

M/S. Saumya Mining Limited vs Srei Equipment Finance Limited on 29 January, 2016

**Equivalent citations: AIR 2016 CALCUTTA 189, (2016) 2 CAL HN 345, (2016) 1
CALLT 457, (2016) 2 ICC 986, (2017) 4 ARBILR 177**

Author: Indira Banerjee

Bench: Indira Banerjee

IN THE HIGH COURT AT CALCUTTA

ORDINARY ORIGINAL CIVIL JURISDICTION

ORIGINAL SIDE

Before :

The Hon'ble Justice Indira Banerjee

And

The Hon'ble Justice Sahidullah Munshi

G.A. No.3516 of 2015

A.P.O.T. No. 532 of 2015

A.P. No.1974 of 2014

M/s. Saumya Mining Limited

... Appellant

-Versus-

Srei Equipment Finance Limited

... Respondent

Mr. Rohit Das, Ms. Ashapurna Roy, Ms. Shradha Rekhechea ... for the appellant Mr. Debasish Kundu, Sr. Adv., Mr. Swatarup Banerjee, Mr. R.N. Ghose ... for the respondent Heard on : 26.11.2015, 01.12.2015, 02.12.2015, 11.12.2015, 14.12.2015, 21.12.2015, 04.01.2015.

Judgment on : January 29, 2016.

Sahidullah Munshi, J.:-

This appeal under Section 37(1)(a) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act') arises from an order dated 24th September, 2015, passed by the Hon'ble Single Judge in an application under Section 9 of the Arbitration Act, filed by the respondent (Srei Equipment Finance Ltd.) being A.P. No.1974 of 2014 (Srei Equipment Finance Ltd. - Vs. - Saumya Mining Ltd.). While considering the respondent's application under Section 9 of the Arbitration Act an objection was raised by the appellant herein that if an arbitration agreement contains a clause for hypothecation the same could not be relied upon unless stamped as per Article 40(b) of Schedule IA of the Indian Stamp Act, 1899. The Hon'ble Single Judge answered in the negative and held that -

"Ordinarily such aspect of the matter does not detain an interlocutory application as Section 35 of the Stamp Act applies when a document is tendered in evidence. None-the-less, the objection and the desirability of an adjudication thereon can wait till appropriate measures are taken.

There is no dispute that the agreement covers 48 assets, of which two have been surrendered by the borrower. The finance company claims that a sum in excess of Rs.14.59 crore is due only on account of defaulted instalments.

It is necessary that receivers be immediately appointed to take possession of the assets since a huge amount remains due and the respondent's response on such issue is the insufficiency of the stamp affixed to the relevant agreement.

Mr. Debduitta Basu, Adv., Mr. Aritra Ghose, Adv., Mr. Siddhyajyoti Biswas, Adv., Mr. Tapas Samaddar, Adv. Are appointed receivers to act severally and not jointly to take possession of the 46 assets. The receivers will meet upon the whereabouts of the assets being disclosed by the respondent to advocate for the petitioner within a week from date, whereat the receivers will decide, based on the location of the assets, which of the receivers will proceed to take possession of which asset.

The receivers will not embark on their journey to take possession of the assets for a period of a fortnight from date. If the respondent pays a sum of Rs.7.5 crore within a fortnight from date, the receivers will proceed to make an inventory of the 46 assets but not take possession thereof. If the respondent pays a sum of Rs.3.75 crore within a fortnight from date, the receivers will take possession of 23 of the 46 assets, the choice of which assets to take possession of being left to the finance company."

It is the contention of the appellant that the Hon'ble Single Judge ought not to have invoked jurisdiction under Section 9 of the Arbitration Act since the arbitration agreement could not have been relied upon, the same not being sufficiently stamped. It is the contention of the appellant that the clause in the agreement is in the nature of mortgage and the agreement should have been

treated to be a mortgage deed and required proper stamping in accordance with Article 40(b) of the Stamp Act. Rather the same ought to have been impounded and dealt with by the Hon'ble Single Judge in accordance with Sections 35 and 38 of the Stamp Act. It is the contention of the appellant that -

- a) Hypothecation deed or an instrument consisting of an express hypothecation clause ought to be treated as a mortgage deed as defined under Section 2(17) of the Stamp Act;
- b) The document should have been stamped within the meaning of Article 40(b) of Schedule IA under Bengal Stamp (Amendment) Act, 1922 and the Indian Stamp (Bengal Amendment) Act 1935 read with Sections 3 and 2(17) of the Stamp Act;
- c) Section 35 of the Stamp Act provides that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of party authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped;
- d) Hon'ble Single Bench has committed an error by not examining, impounding and forwarding the agreement to the Collector in terms of Sections 33, 35 and 38 of the Stamp Act;
- e) Payment of stamp duty of Rs.80/- (Rupees Eighty) only, is insufficient stamp on the said agreement.

In support of his submission learned counsel for the appellant has placed reliance on the provisions of Section 2(17) of Indian Stamp Act, 1899 to show the definition of 'mortgage deed'. He has also placed reliance on Article 40(b) of Schedule IA of the Stamp Act. Both the aforesaid provisions are reproduced below :

Description of Instruments Proper stamp duty

40. Mortgage-deed, 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) : -

(a) when possession of the property or any The same duty as a part of the property comprised in such Conveyance (No.23) for deed is given by the mortgagor or agreed a consideration equal to be given; to the amount secured by such deed.

(b) when possession is not given or agreed to [Rupees ten for every be given as aforesaid; Rs.500 or part thereof, for the amount secured by such deed, subject to the maximum of Rs.1,00,000.] Explanation. - A mortgagor who gives to the mortgagee a power-of-attorney to collect rents of a lease of the property mortgaged or part

thereof, is deemed to give possession within the meaning of this article;

(c) when a collateral or auxiliary or additional or substituted security or by way of further assurance of the abovementioned purpose where the principal or primary security is duly stamped -

for every sum secured not exceeding [Rupee one and fifty Rs.1,000; and naye paise.] for every Rs.1,000 or part thereof secured [Rupee one and fifty in excess of Rs.1,000. naye paise] Exemptions (1) Instruments executed by persons taking advances under the Land Improvement Loans Act, 1883 (XIX of 1883), or the Agriculturists' Loans Act, 1884 (XII of 1884), or by their sureties as security for the repayment of such advances.

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

Learned advocate appearing for the appellant in support of his aforesaid submissions has placed reliance on the following judgments, namely,

i) The Empress - Vs. - Debendra Krishna Mitter reported in 4 CWN 524;

ii) SMS Tea Estates Pvt. Ltd. - Vs. - Chandmari Tea Co.

Pvt. Ltd. reported in (2011) 14 SCC 66;

iii) Jayraj Devidas - Vs. - Nilesh Shantilal Tank reported in (2014) 5 ABR 611;

iv) An unreported judgment of the Hon'ble Bombay High Court in the case of Appeal (Lodging) No.272 of 2013 (Lakdawala Developers Pvt. Ltd. - Vs. - Badal Mittal & Ors.);

v) Ko Shway Aung & Ors. - Vs. - Strang Steel and Co.

reported in (1893) ILR Cal 241 and

vi) In Re: Gajaraj Singh reported in 1884 ILR 98 ALL 585. None of the aforesaid case laws relied upon by the learned advocate for the appellant is relevant in the facts and circumstances of the instant case.

In the case of Empress (supra) the subject-matter of the lis was a mortgage deed where a certain promissory note payable on payment was given as a collateral security and, therefore, it fell within the ambit of a mortgage deed and, accordingly, Court held that it required to be stamped as such. The said case does not relate to a situation like the present one which contains a clause for hypothecation and/or charge of a movable property on a loan agreement.

In the case of SMS Tea Estates Pvt. Ltd. (supra) the subject- matter was whether an arbitration agreement contained in an unregistered but compulsorily registrable instrument was valid and

enforceable. An agreement where the arbitration clause was for a long term lease for 30 years which was unregistered, the Hon'ble Supreme Court held that every such agreement was compulsorily registrable and was not duly stamped, it had to be impounded under Section 33 of the Stamp Act and resultantly the procedure under Sections 35 and 38 was valid. The proposition of law is not in dispute but the same does not apply in the present case inasmuch as the agreement in question contains a clause of hypothecation and/or charge of movable property in a loan agreement.

The case of Jayraj Devidas (supra) relates to insufficiency of stamp under the Bombay Stamp Act, 1958 and inasmuch as such fact was not disputed, it was held by the Hon'ble Bombay High Court that when a lease deed which was compulsorily registrable under Section 17 of the Indian Registration Act and was required to be appropriately stamped but was not done as such the Court could not go into such document which was insufficiently stamped and pass interim orders under Section 9 of the said Act. This proposition of law is, however, not applicable in the facts and circumstances of the present case since hypothecation agreements are not required to be stamped.

In Lakdawala Developers Pvt. Ltd (supra) the issue before the Hon'ble Bombay High Court was whether at the hearing of the application under Section 9 of the Arbitration and Conciliation Act, 1996 an objection which was raised on behalf of the appellant on the ground that the Memorandum of Understanding (MOU) was insufficiently stamped, should have been considered by the Hon'ble Single Bench. The Court considered that the issue could not have been deferred to the arbitration proceedings having regard to the provisions of Section 33(1) of the Bombay Stamp Act, 1958. It was held that Article 5(ga) of the Schedule relates to the stamp duty payable on an agreement or MOU where it relates to giving authority or power to a promoter or a developer by whatever name called for construction or development of or sale or transfer (in any manner whatsoever) of any immovable property. The fact situation of the said case is totally different from the present one and, therefore, the issue decided in the said case has no bearing on the present one.

The case of Ko Shway Aung & Ors. (supra) is distinguishable on facts and, therefore, is not applicable in the present case. In the said case it was held that the instrument was a mortgage deed.

The case of Gajaraj Singh (supra) relates to a bond as also an agreement for delivery of 'rab' with a provision for damages in case of breach of contract to deliver and as security for payment of damages which was in the nature of a mortgage deed and, therefore, held to be chargeable to the highest stamp duty. The principle laid down in the said case is not applicable to the present case.

In reply to the contention raised by the appellant M/s. Saumya Mining Ltd., the learned counsel on behalf of Srei Equipment Finance Ltd., the respondent herein, submitted that the appellant company had entered into a loan-cum-hypothecation agreement with Srei on 22nd September, 2013 (hereinafter referred to as 'the said agreement') while utilizing the financial asset (facility) of Rs.20,36,62,015/- (Rupees Twenty Crore Thirty Six Lakh Sixty Two Thousand Fifteen) only, to be repaid along with agreed interest for a total sum of Rs.25,65,97,600/- (Rupees Twenty Five Crore Sixty Five Lakh Ninety Seven Thousand Six Hundred) only, in 34 monthly instalments.

The appellant paid only one monthly instalment to Srei and thereafter, failed to make any further payment, therefore, Srei terminated the said agreement and called upon the appellant to make payment of all the dues of Srei amounting to Rs.25,99,54,733/- (Rupees Twenty Five Crore Ninety Nine Lakh Fifty Four Thousand Seven Thirty Three) only, and deliver possession of the financial assets (equipment) as per the terms and conditions of the said agreement. The loan was sought to be obtained by the appellant solely / exclusively for the purchase and/or re-financing of / acquiring / financing the assets in annexure 1/1A of Schedule VII of the said agreement. Clause 4.1 of the said agreement stipulates hypothecation on charge over the assets to the effect that "in consideration of grant of the facility by the company to the customer and as security for the payment, repayment, reimbursement, as the case may be of the secured obligations, the customer hereby hypothecates and charges unto and in favour of the company as and by way of first / exclusive charge of the assets including but not limited to any receivables thereto in a form satisfactory to the company upon the terms and conditions specified in the agreement."

Srei had not taken possession of any of the movable equipment/assets which were hypothecated/charged by the appellant who was the owner thereof at the time of entering into the said agreement.

It has been submitted by the learned counsel for the respondent that certain charges including mortgages are required to be reduced under Section 125 of the Companies Act, 1956. In the present case subject agreement is not required to be charged under Section 125 of the Companies Act, 1956. And that there is a clear distinction between a 'mortgage' and a 'charge', the former being a transfer of an interest in immovable property as a security for the loan; whereas the latter is not a transfer, though, it is a security for the repayment of an amount and on such proposition he has relied upon a judgment in the case of Altaf Begum - Vs. - Brij Narain reported in AIR 1929 All 281. As argued by the learned counsel we also hold that hypothecation in its ordinary connotation is a mode of crediting a security without delivery of title or possession both ownership in the movable property and possession thereof remains with the debtor. The creditor has an equitable charge over the property and is given a right to take possession and to sell the hypothecated movable to recover his dues. The creditor may also have the right to claim repayment from the sale proceeds. We have considered the proposition laid down in the case of Indian Oil Corporation - Vs. - NEPC India Ltd. & Ors. reported in (2006) 6 SCC 736 (paragraph 25) as relied upon by the learned counsel for the respondent. As argued by the learned counsel we hold that under the provisions of Section 2(n) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, "hypothecation" means a charge in or upon any movable property existing or future credited by a borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor as a security for financial assets and includes a floating charge and crystallization of such charge into fixed charges on movable property. It is clear that the Act of 1899 does not require stamp duty to be paid in the cases of hypothecation deeds or agreements. He relies on a judgment in the case of Central Bank of India - Vs. - Sunil Kumar Paul reported in 1978(2) CLJ 179. The Division Bench of this Hon'ble Court relied on a notification being Finance Department No.6 dated 12th September, 1931 and came to a conclusion that an unattested instrument evidencing an agreement related to the hypothecation of movable property where such hypothecation has been made by way of security for the repayment of moneys advanced or to be advanced by way of loan or of an existing

or further debt is exempted from payment of stamp duty under the Act of 1899. He submits that the argument advanced by the appellant that the hypothecation dues are to be stamped in accordance with Article 40 of Schedule IA of the said Act of 1899 does not take into consideration the Finance Memo No.6 of 1931, which exempted hypothecation dues or agreements from any stamp duty. Referring to the case of Syndicate Bank - Vs. - Official Liquidator reported in AIR 1985 Delhi 256, as cited by the learned counsel we hold that unlike a mortgage a pledge or hypothecation does not have the effect of transferring any 'interest' in the property in favour of the pledgee or the hypothecatee. The pledge and hypothecation, however, creates a special property in the goods in favour of the pledgee or hypothecatee. In the case of pledge the special property is to keep possession of the pledged goods and to dispose of them for the realisation of the debt for which it is held as security. In the case of hypothecation possession remains with the hypothecator but the hypothecatee has a liberty to take possession of the hypothecated property and to sell it for the realisation of the debt secured by the hypothecation.

Upon considering the case of Sri Harish Chandra & Ors. - VS.

- Punjab National Bank Ltd. reported in AIR 1958 All 864, as relied upon by the learned counsel for the respondent we are impressed to note that in a hypothecation the possession over the property is retained by the owner. It has only certain rights in that movable property that are transferred to the person in whose favour the property is hypothecated. Where the goods themselves have been handed over to the bank in whose favour the document has been executed by way of security, the goods in respect of which a document was executed became pledged within the definition of 'pledge' in Section 172 of the Contract Act. The document in question is chargeable with duty under Article 6.

Referring to the case of Hindustan Construction Co. - Vs. - Board of Revenue reported in AIR 1986 Kerala 142, as cited by the learned counsel we hold that the document was not chargeable to stamp duty under Article 37 as a deed of mortgage.

On consideration of the materials on record and the rival contentions made by the parties we hold that the Hon'ble Single Judge has committed no error in invoking the jurisdiction under Section 9 of the Arbitration Act and there are no infirmities in the order under appeal. We hold that the relevant clause in the agreement being clause No.4.1 comes within the second exemption under Article 40(2) of Schedule IA of the Stamp Act. Letter of hypothecation accompanying a Bill of exchange being exempted, by implication, all the other types of hypothecations fall within the ambit of the said Article and payment of stamp duty is not mandatory.

Accordingly, the appeal fails and the same is dismissed. Urgent Photostat certified copy of this judgment, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual formalities.

I agree.

(Indira Banerjee, J.) (Sahidullah Munshi, J.)