B of the Stamp Act. Thus, to be subjected to stamp duty under that Entry/Article, the ‘instrument’ must squarely/unequivocally describe the terms of that Article/Entry, read strictly. Such an ‘instrument’ must ‘evidence’ an ‘agreement’ to ‘deposit of title deeds’ etc. The words ‘that is to say’ prefixed to that taxing entry is an ancillary clause, enacted to explain the meaning of the principal clause. It makes clear and fixes the meaning of the

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11 S.N. Mathur Vs Board of Revenue, (2009) 13 SCC 301

12. Govind Rubber Ltd. Vs Louids Dreyfus Commodities Asia (P) Ltd. (2013) 13 SCC 477

nature of ‘instruments’ subjected to Stamp duty, by the legislature<sup>13</sup>. Therefore, the ‘instrument’ to be subjected to stamp duty payment under that Article/Entry must specifically provide for “the deposit of title deeds or.....”.

20. In other words, only when a writing is found executed by the debtor, providing for deposit of any title deed of an immovable property with the creditor - to secure any existing loan or future loan to be advanced by the latter (which would be rights and liabilities dealt with by that document), the taxing event may exist. That alone may give rise to a levy of stamp duty as the rate and measure of the tax provided under Article 6(1) of Schedule 1-B to the Stamp Act. There cannot be any presumption or inference as to that.

21. In the absence of that written agreement, no ‘instrument’ less so ‘chargeable to duty’ - in terms of Section 3 read with Article 6(1) to Schedule 1-B of the Stamp Act may ever exist. In that event, an actual deposit of the title deed with a creditor, to secure any loan availed by the debtor, would not attract any stamp duty liability, since the Stamp Act does not seek to levy stamp duty on oral agreements/transactions. On the contrary, the Stamp Act imposes duty liability only on an ‘instrument’<sup>14</sup>. Those it construes as every document/ written record etc. Unless written words executed by the parties exist to establish the nature of the transaction described under Article 6(1) of Schedule 1-B of the Stamp Act, no taxable event may ever arise or be witnessed under the Stamp Act.

22. Seen in that light, Clause 10(a) of the Loan Agreement only required the borrower to submit documents mentioned in the Sanction Letter/Loan Agreement. Remarkably, the Loan Agreement itself does

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13. State of Tamil Nadu Vs M/s Pyare Lal Malhotra & Ors., (1976) 1 SCC 834

14. Brij Mohan Vs Sugra Begum (1990) 4 SCC 147

not require the borrower to deposit the title deed in any immovable property with the petitioner, to secure the loan availed by the borrower. The Loan Agreement does not speak of the deposit of any title deed. Neither the Sanction Letter nor the Loan Application nor any other document (evidencing any bargain reached between the parties requiring the borrower to deposit any title deed, to secure the loan availed by him), has been brought on record. Therefore, the contents of such documents may remain to be speculated, but never admitted, proved, or established. There is no evidence or credible material (shown to exist) with the revenue authorities, to establish the existence of any written bargain reached between the parties that may have obliged the borrower to deposit any title deed with the petitioner - to secure the loan availed by the former. That burden has remained undischarged.

23. Similarly, in the absence of any other document produced, the mere existence of Clauses 10(f), 10(h) of the Loan Agreement, Clauses 7, 10(a), 11, and 13 of the MITC, the terms and conditions of the Offer Letter, the Loan Application, and other documents (that may form part and parcel of the Loan Agreement), on their (own) force did not create any written stipulation or agreement or evidence of a bargain reached by the borrower to deposit any title deed etc., with the petitioner to secure the loan availed by him. Creation of security interest in immovable property, without documentary evidence of bargain, reached - to deposit the title deed in the immovable property (in which such security interest may have been created in terms of Act Number 54 of 2002), may also not be read as evidence of an 'instrument' drawn to deposit the title deed in that property, to secure the loan availed by the borrower.

24. In view of the above, Clause 13(iii)(b) of MITC is extraneous to the issue. Unless an 'instrument' evidencing an 'agreement' to deposit any title deed is executed by the borrower, in favour of the petitioner - to secure a loan availed by the former, mere deposit of such title deed (against an oral agreement) and its return (against a written agreement) would not give rise to any taxing event under Section 3 read with Section 2(14) and Article 6(1) of Schedule 1-B to the Stamp Act. An oral 'agreement' not being a 'document' may never be described as an 'instrument'. Hence, it may never suffer the impost of stamp duty. Forever, it would remain beyond the reach and clutches of the Stamp Act.

25. As to precedent relied by the learned Additional Advocate General, in **United Bank of India Limited vs M/s Lekharam Sonaram and Co. AIR 1965 SC 1591**, there pre-existed a letter written by Lekharam [Ex-7(a)], authorising his son Babulal to deposit on his behalf certain title deeds to create an equitable mortgage. In turn, Babulal wrote a letter to the lender Bank [Ex-7(b)], authorising his younger brother to deposit the title deeds and to negotiate further in that respect. Since those documents were not registered under Section 17 of the Registration Act, the trial court refused to grant a mortgage decree. That view was maintained by the High Court, in appeal. The Supreme Court reversed that decision and reasoned that the documents in issue created an equitable mortgage. Accordingly, the plaintiff bank was found entitled to a mortgage decree. At the same time, it was not an issue and no finding was reached to infer the existence of an instrument, to deposit the title deeds to secure a loan, in that facts circumstance.

26. In **United Bank of India Limited Vs Ram Chandra Kapoor, 1967 SCC OnLine All 278**, the only issue involved was whether the



endorsement made in the main agreement read together with a separate document executed later, could be read as an agreement relating to pawn or pledge. By reading the documents comprehensively, a coordinate bench of this Court opined that such an 'instrument' existed and may be subjected to stamp duty under Article/Entry 6(1) of Schedule 1-B to the Stamp Act. Here, there is no 'document' recording such an 'agreement'.

27. In **Padam Chand Jain Vs C.C.R.A., 1970 SCC OnLine All 106**, a reference made by the Board of Revenue was answered by a three-judge bench of this Court. That reference arose on the following question:

*“Whether the document under reference is a memorandum of agreement relating to deposit of title deeds within the meaning of Art.6(1), Schedule 1-B of the U.P. Stamp (Amendment) Act, 1962 or a mortgage deed within the definition of that term in Sec. 2(17) of the Stamp Act and chargeable accordingly with a duty of Rs. 3937.50 under Art. 40(b), Schedule 1-B, ibid”.*

Reading the document, it was opined thus:

*“The deed also records an agreement relating to “a first mortgage by deposit of title deeds” in respect of the land and premises specified in the first Schedule as a collateral security for the said amount. As stated in the deed, the title deeds had already been deposited with the branch of the State Bank of India in Chipitola, Agra. The deed, however, does not purport to create any charge on the specified properties to secure the sum of Rs. 1,75,000/-. The reason is obvious; a mortgage by deposit of title deeds effectuates transfer of a right to the properties and creation, separately, of a charge their own becomes unnecessary”.*

28. It was concluded that that deed evidenced an agreement to pledge goods and an agreement to create the first charge by deposit of title deeds. Accordingly, it was found - not chargeable to duty under Article 40 to Schedule 1-B of the Stamp Act, but under Article 6 of Schedule 1-B to the Stamp Act. In that case, the title deed of immovable property was deposited with the lender bank by way of

security against an 'instrument'. Here, no 'document' requiring deposit of title deed exists.

29. In **K. J. Nathan Vs S.V. Murthi Rao and Others, 1964 SCC OnLine SC 120**, the issue was regarding enforcement of a mortgage created by deposit of title deeds. The Supreme Court held, a Court may presume under certain circumstances that a loan and deposit of title deed, constitute a mortgage. That was held to be an inference as to the existence of one fact drawn from the existence of some other fact or facts. Yet, it was not an issue whether an instrument to deposit the title deeds may be inferred, in such circumstances.

30. In **Umesh Kumar Gupta Vs State of UP and others, AIR 2006 Allahabad 30**, the issue involved was whether a mortgage by deposit of title deeds may be created under Section 58(f) of the Transfer of Property Act, 1882. Despite the absence of a written deed, a mortgage was inferred on the strength of the deposit of the title deed. The issue was not whether an oral agreement may be subjected to stamp duty.

31. As discussed by the division bench, more than fifty years ago, a similar reference arose before the Madras High Court in **The Chief Controlling Revenue Authority, Madras vs M/s Pioneer Spinners Pvt. Ltd., 1968 ILR Madras Series 284**. In that, a loan was sanctioned by the Canara Bank by executing an 'instrument' described as the "Articles of Agreement" with related papers accompanied by actual delivery and deposit of certain title deeds (to create security), set out in the Schedule to the loan proposal. That 'instrument', in its annexed Schedule, contained a list of title deeds deposited. Yet, it did not include any clause evidencing an 'agreement' or 'bargain' to deposit the title deeds to secure the loan advanced by the Canara Bank to the borrower. Surely, the "Articles of Agreement" that were the loan agreement also did not contain any clause to that effect.

32. In those facts, a full bench of the Madras High Court, speaking through Justice Natesan reasoned – that there was the absence of any documentary evidence of an ‘agreement’ reached between the parties requiring the borrower to deposit the title deeds to secure the loan availed by it. Further, absence of any clause in the “Articles of Agreement” (the loan agreement in that case), to include and make part of that written ‘agreement’ - the “borrower’s proposal” (containing an offer to deposit the title deeds), the mere reference made in the “Articles of Agreement” that:

*“(a) The borrowers proposal shall be deemed to constitute the basis of this agreement end of the loan to be advanced by the bank; and*

*(b) that the advance shall be governed by the terms contained in the agreement as well as in security documents listed in the schedule”*

also did not constitute documentary evidence that “*those parties tacitly considered the writing as the repository and appropriate evidence of the agreement*” that could be subjected to stamp duty liability under Article 6 of Schedule 1-B of the Stamp Act. That clause did not make the “Articles of Agreement” a repository of the ‘bargain’ between the parties to deposit the title deeds. The oral agreement if any to that effect remained beyond the reach of the Stamp Act. With time that principle has got set in hard concrete in our jurisprudence. The division bench in **HDFC Ltd. Vs Assistant Commissioner Stamps, Ghaziabad (supra)** and we are in unequivocal agreement with the same. No exception is drawn to that.

33. Thus, we conclude:

(i) creation of a simple mortgage (through deposit of title deeds), though valid in law and fully enforceable as such, would remain beyond the clutches of the Stamp Act, so long as there is no written agreement executed

between the parties or any document that is made part of thereof that evidences the bargain reached between the parties – to deposit the title deed (with the lender) to secure the loan availed by the borrower.

(ii) in the present case, as noted above, there is no written evidence yet brought on record, of any bargain reached by the parties requiring the borrower to deposit the title deeds with the lender/petitioner.

34. Accordingly, we answer the reference made by the learned single judge thus:

(I) An equitable mortgage may exist in favour of the petitioner, through a deposit of title deed, against an oral agreement. Yet, Clauses 10.5(f), 10.5(h) of the Loan Agreement and Clause 13(iii)(b) of the MITC to the Loan Agreement do not constitute an ‘instrument’ or documentary evidence of a written ‘agreement’ or bargain reached between the parties, to thus secure the loan availed by the borrower.

(II) Levy of stamp duty under Article 6 of Schedule 1-B of the Stamp Act may arise only on an ‘instrument’ that must be a ‘document’ containing writing (as would never include an oral agreement), to establish the existence of an “agreement relating to deposit of title deeds”, to secure the loan availed by the borrower. Since that condition is not satisfied, no levy of stamp duty may arise, at present.

(III) Given the above, Clauses 10.5(f), 10.5(h) of the Loan Agreement and Clause 13(iii)(b) of the MITC to the Loan Agreement, do not create any doubt as to the correctness of the division bench pronouncement in **HDFC Ltd. Vs Assistant Commissioner Stamps, Ghaziabad, 2015:AHC:125281-DB.**

35. Let the matter be listed before the appropriate bench.

**Order Date :-** 30.5.2024

Faraz

(Siddharth, J.) (S.D. Singh, J.) (M.C. Tripathi, J.)