

# Housing Development Finance ... vs Asstt. Commissioner Stamps & Anr. on 31 August, 2015

**Bench: Krishna Murari, Amar Singh Chauhan**

HIGH COURT OF JUDICATURE AT ALLAHABAD

Reserved

A.F.R.

Civil Misc. Writ Petition No. 58682 of 2005

Housing Development Finance

Corporation Ltd.

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Petitioner

Versus

Assistant Commissioner, Stamps,

Ghaziabad & Anr.

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Respondents

Hon'ble Krishna Murari, J.

Hon'ble Amar Singh Chauhan, J.

(Delivered by Hon'ble Krishna Murari, J.) Petitioner is a company incorporated under the Companies Act, 1956 having its registered office at Ramon House, H.T. Parekh Marg, 169, Backbay Reclamation, Church Gate, Mumbai with a branch office at Hindustan Times House, IInd Floor, 25, Ashok Marg, Lucknow. Petitioner-company is carrying out business of housing advance within the State of U.P. and is governed by the National Housing Bank Act, 1987.

The issue for adjudication is whether the instrument, namely, the loan agreement executed by the customer availing the loan from the petitioner-Bank falls under Article 6 of Schedule 1-B of Indian

Stamp Act (hereinafter referred to as the 'Act') as applicable in State of U.P. or is only an agreement falling under Article 5 (c) of the Act.

State Government finding that loan facilities for house constructions/ land- building purchase/ house extension are being provided by some of the Banks functioning in the State of U.P. under which, at the time of obtaining signatures of the loanee on the loan agreement, his/her signatures are also obtained on a declaration separately in this regard that loanee is depositing his/her title deeds with the Bank as security against loan and, thus, the above declaration read with loan agreement executed in this manner separately, is covered under Article 6 (1) (A) (Agreement relating to deposit of title deeds, pawn or pledge) of Schedule 1-B of Indian Stamp Act and the stamp duty is payable accordingly, whereas the stamp duty at the prescribed rate is not being charged by several Banks functioning in the State at the time of giving loan to its customers, as such, the loan agreement is not covered under Article 5 (c) of the Act and stamp duty of Rs.100/-, is not acceptable and the fact that the declaration is executed from the loanees, is also concealed by them in the body of the loan agreement. The order further provides that stamp duty will be payable on the agreement relating to deposit of title deed, pawn or pledge and all the Banks functioning in the State must pay the stamp duty as per the classification shown payable on the agreement relating to deposit of title deed, pawn or pledge.

In pursuance to the aforesaid order issued by the State Government, Assistant Commissioner, Stamp, Ghaziabad issued a letter dated 1st July, 2005 addressed to Executive Director of the petitioner-Bank mentioning that the Bank is legally bound to mention in the security document and other related document of the fact that title documents have been deposited with the Bank and non-compliance of the said requirement violates Article 27 of the Indian Stamp Act, which is also an offence under clause 64 of the said Act, for which both lender and borrower will be held responsible for being parties to conceal facts relating to payment of stamp duty and prosecution action may be considered and initiated. The petitioner was further directed to ensure payment of stamp charges on all such loan agreement and also ensure submission of details of all such loan agreement executed in its branch by any borrower for inspection within 15 days so that stamp charges payable in the document may be assessed.

An inspection of the office of the petitioner-company at Lucknow was carried out on 18.08.2004 by Deputy Commissioner, Stamp, Lucknow Division, who after inspecting 23 files relating to housing loan to different loanees, submitted the following report.

"INSPECTION REPORT OFFICE HOUSING DEVELOPMENT FINANCE CORPORATION LTD.

25 ASHOK MARG, LUCKNOW.

Date of Inspection : 18.08.2004.

No. of Cases related to indicated stamp duty deficiency : 23 Indicated Deficient  
Stamp Duty : Rs.26,725.00 Today on 18.08.2004, inspection of office of H.D.F.C.

Ltd., Second Floor, Hindustan Times, 25 Ashok Marg has been carried out. At the time of inspection, S/Shri Asim Vivek, Manager, HDFC and Shri Anil Joshi, Officer Legal, HDFC were present. Files shown in the enclosed list of loans sanctioned for House Construction Extension/Purchase have been made available by them to me for inspection. It has been found on conducting the inspection of the records available in these files that Home Loan Agreement has been executed between H.D.F.C. and Loanee and as per the provisions stipulated in Article 3 of the Home Loan Agreement, registered deeds executed in their favour and registered with the Sub-Registrar Office are got deposited from them as Security from the concerned loanee and stamp duty worth Rs. 100/- only has been paid in the Agreement under Article 5C of Schedule 1B of Indian Stamp Act. Keeping in view the application form of loan in question and provisions of Home Loan Agreement etc., concerned Home Loan Agreement should be deemed as Agreement related to deposit of title deeds under Article - 6 of Schedule 1B of Indian Stamp Act, on which stamp duty of Rs. 10,000.00 maximum is payable at the rate of Rs. 5.00 per thousand on the total loan amount, whereas stamp duty of Rs. 100/- has been paid on the related deeds. Thus, by carrying out wrong categorization of the deeds and showing deficient stamp duty indicated against the deeds shown in the list, revenue loss has been caused.

Thus, in the light of the above on having found the deficient stamp duty paid, deeds in question were seized under Section 33 of the Stamp Act and Manager, HDFC is directed that files of the cases shown in the list enclosed be submitted before the District Magistrate, Lucknow to recover the deficient stamp duty and fine and list of all such agreements which are executed during the period 2000-01 to 2004-05 be also made available to the office of the undersigned in the prescribed format.

Enclosed. As above"

Aggrieved, the petitioner filed the instant writ petition seeking the following reliefs.

"i) To issue a writ of certiorari quashing the letter dated 1st July, 2005 (Annexure 1 to the writ petition) issued by Respondent No. 1 bearing No. 553/ACS/05.

ii) To issue a writ of prohibition or any other writ, direction or order under Article 226 of the Constitution of India prohibiting application of Article 6 of the Stamp Act and/or Government Order dated 24th May, 2005 to the petitioner in the State of U.P. to loan Agreements executed between the petitioner Company and the borrowers.

iii) To issue a writ of prohibition or any other appropriate writ, direction or order, under Article 226 of the Constitution of India, prohibiting the respondents from in any manner proceeding, initiating any action including any police/criminal action or other coercive action against any of the marketing/selling agents or the customers/borrowers of the petitioners.

iv) To mould and issue any other writ, direction or order which this Hon'ble Court deems necessary under the facts and circumstances of the case."

Specific case set up by the petitioner is that once the application for loan is processed, a loan agreement is executed between the borrower and the petitioner. The said loan agreement contains the following provisions.

(i) Definitions;

(ii) Loan interest etc.;

(iii) Covenant for security;

(iv) Conditions precedent to disbursement of loan;

(v) General covenants;

(vi) Borrower's warranties;

(vii) Remedies of HDFC

(viii) Waiver

(ix) Effective date of agreement

(x) Miscellaneous provisions

(xi) Schedule It may be relevant to reproduce Article 3 from the loan agreement which deals with the security.

"3.1 Security for the loan The borrower agrees and undertakes that the principal sum of the loan, interest, other charges and any other dues under this agreement shall be secured by such security as HDFC shall determine in its sole discretion with HDFC having the right to decide the place, timing and type of the security, including the manner of its creation and/or additional security it may require and the borrower shall create the security accordingly and furnish any such additional security as may be decided by HDFC.

3.2 The borrower shall comply with the following:

(a) To execute a pro-note in favour of HDFC for the amount of the loan.

(b) To execute any such agreement/s, document/s undertaking/s, declaration/s that may be required now or hereafter at any time during the pendency of this loan/or any

other loan or loans granted by HDFC hereafter."

A stamp of Rs.100/- is affixed on the loan agreement in terms of Article 5 (c) contained in Schedule 1-B of the Act as applicable in State of U.P. Specific case set up by the petitioner is that no document regarding the deposit of title deeds is signed or executed by the borrower, hence, agreements are not chargeable under Article 6 of Schedule 1-B of the Act.

Shri Anurag Khanna, learned Senior Counsel appearing for the petitioner contends that since neither the petitioner nor its borrower make or sign any letter, note, memorandum or writing relating to oral and equitable mortgage created by deposit of title deeds, which is permitted under Section 58 (F) of the Transfer of Property Act, 1882 and the same is not chargeable to stamp duty as no instrument regarding the deposit of title deeds is created. It is further submitted that Article 3.1 and 3.2 of the loan agreement only vests the petitioner with the authority to require the loanee providing of such security as may be considered necessary, at its discretion. Thus, the loan agreement only provides for a future eventuality requiring the giving of the security, if so desired by the petitioner, but does not provide, 'in presenti', for any security and the loan agreement by itself does not constitute a mortgage or security document so as to make it amenable to Article 6 of Schedule 1-B of the Act.

Learned Standing Counsel appearing for the State respondents has tried to justify the impugned action. It is submitted that the loan agreement contains security Article, which specifically provides that borrower shall execute pro-note in favour of the HDFC for grant of loan and also execute any such agreement/s, document/s undertaking/s, declaration/s that may be required. It is further submitted that any collateral agreement are subject to chargeability of stamp duty under the provisions of the Act and a conclusion can only be reached after inspecting those collateral agreement regarding chargeability of stamp duty. It is further submitted that the authorities are well within their powers to examine the record and other document to satisfy regarding the chargeability of stamp duty on an instrument and authorities cannot be restrained from discharging their official function.

We have considered the arguments advanced on behalf of the learned counsel for the parties and perused the record.

The order of the State Government dated 24th May, 2005 filed as Annexure 2 to the writ petition is general in nature and only provides that, in case, a declaration is separately obtained from loanee that he is depositing his/her title deeds with the Bank against security loan, then the said declaration is covered under Article 6 (1) (A) of Schedule 1-B of the Act and the stamp duty is payable, accordingly. This part of the Government Order just reiterates, what is contained in the Statute. It is further provided in the said order that though certain Banks are getting executed the declaration regarding deposit of title deeds as security against the loan, but they are concealing the same in order to evade the payment of stamp duty and it is anticipated by all the Banks functioning in the State that they pay the stamp duty as shown payable on the agreement relating to deposit of title deeds, pawn or pledge.

In pursuance to the aforesaid order, Assistant Commissioner of Stamp, Ghaziabad issued a letter dated July 1, 2005 to the Executive Director of the petitioner-Bank directing to ensure payment of stamp charges in accordance with Article 6 (1)(A) of Schedule 1-B of the Act of all loan agreement, irrespective of the fact whether a separate declaration for deposit of title deeds has been made between the Bank and the borrower or not.

According to the case set up by the petitioner, the loan agreement only provides for a future eventuality requiring giving of the security, if so desired by the petitioner.

A plain reading of Article 6 goes to show that the said provision does not seek to impose a stamp duty on a potential mortgage or one which the parties agree to create sometimes in future. The stamp duty is payable upon an agreement, which imposes a contractual obligation to either deposit the title deeds immediately or at least create an obligation to necessarily enter into a mortgage. The language of Article 6 cannot be stretched to cover the agreement where the parties merely reserve unto one of them to demand a security. In other words, the language of Article 6 would apply to mortgage deeds, i.e., either the document which evidences the deposit of title deeds or at best an agreement to create a mortgage 'in presenti' by deposit of title deeds.

A mortgage of deposit of title deeds under Section 58 (F) of Transfer of Property Act does not require any writing in law. The same is not chargeable for any stamp duty as no instrument regarding the deposit of title deeds is created or comes into existence. Thus, unless the deposit of title deeds is accompanied by a letter, note, memorandum or writing evidencing agreement relating to deposit of title deeds, merely the loan agreement executed between the petitioner and its borrower cannot be treated as an agreement relating to deposit of title deed for the purposes of Article 6 of Schedule 1 B of the Act as applicable to State of U.P. Further, merely because an agreement by deposit of title deed is created as provided by Section 58 (F) of the Transfer of Property Act, does not require any writing in law, the same is not chargeable for any stamp duty as no instrument regarding the deposit of title deeds is created or comes into existence. Thus, unless the deposit of title deeds is accompanied by a letter, note, memorandum or writing evidencing agreement relating to deposit of title deeds, merely the loan agreement executed between the petitioner and its borrower cannot be treated as an agreement relating to deposit of title deeds for the purpose of Article 6 of Schedule 1-B of the Act as applicable to State of Uttar Pradesh. Merely because an oral mortgage by deposit of title deed is created, as provided by Section 58 (F) of the Transfer of Property Act, the same does not require by law to be reduced in writing.

An identical issue came up for consideration before a Full Bench of Madras High Court in a reference under Section 57 of the Act in the case of Chief Controlling Revenue Authority, Madras Vs. Pioneer Spinners Private Ltd., AIR 1968 Mad 223.

The question for consideration was whether the instrument in the case falls under Article 6 of the Act as an agreement relating to deposit of title deeds or is only an agreement falling under Article 5.

The facts were the executant, namely, respondent Pioneer Spinners Pvt. Ltd. applied to the Canara Bank for a loan of Rs.8 lacs for business purposes, offering to security the repayment of the loan by

executing in favour of the Bank a document termed, "Articles of Agreement" for Rs.8 lacs with other relative papers and by delivering and depositing with the Bank with intent to create security thereon title deeds of properties set out in the schedules to their proposal. The proposal accompanied a list of documents which contained the description of the properties to which the title deeds related, Immovable properties including machineries. On the Bank agreeing to grant loan, respondent no. 2 deposited the title deeds of their property as security for the loan. They also executed in favour of the Bank the articles of Agreement embodying the terms and conditions governing the repayment of loan. The said document was stamped under Article 5 of the Stamp Act.

The question arose whether the instrument, namely, articles of agreement falls under Article 6 of the Act or was liable to be stamped under Article 5. The case set up by the executant was that the article of Agreement did not relate to deposit of title deeds, but is only a collateral agreement governing the repayment of the advance of the matters incidental to the advance. For the Revenue, emphasis was laid on certain terms and provisions of the instrument, in particular, to the reference in the preamble to the borrower's proposal, which was annexed to the article of Agreement.

The Full Bench of Madras High Court noticing that instrument, namely, articles of Agreement contained a list of title deeds of property, which has been deposited as collateral security annexed to the schedule held as under.

"The instrument styled articles of agreement, even though it is executed on the date of the deposit of the title deeds, does not itself evidence or contain the terms regarding the deposit of title deeds. In the original proposal which emanated from the executants to the Bank, the executants had offered (1) to execute the article of agreement and (2) to deposit the title deeds of their immoveable property as security. The deposit of title deeds and the execution of the articles of agreement may all be in the course of the same transaction. But the articles of agreement does not itself embody the bargain for security by the deposit of title deeds; in fact it proceeds upon the existence of the security when it is executed. It itself does not bring about any security by deposit of title deeds.

(2) The material part of Art. 6 of the Stamp Act reads:--

"Agreement relating to deposit of title deeds..... that is to say, any instrument evidencing an agreement relating to (1) the deposit of title deeds or instruments constituting or being evidence of the title to any property whatever (other than a marketable security) (2)..... where such deposit..... has been made by way of security for the repayment of the money advanced by way of loan or an existing or future debt..... "

The question here is whether the articles of agreement under consideration is an agreement relating to deposit of title deeds. The first column of the Schedule I of the Stamp Act specifies the instrument and the second column the duty payable on the instrument. An instrument to fall under Art. 6 must be an agreement relating to the deposit of title deeds. The expression "that is to say" in Art. 6 is

explanatory and in the explanation there is also a limitation. The Article takes in the most common class of equitable mortgages by deposit of title deeds accompanied with a Memorandum of charge containing the terms of the mortgage.

5. Can it be said that the instrument in question here evidences an agreement relating to the deposit of title deeds? This aspect, we have to consider from the well established principle that oral proof cannot be substituted for the written evidence of any agreement, which the parties have put into writing. If the writing evidences the agreement, it must be taken that the parties themselves have tacitly considered the writing as the repository and appropriate evidence of the agreement. Can it be said that the "article of agreement" in this case is the repository of the agreement between the parties relating to the deposit of title deeds as security for the advance? Unless, the instrument could be so read, it cannot be said that it is an agreement relating to deposit of title deeds, or expanding the same concept, an instrument evidencing the agreement relating to deposit of title deeds, by way of security for advance. The mere fact that there is reference to the original proposal, and the proposal is made the basis for the articles of agreement, and there is thus reference in a way to the deposit of title deeds and the documents deposited are also specified in the articles of agreement, cannot make the instrument itself the repository of the bargain between the parties relating to the deposit of the title deeds. The proposal contains a provision for the execution of the document called "articles of agreement" and with reference to this document, certainly the proposal does form a basis. In our view, the phrase "relating to" in Art. 6 cannot be read as merely meaning "connected with". Statutes imposing duties are to be so construed as (not?) to make any instrument liable to stamp unless manifestly within the intention of the legislature.

A mortgage by deposit of title deeds, does not requires any writing in law. Besides the deed and the deposit, what is required is an intention that the deeds shall be security for the debt. The existence of the intention is a matter for inference from facts. The existence of the intention may be established by written documents alone, or coupled with oral evidence or oral evidence only. In a particular case, the circumstances may warrant the inference of a deposit for security from the very fact of deposit. The question whether oral evidence is admissible to explain or establish a deposit of title deeds, would depend on, whether the writing itself has constituted the bargain between the parties. As parties can put thorough a transaction of loan on security furnished by the deposit of title deeds, without an instrument made for a collateral purpose, referring to the deposit incidentally as an agreement relating to deposit of title deeds. It is only the instrument which itself is the agreement relating to deposit of title deeds that is taken in under Art. 6. It cannot be said that in the present case the deposit was contemporaneous with the execution of the instrument and the instrument was intended to evidence the deposit of title deeds. The instrument by itself does not evidence any deposit of title deeds.

(4) We are, therefore, of the view that the instrument is not an agreement relating to the deposit of title deeds governed by Article 6 of the Stamp Act. It would fall under Art. 5 of Schedule I of the Stamp Act."

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.

In such view of the matter, the impugned letter dated 1st July, 2005 of the Assistant Commissioner, Stamp, Ghaziabad (Annexure 1 to the writ petition) cannot be sustained and is hereby quashed.

It shall, however, be open to the respondent authorities to inspect the document in exercise of powers conferred by the provision of the Stamp Act and to take a decision accordingly, in accordance with the provisions of the Act and the law declared as above.

The writ petition, stands allowed to the extent directed above.

August 31st, 2015 VKS