

# **The Chief Controlling Revenue ... vs Vishal Malleables Ltd. on 12 July, 1994**

**Equivalent citations: (1994)2GLR1357**

**Author: M.B. Shah**

**Bench: M.B. Shah, H.L. Gokhale**

## **JUDGMENT**

M.B. Shah, J.

1. An agreement executed on 5th February, 1979 between M/s. Vishal Malleables Ltd., a company registered under the Companies Act, 1956, and having its registered office at G.I.D.C. Industrial Estate, Ankleshwar, District Broach (First Part), Gujarat State Financial Corporation (G.S.F.C. - Second Part), Gujarat Industrial Investment Corporation Ltd. (G.I.I.C. - Third Part) and the Bank of Baroda (Fourth Part), was registered with the Sub-Registrar of Ankleshwar on 8th February, 1979 at Sr. No. 82. The said instrument was executed by affixing a Stamp Duty of Rs. 10/- as if it was an agreement as provided under Article 6 of the Bombay Stamp Act, 1958 ("the Stamp Act" for short). At the time of audit of the Sub-Registrar's Office, the Deputy Accountant General referred to the said instrument and arrived at the conclusion that the instrument was not evidencing the deposit of title deeds or pari passu agreement between the financial institutions and the company but it contained recitals such as:

(i) right to sell the property in case of default in payments;

(ii) continued security of the property for the amount due;

(iii) right to appoint a receiver at any time; and

(iv) exercising any other rights conferred, etc. Hence, it was not an instrument to deposit title deeds but it was a mortgage deed. Hence, the document would be liable to Stamp Duty as mortgage deed under Article 40 of the Stamp Act. A detailed report was submitted by the Deputy Accountant General.

2. On the basis of the said report, the instrument was impounded and the matter was referred to the Collector, Broach, for deciding the true nature of the said instrument and also for determining the proper amount of Stamp Duty leviable thereon and for taking suitable further action in that behalf.

3. The Collector, Broach, by his order dated 28th February, 1984, arrived at the conclusion that the true nature of the instrument was that of mortgage deed and determined the amount of Stamp Duty leviable on the said instrument under Section 39(1)(b) of the Stamp Act. He passed an order for recovery of deficit Stamp Duty of Rs. 2,59,720 on the basis of Article 40 of First Schedule to the Stamp Act and registration fee of Rs. 31,240- together with penalty of Rs. 25,000/-, that is to say, in all Rs. 3,05,960.- from the company, M/s. Vishal Malleables Limited. Against that order, the company preferred a revision application to the Chief Controlling Revenue Authority, Gujarat State, Ahmedabad, under Sub-section (1) of Section 53 of the Stamp Act. After hearing the parties, the Chief Controlling Revenue Authority came to the conclusion that a substantial question of law is involved in deciding the true nature of the instrument and determining the proper amount of duty leviable thereon. Hence, the following questions are referred to this Court under Section 54(1) of the Stamp Act:

(1) Whether the document in question titled as 'agreement' which bears the registered Serial No 82 dated 8th February, 1979 executed on 5th February, 1979 is a 'mortgage deed' as defined in Clause (p) of Section 2 of the Bombay Stamp Act, 1958; chargeable with duty as per Article 45 of Schedule I to the said Act; or (2) Whether the said document is an "Agreement" chargeable with duty as per Article 5(h) of Schedule I to the Bombay Stamp Act.

Before referring these questions, the Chief Controlling Revenue Authority has found that by the aforesaid agreement, the company created a joint mortgage by a registered instrument termed as Pari-passu Agreement. Further, he has, inter alia, referred to the terms and conditions of the documents in the statement of case which we would refer to at the later stage.

Relevant Provisions of The Stamp Act:

4. For determining the questions referred to in this reference, it would be necessary to refer to the relevant provisions of the Stamp Act. Section 2(p) of the Stamp Act defines the term 'mortgage deed' as under:

(p) 'mortgage deed' includes every instrument whereby, for the purpose of securing money advanced, or to be advanced, by way of loan, or an existing or future debt, or the performance of an engagement, one person transfers or creates to, or in favour of, another, a right over or in respect of specified property.

Section 3 of the Stamp Act, inter alia, provides that, subject to the provisions of the Act and the exemptions contained in Schedule I, every instrument mentioned in Schedule I, which, not having been previously executed by any person, is executed in the State shall be chargeable with duty of the amount indicated in Schedule I. Sections 4, 5 and 6 of the Stamp Act read as under:

4 Several instruments used in single transaction of sale, mortgage or settlement -

(1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principal instrument only shall be chargeable with the duty prescribed in Schedule I for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of ten rupees instead of the duty if any prescribed for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of Sub-section (1), be deemed to be the principal instrument: Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

5. Instruments relating to several distinct matters -Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instrument, each comprising or relating to one of such matters, would be chargeable under this Act.

6. Instruments coming within several descriptions in Schedule I -

Subject to the provisions of Section 5, an instrument so framed as to come within two or more of the descriptions in Schedule-I shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties:

Provided that nothing in this Act contained shall render chargeable with duty exceeding ten rupees a counter-part or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid.

Articles 6 and 45, as they stood in 1979, are as under:

Article 6: Agreement or Memorandum of Agreement relating to deposit of title deeds, pawn or pledges - that is to say, any instrument evidencing an agreement or memorandum of agreement relating to:

(1) the deposit of title deeds or instruments constituting or being evidence of the title of any property whatever (other than a marketable security) or (2) the pawn or pledge of moveable 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:

(a) if such loan or debt is repayable on demand or more than three months from the date of the instrument evidencing the agreement;

If the amount of loan does not exceed Rs. 500/- - Five rupees If it exceeds Rs. 500 and does not exceed Rs. 1000/- - Ten rupees And for every Rs. 1000 or part thereof in excess Rs. 1000/- - Ten rupees

(b) If any loan or debt is repayable not more than three months from the date of such instrument - Half the duty payable under Sub-clause (a).

Exemption: Instrument of pawn or pledge of goods if unattested.

Note: The above rate of stamp duty is increased by a surcharge at the rate of ten per cent with effect from 22-4-1963. as per Section 4 of the Amendment act of 1963.

Art. 45 Mortgage Deed, not being an Agreement relating to deposit of title deeds, pawn or pledge (No. 6), Bottomary Bond (No. 19), Mortgage of a crop (No. 46), Respondentia Bond (No. 59), or Security Bond (No. 60).

(a) When possession of the property or any part of the property comprised in such deed is or is not given, or is agreed to be given, by the mortgagor.

The same duty as is leviable on a conveyance under Clause (a) or (b), as the case may be, of Article 27 for a consideration equal to the amount secured by such deed.

(b) When a collateral or auxiliary or additional or substituted security, or by way of further assurance for the above mentioned purpose where the principal or primary security is duly stamped for every sum secured not exceeding Rs. 1000, Five rupees.

And for every Rs. 1000 or part thereof secured in excess of Rs. 1000/ Five rupees.

Exemption: (I) Instruments executed by persons taking advances under the Land Improvement Loans Act, 1883 or the Agriculturists Loans Act, 1884 or by their sureties as security for the repayment of such advances.

(2) Letter of hypothecation accompanying a bill of exchange.

#### Submissions

5. Keeping the aforesaid provisions in mind, the question required to be determined is as to whether the instrument termed as 'pari-passu inter se agreement' between M/s. Vishal Malleables Limited, G.S.F.C., G.I.I.C. and Bank of Baroda, is an agreement or the Memorandum of Agreement relating to deposit of title deeds covered by Article 6 or is a 'mortgage deed' as provided in Section 2(p) and covered by Article 45 of the Stamp Act.

6. Mr. Gandhi, learned Advocate appearing on behalf of the opponent-company, vehemently submitted that the said document was merely an agreement as provided under Article 6 and was not a mortgage deed because by the said agreement, no new rights are created, but only existing rights in favour of the financial institutions are confirmed. As against this, Miss Doshit, learned Advocate appearing on behalf of the applicant, vehemently submitted that, by no stretch of imagination, the document can be considered to be an agreement or memorandum of agreement relating to deposit

to title deeds, pawn or pledges, but it is a mortgage deed. For this purpose, she relied upon various terms of the instrument. She submitted that moveable and immoveable properties of the company are enumerated in the said instrument for evidencing that the said properties are hypothecated to various financial institutions for the loan taken by the company. The instrument further created a right to share the sale proceeds proportionately in case of sale of properties of the company by the financial institutions. The said right was created for the first time by the said instrument. It also provides that the mortgagees are having right to take possession and manage the properties and to appoint receiver. If all these terms of bargain between the parties are specified in the instrument for securing the money advanced, it could never be an agreement relating to deposit of title deeds, Recitals in the Instrument

7. For deciding the nature of the document, it would be necessary to refer to certain terms and conditions mentioned therein. Sub-paragraphs (6) to (9) of the document, recite that unattested Memorandum of Hypothecation were executed by the company in favour of G.S.F.C, G.I.I.C. and the Bank of Baroda on the dates mentioned therein. The said paragraphs inter alia provide that the company has taken total amount of Rs. 61.25 lakhs as secured loan, as stated in paras (6) to (9) of the instrument in the following manner:

- |     |     |             |  |
|-----|-----|-------------|--|
| (1) | Rs. | 26-5 lakhs  | by unattested hypothecation dated 20-4-1978 in favour of G.S.F.C. in regard to movable property and joint equitable mortgage dated 5th February, 1979 in regard to immovable property of the company.  |
| (2) | Rs. | 20.5 lakhs  | by unattested hypothecation dated 20-4-1978 in favour of G.I.I.C. in regard to movable property and joint equitable mortgage dated 5th February, 1979 in regard to immovable property of the company.  |
| (3) | Rs. | 14.25 lakhs | by deed of unattested hypothecation dated 20-4-1978 and supplemental deed dated 5-7-1979 in favour of Bank in regard to movable property and joint equitable mortgage dated 5th February, 1979 in regard to immovable property of the company. |
| (4) | Rs. | 61.25 lakhs | total secured loan.  |

sub-paragraph (10) read as under:

(10). It has been agreed by and between the parties hereto that the security created and/or arising out of G.S.F.C. Hypothecation, G.I.I.C. Hypothecation, Bank Hypothecation and the Joint Equitable Mortgage shall also inter se rank pari passu for all purposes and to all intents and that all moneys resulting from the enforcement and realization of the joint security as hereinafter defined and/or any other realization out of the specifically mortgaged premises as hereinafter defined and/or the general assets as hereinafter defined shall be distributed and shared between G.S.F.C., G.I.I.C. and Bank pari passu without any preference or priority of one over the other or others and for all purposes and to all intents and that for such purpose and certain other ancillary purposes an agreement being these presents should be entered into by and between the parties hereto in the

manner hereinafter appearing.

Now these presents witness and it is hereby agreed by and between the parties hereto as follows:

(1) In this Agreement unless something in the subject or context otherwise requires, the expressions following shall have the following meanings, namely-

(a) to (b) X X X (2) Notwithstanding anything to the contrary by virtue or reason of or implied by or contained in the Joint Securities the Mortgagees and charges created thereunder shall all infer se rank pan passu in point of security without any preference or priority of one over the other or others for all purposes and to all intents.

3.(a) XXX

(b) In case of any moneys becoming due and payable under such insurance as aforesaid, the amount realized from the insurance company or insurance companies concerned shall be received in the first instance by G.S.F.C. and shall, unless the Joint Mortgagees required it to be applied in or towards the repayment of the principal debts due to each of them in accordance with the provisions of Clause 11 hereof, be applied for repair, reinstatement or replacement of the Mortgaged Premises so damaged or destroyed.

4. xxx

5. xxx

6. If, pursuant to any permission in writing that may be jointly given by the Joint Mortgagees to the company to sell any assets forming part of the Mortgaged Premises, the company may sell any such assets, and the sale proceeds realised by the company out of the sale of such assets shall, if the Joint Mortgagees so consent, be utilized by the company in acquiring additional capital assets and in the absence of such consent shall be forthwith paid by the company to Joint Mortgagees who shall thereafter utilize the same in the manner provided in Clause 11 hereof.

7.(a) xxx (b) x x x

8.(a) The company doth hereby covenant and declare that if at any time during the currency of the Joint Securities and these presents, the company shall commit any default in payment of any of the instalments of principal and/or interest or breach of any of the covenants and conditions in or arising out of any of the Joint Securities, and/or the G.S.F.C. letters of sanction or loan agreement and/or the G.I.I.C. letters of sanction or loan agreement and/or Bank's letters of sanction or loan agreement and moneys due to each of the Joint Mortgagees shall become due and payable or be deemed to have become due and payable forthwith as the company doth hereby agree and confirm and any of the Joint Mortgagees shall be entitled to exercise such rights (including right to take over the management of business affairs, concern and undertaking of the company) or to enforce the

right to sell the Mortgaged Premises or to appoint a receiver thereafter or to exercise any other rights as are conferred by the said respective securities and/or other documents or writings and/or otherwise in law and the exercise of such rights shall be for the benefit of the Joint Mortgagees but before exercise of such rights, such Joint Mortgagees shall consult the other Joint Mortgagees.

8.(b) Without prejudice to the generality of the foregoing, the company hereby agree, covenant and declare that if at any time during the subsistence of the Joint Securities, the company shall commit default in payment of the instalments of principal and/or interest or breach of any of the covenants and conditions in or arising out of the G.S.F.C. Hypothecation, the G.I.I.C. Hypothecation, the Bank Hypothecation, the G.S.F.C. Loan agreement and/or G.S.F.C. letters of sanction, the G.I.I.C. Loan agreement and/or G.I.I.C. letters of sanction and the Bank's Loan agreement and/or letters of sanction and/or any of them the moneys due to the G.S.F.C. securities, the G.I.I.C. securities and the Bank's securities shall become due and payable immediately, and the Joint Mortgagees shall be entitled (as the company hereby agree covenant and confirm) to take over the management of business, concern and undertaking of the company or to enforce right to sell the mortgaged premises or any of them or to appoint Receiver thereof or exercise any other rights conferred under the Joint Securities or otherwise in law and the exercise of such rights shall be for the benefit of the Joint Mortgagees but before exercising such rights the Joint Mortgagees shall consult each other.

9.(a) x x x (b) x x x

10.(a) xxx

10.(b) If at any time in the course of enforcing the Joint Securities any of the Joint Mortgagees decides to appoint a Receiver in exercise of the power received therefor (sic) in its relative Mortgage Document or otherwise, it shall not appoint such Receiver except in consultation with others of them.

(c) Any Joint Mortgagees taking over possession and/or management of the company or having a Receiver appointed as aforesaid or enforcing any of the Joint Securities as aforesaid such Joint Mortgagees or the Receiver shall be responsible to the other Joint Mortgagees or to all the Joint Mortgagees as the case may be and shall keep the other Joint Mortgagees or all the Joint Mortgagees as the case may be from time to time informed of all important matters connected with or affecting the Joint Securities.

Such Joint Mortgagees or Receiver:

(i) may at its or his discretion distribute amongst the Joint Mortgagees at any time any moneys collected by it or him; and

(ii) shall in any event, distribute amongst the Joint Mortgagees on the Appointed Day and such moneys collected by it or him upto the end of the preceding month if such moneys amount to Rs. one lac or more, but in either case such distribution shall be on the basis and in the manner laid down in Clause 11 hereof.

11. X X X (1) XXX (2) xxx (3) x x x (4) xxx (5) The aforesaid provisions of this clause shall take effect between the Joint Mortgagees and the persons claiming through them and without prejudice to any rights they or any of them may have against the company.

12. The company doth hereby confirm these presents and undertake that during the subsistence of the Joint Securities the company shall not do or suffer to be done or be party or privy to any act, deed, matter or thing which may in any way prejudicially affect the joint securities and the rights of the Joint Mortgagees.

13. For all or any of the purposes incidental to the exercise of the rights of the Joint Mortgagees under or by virtue of the Joint Securities the company hereby irrevocably appoints the Joint Mortgagees jointly and severally as well as any receiver or receivers appointed pursuant thereto be its true and lawful attorneys or attorney and in the name and on behalf of the company to execute and do all acts, deeds, matters and things which the company could execute and do under the provisions therein contained and generally to use the name of the company in the exercise of all or any of such powers.

In witness whereof the Common Seal of Vishal Malleables Limited have been hereunto and to three counter-parts hereof affixed and Gujarat State Financial Corporation, Gujarat Industrial Investment Corporation and Bank of Baroda have caused these presents and the said three counter-parts hereof to be duly executed on their respective behalf, the day and the year first hereinabove written. At the end of the document, the First Schedule refers to leasehold properties taken by the company and the Second Schedule provides an exhaustive list of plant and machinery owned by the company.  
Opinion

8. Considering the aforesaid terms, in our view, the instrument is unquestionably a mortgage deed. It is not disputed that, prior to executing this instrument, hypothecation deeds were executed as if they were the agreement covered by Article 6 of the Stamp Act. The terms of this instrument clearly confirm that G.S.F.C, G.I.I.C. and Bank of Baroda were the mortgagees of the properties mentioned in Schedule I and Schedule II of the instrument for the loans taken by the company as mentioned therein. The instrument also provides the method and mode of recovering the secured debt. For recovery of the amount, the Financial Institutions were entitled to appoint a Receiver as per clause No. 8 in case of default of making payment by the company. It also provides that, if the company commits default in making payment to any of the creditors, then monies due to all the creditors shall become due and payable immediately and that the Joint Mortgagees shall be entitled to take over the management of business, concern and undertaking of the company or to enforce the right to sell the mortgaged properties. It also provides that the amount realised shall be distributed to the Financial Institutions proportionately. As per clause No. 18, the Joint Mortgagees are irrevocably appointed as Attorneys jointly and severally or Receiver or Receivers on behalf of the mortgagor to execute and do all acts, deeds, matters and things. Hence, in view of the definition of mortgage deed, as provided under Section 2(p) of the Stamp Act, it is apparent that the aforesaid instrument is a mortgage deed because by the said instrument for the purpose of securing money advanced, the mortgagor has specified various rights over and in respect of the properties mentioned in First and Second Schedules of the instrument in favour of three financial institutions. It can be further stated



that by the said instrument, the rights of the three mortgagees inter se and their rights vis-a-vis the secured properties are crystallized. Term No. 2 specifically gives overriding effect to the terms and conditions of the instrument in question by providing that notwithstanding anything to the contrary by virtue or reason of or implied by or contained in the joint securities the rights of the mortgagees shall all inter se rank *pari passu*. In view of all these conditions, it would be difficult to hold that the said instrument is not a mortgage deed as defined under Section 2(p) of the Stamp Act and is simpliciter an inter se agreement between the mortgagees.

9. Further, it would be difficult to hold that the instrument in dispute is an agreement or a memorandum of agreement relating to deposit of title deeds, pawn or pledges as provided under Article 6 to the First Schedule of the Stamp Act. It is not executed for depositing title deeds or for constituting evidence with regard to deposit of title deeds. It also cannot be stated that the instrument is relating to pawn or pledges of moveable properties. On the contrary, the instrument contains all the provisions and conditions which would normally be there in a mortgage deed. It contains certain additional conditions as to how the properties are required to be dealt with in case of default of payment by the mortgagor to any of the mortgagees and inter se rights of three mortgagees. Various conditions, which we have referred to hereinabove, have nothing to do with deposit of title deeds. It appears that in the present case, after handing over the title deeds, the instrument in question is executed incorporating various terms and conditions providing for what was the bargain between the mortgagor and three mortgagees with regard to the mortgaged properties.

10. For deciding the nature of such instrument, the law is well settled. We would first refer to a decision of the Privy Council in the case of *Subramaniam v. Lutchman* AIR 1923 Privy Council 50, wherein it is held as under:

"This Board, however, cannot agree with the view taken by the trial Judge. The law upon the subject admits of no doubt. In the case of *Kedamath Dust v. Shamlal Khetlry* (1) Couch, C.J. says:

The rule with regard to writings is that oral proof cannot be substituted for the written evidence of any contract which the parties have put into writing. And the reason is that the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement.' If this memorandum was of such a nature that it could be treated as the contract for the mortgage and what the parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within Section 17 of the Registration Act.

This Board in *Pranjivandas Mehta v. Chan Ma Phee* (2) laid down the law as follows:

The law upon this subject is beyond any doubt: (1) Where titles are handed over with nothing said except that they are to be security, the law supposes that the scope of the security is the scope of the title. (2) Where however, titles are handed over

accompanied by a bargain that bargain must rule. (3) Lastly, when the bargain is a written bargain, it, and it alone, must determine what is the scope and extent of security.

In the words of Lord Cairns in the leading case of *Shaw v. Foster* (3) although it is a well established rule of equity that a deposit of a document of title without more, without writing, or without word of mouth, will create in equity a charge upon the property referred to, I apprehend that the general rule will not apply when you have a deposit accompanied by an actual written charge. In that case you must refer to the terms of the written document, and any implication that might be raised, supposing there was no document, is put out of the case and reduced to silence by the documents by which alone you must be governed.

11. Applying the aforesaid test laid down by the Privy Council, there cannot be any doubt that the instrument in question was a bargain between the parties and without its production in evidence, the parties cannot establish claims specified in the instrument over the properties mortgaged by the company in favour of the financial institutions. The instrument in question is an overall instrument which clarifies the rights of the financial institutions vis-a-vis the properties mortgaged with them. It determines what is the scope and extent of the security given by the company to the financial institutions.

12. Additionally, the instrument provides for management of properties in case of default by the mortgagor. It specifically provides that, in case of failure to make payment of instalments due and payable to any of the mortgagees, then the money due to each of the Joint Mortgagees shall become due and payable or be deemed to have become due and payable forthwith. In such a situation, the Joint Mortgagees are entitled to take over the management of the business, concern and undertaking of the company. They are also entitled to enforce right to sell the mortgaged premises or any of them or to appoint Receiver. These are written terms and conditions of a bargain between the mortgagor and the mortgagees. Hence, this instrument alone determines as to what is the scope and extent of the security and various rights of the Joint Mortgagees.

13. Dealing with the similar question in the case of *Rachpal v. Bhagwandas*, the Supreme Court observed that when the debtor deposits with the creditor the title deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be sole evidence of its terms. In that case, the Court referred to the Privy Council in the case of *Hari Sankar v. Kedar Nath* wherein it is observed:

The title deeds were deposited accompanied by a memorandum when part of the advance arranged for was made. Some days later when the balance was advanced, another memorandum was delivered superseding the earlier one, and this was a formal document stating the essential terms of the transaction 'hereby agreed' and referred to the moneys 'hereby secured'. It also conferred an express power of sale on

the mortgage. Lord Macmillar, after reviewing the earlier decisions of the Board, held that the document required registration, observing 'where, as here, the parties professing to create a mortgage by a deposit of title deeds contemporaneously enter into a contractual agreement, in writing, which is made an integral part of the transaction, and is itself an operative instrument and not merely evidential, such a document must, under the statute, be registered.

(Emphasis supplied) In the present case the facts are similar. After depositing the title deeds and obtaining the loan from the financial institutions, another document is executed superseding the earlier one and this document is executed stating essential terms of the transaction "hereby agreed" and referred to "the monies (loan received)" with reference to the security given by the mortgagor. It also confers express power of sale on the mortgagees or to manage the business or to appoint a receiver or to act as power of attorney.

14. Similar question is considered by the Special Bench of the Bombay High Court in *Re The Indian Stamp Act, 1899 AIR 1954 Bombay 462*. After considering the definition of 'mortgage deed' in Section 2(17) of the Indian Stamp Act, 1899, the Court observed that the Stamp Act makes no distinction between a legal and an equitable mortgage. But the Legislature has provided that although a document may be a mortgage deed, if it falls within the special class of documents referred to in Article 6 then it would be looked upon as an agreement relating to the deposit of title deeds and not a mortgage deed and the stamp duty payable will be under Article 6 and not under Article 40(b). The Court held that it is Clear that what was intended by Article 6 was a document which should merely contain the bargain between the parties with regard to the deposit of title deeds and conditions subsidiary or ancillary to the deposit of title deeds. But the document which contains all the provisions which one would normally find in a mortgage deed, then the mere fact that the document also contains the bargain with regard to the deposit of title deeds would not make it an agreement for the deposit of title deeds. After considering the document, the Court observed as under:

In our opinion, it is clear that this is by no means a simple document, it is a most elaborate document, and by this document the mortgagee has acquired rights which are proper to a legal mortgage and not to a memorandum of deposit of title deeds. We, therefore, agree with the revenue authorities that the document falls under Article 40(b) and not under Article 6.

Further, dealing with the similar conditions mentioned in the document, in the case of *Chief Controlling Revenue Authority v. Jawahar Mills Ltd. AIR 1967 Madras 1*, the Full Bench of the Madras High Court observed that the recitals in the document create, by their own force, a mortgage in favour of the Indian Overseas Bank Ltd., in respect of all the properties of Schedules A and B, quite apart from the deposit of title deeds under Schedule B. The Court held that the recitals such as 'the properties shall remain as continuing security for the amount due to the mortgagee', in the document, created by their own force a mortgage in favour of the mortgagee quite apart from a

deposit of title deeds of the terms of the bargain of such deposit and the stamp duty for such document was payable under Article 40(b) and not under Article 6(2)(a). Similar are the recitals in the instrument in question.

15. In view of the aforesaid discussion, in our view, the Collector was right in arriving at the conclusion that the instrument was required to be charged under Article 40 of the Stamp Act and not under Article 6.

16. However, Mr. Gandhi, learned Advocate appearing on behalf of the respondent, submitted that it is merely an agreement covered by Article 6 and not a mortgage deed because no new rights are created by the said document and only existing rights are confirmed by the said document. He relied upon the decision of the Allahabad High Court in the case of *State v. Willard India Ltd.* . In that case, the Court was required to consider the document relating to inter se rights of financial institutions from whom the company had received loan, in regard to the joint securities. The Court held that the document was not a mortgage deed falling under Article 6, but it was an agreement. The Court relied upon the decision of the Chief Controlling Revenue Authority. *Madras v. Pioneer Spinner Private Ltd.* and observed that the agreement in question could not fall under Article 6 as the company had deposited the title deeds in respect of the properties on May 31, 1974 with I.F.C.I. The document referred to the original proposal and also contained a list of title deeds. In such a case, the Court held that the instrument is not an agreement relating to deposit of title deeds governed by Article 6 of the Stamp Act.

17. In our view, the aforesaid decisions would have no bearing in the present case. As discussed above, apart from mentioning the fact that the properties have been mortgaged with the financial institutions after taking loan, as stated hereinabove, the document was executed so as to crystallize the rights of the mortgagor and the mortgagees over the secured properties. The instrument is clearly repository of the bargain between the company on the one hand and the financial institutions on the other for their rights over the secured properties.

18. Learned Advocate Mr. Gandhi further relied upon similar decision in the case of *Murugharajendra Co. v. Chief Controlling Rev. Authority*. AIR 1974 Karnataka 60, wherein the Full Bench of the Karnataka High Court has observed that the essential factor which determines whether a document is one by which an equitable mortgage is created is the intention of the parties, thereto. The existence or otherwise of such intention can be established either by the documents produced by the parties or by oral evidence or by both. Where there was already an equitable mortgage of company's fixed assets, the company wanting to borrow additional sum requested the Bank to advance the additional sum on the self-same assets and the Bank having agreed to the proposal got a resolution of its Board of Directors passed therefor and informed of it by a letter in which reference to earlier mortgage by deposit of title deeds was made. The Court held that the letter was not intended by the mortgagees to be the sole repository of the terms of the equitable mortgage, but it was only an acknowledgment of an already concluded equitable mortgage. As discussed elaborately above in the present case, the situation is altogether different. The instrument in question is executed for specific purpose of crystallizing the rights of the mortgagees vis-a-vis the mortgaged properties as well as their inter se rights over the properties.

19. Once the instrument is held to be a mortgage deed and not an agreement or Memorandum of Agreement relating to deposit of title deeds, pawn, or pledges, in our opinion, there is no question of holding it to be an agreement chargeable with duty as per Article 5(h) of Schedule I to the Bombay Stamp Act. Article 5(h) specifically provides that it would cover those agreements which are not otherwise provided for. Hence, there is no question of applicability of Article 5(h) of Schedule I to the Bombay Stamp Act.

19. Considering the aforesaid law and the terms of the document in question, in our opinion:

(i) the document in question titled as an agreement executed on 5th February, 1979 is a mortgage deed as defined in Section 2(p) of the Bombay Stamp Act, 1958 chargeable with duty as per Article 45 of Schedule I to the Bombay Stamp Act (as it stood at the relevant time); and

(ii) the said document is not an agreement chargeable with duty as per Article 5(h) of Schedule I to the Bombay Stamp Act nor it is an agreement or Memorandum of Agreement relating to deposit of title deeds, pawn or pledges.

20. In the result, both the questions are answered as stated above. The reference stands disposed of accordingly with no order as to costs. The Registry is directed to send a copy of the order immediately to the Chief Controlling Revenue Authority.