

Judgment Sheet

**IN THE LAHORE HIGH COURT LAHORE**

**JUDICIAL DEPARTMENT**

Writ Petition No.6859 of 2014

**JUDGEMENT:**

Date of hearing	09.05.2014.
Petitioner by	Malik Amin ur Rehman Khan, Advocate.
Respondent by	Mr. Iftikhar Ahmad, Assistant Advocate General.

**Shams Mehmood Mirza, J:-** The principal issue involved in this writ petition is the interpretation of the expression “for money advanced” as used in Article 35 (c) (i) of the First Schedule to Stamp Act and its application to the amount security deposit mentioned in the rent deed executed between the petitioners. The petitioners through this writ petition assail orders dated 15.07.2013 and 26.09.2013 passed by respondents No. 1 and 2 respectively whereby the rent deed executed between the parties was impounded and the petitioners were asked to pay, inter alia, the stamp duty on the amount of the security deposit.

2. Brief facts of the case are that petitioner No. 1 executed a rent deed in respect of a shop situated in Commercial Zone, Liberty Market, Gulberg-III, Lahore in favour of petitioner No. 2. The lease period was fixed for three years and the rent payable per month was Rs.150,000/-. The lessee also agreed to submit Rs.4,000,000/- as security deposit refundable on the determination of the lease. The rent deed was executed before the local commission on 05.07.2013 who presented the same before Sub-registrar, Gulberg Town, Lahore, respondent No. 1, on 15.07.2013 for registration. Respondent No. 1 declined to register the rent deed as according to him there was a deficiency of Rs.80,000/- in payment of the stamp duty on account of the security deposit and a further deficiency of Rs.3720/- on account of average annual rent. Accordingly, vide order dated 15.07.2013 passed by respondent No. 1, the rent deed was impounded and forwarded to respondent No. 2, Additional Collector (Gen), Lahore for passing orders for recovery under Section 40 of the Stamp Act. The petitioners feeling aggrieved by order dated 15.07.2013 also filed an appeal before respondent No. 2 against the said order.

3. Respondent No. 2 vide order dated 26.09.2013 decided the reference/appeal upholding the decision of respondent No. 1. Respondent No. 1 accordingly sent a notice to the petitioners for payment of Rs.83,720/- in respect of deficiency of stamp duty and Rs.16,745/- as fine. Feeling aggrieved from the afore-referred two decisions and the notice for payment of the amounts, the petitioners have filed the present writ petition.

4. The case of the petitioners is that the security deposit does not form part either of the rent or of the consideration for which the lease was granted. It is argued that the security deposit is refundable and, therefore, rent deed executed between the petitioners is not liable to stamp duty in terms of Article 35 (c) (i) of the First Schedule to the Stamp Act rather it is liable to stamp duty under Article 35 (a) (ii) thereof. The petitioners, however, admit the deficiency of Rs.3720/- on account of average annual rent.

5. The respondents have filed their report and parawise comments pursuant to orders passed by the Court. A preliminary objection has been taken regarding the maintainability of the present writ petition on the ground that the remedy of the Revision petition available to the petitioners before the Chief Revenue Authority/Senior Member, Board of Revenue, Punjab has not been availed. It is the case of the respondents that the rent deed executed between the petitioners falls under Article 35 (c) (i) of the First Schedule to the Stamp Act and the security deposit mentioned therein comes within the purview of the expression “money advanced” as used in the afore-mentioned Article. The respondents further contend that stamp duty is chargeable on the refundable security in a lease deed as per General Circular Notification No. 2701-83/846-ST(II) dated 24.01.1985 issued by the Board of Revenue, Punjab whereby the question whether security deposit is liable to stamp duty in terms of Article 35 (c) (i) of the First Schedule to the Stamp Act was referred to it as Chief Revenue Authority under the said Act. The relevant portion of the opinion is reproduced hereunder.

*“In the circumstances, the learned Member (Revenue) has ruled that the amounts of security deposited by the lessees in addition to the rent reserved bring the two leases within the mischief of Article 35 (c) (i) of schedule 1 to the Stamp Act, and, as such, have been correctly assessed to stamp duty by the Chief Collector of stamps.”*

6. With consent of the parties, this petition is treated as a Pacca case as all the relevant material has already been brought on the record.

7. The real controversy before the respondents was whether the security deposit mentioned in the rent deed executed between the petitioners brings the said

rent deed within the mischief of Article 35 (c) (i) of Schedule 1 to the Stamp Act. Before proceeding any further in the matter, it would be expedient to refer to the following expressions used in Article 35 of the Stamp Act in connection, inter alia, with a lease.

“where by such lease the rent is fixed and no premium is paid or delivered”  
(**Article 35 (a) (i) of the First Schedule to the Stamp Act**);

“where the lease is granted for money advanced and where no rent is reserved” (**Article 35 (b) (i) of the First Schedule to the Stamp Act**);

“where the lease is granted for a fine or premium and where no rent is reserved” (**Article 35 (b) (ii) of the First Schedule to the Stamp Act**); and

“where the lease is granted for money advanced in addition to rent reserved” (**Article 35 (c) (i) of the First Schedule to the Stamp Act**)

“where the lease is granted for a fine or premium in addition to rent reserved” (**Article 35 (c) (ii) of the First Schedule to the Stamp Act**)

8. The expressions “*rent*”, “*fine*”, “*premium*” and “*money advanced*” have not been defined in the Stamp Act rather these expressions find mention in Section 105 of the Transfer of Property Act, which reads as under:

**“105. Leases defined.** *A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.*

***Lessor, Lessee, premium and rent defined.*** *The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.”*

9. From a bare reading of Section 105 of the Transfer of Property Act, it is clear that there are two types of considerations for which a lease can be granted by a lessor to the lessee. The first is the price paid or promised and is called the *premium*. The second is the money, share of crops, service etc to be paid at stated periods or on specific occasions, which is called the *rent*. The afore-mentioned section does not admit of any other type of consideration.

10. The definition of rent as afore-mentioned makes it clear that it is a liability payable in future, periodically or on occasions specified in the instrument executed between the parties. However, it may be clarified that when rent is determined in the lease instrument together with a covenant to pay the same at a specified time

and if such a liability is met by making advance payment of the entire rent, the said advance payment of rent shall still be treated as rent and not otherwise for the reason that the legal character of that payment is rent and simply because it has been paid in advance would not change its character. The premium, on the other hand, is a price which may be paid prior to the lease or it may be price paid after the lease in consideration for the grant of lease but its promise has to be made prior to the lease.

11. In subcontinent, there still exists a custom in the towns of making a one time payments to the landlord for acquiring the benefits of the lease, which is often described as “Salami”, “Pagree” etc. This custom has been explained in Chief Controlling Revenue Authority v. Marshall Produce Brokers Co. Pvt. Limited **AIR 1980 Delhi 249** where it was held that “*Fine in relation to leases is something which is to go irrevocably into the pocket of the landlord who requires it as a condition of consenting to a transfer of right to enjoy property. Fine is indistinguishable from premium and is money payment in consideration of a demise. Fine paid as fine is money paid with the intention of passing over the property in it to the landlord so that it should become his.*” Later in the judgment, it was also held that “*The legislature must be aware of money payments in consideration of the lease, when it sought to cover “fine or premium or for money advanced” in Art. 35 (b) and (c). The words used here “for money advanced” do not connote any idea of repayment ..... Money advanced here is money which is not to revert to the lessee.*”

Similarly, in Commissioner of Income Tax v. The Panbari Tea Co. Limited **AIR 1965 SC 1871**, while referring to Section 105 of the Transfer of Property Act, it was held that “*The section, therefore, bring out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital income and the latter a revenue receipt.*”

12. The afore-mentioned custom has been given statutory recognition in Section 105 of the Transfer of the Property Act. The expressions “fine” and “premium” used in Article 35 of the Stamp Act, thus, indicate a one time irreversible payment made by the lessee to the landlord for acquiring the benefit of the lease, which is treated as capital income. It will also be seen that the expressions “fine” and “premium” have been used interchangeably in Article 35 (b) and (c) of the Stamp Act. The expression “for money advanced” has also been

used only in Article 35 (b) and (c) of the Stamp Act. It may not be out of place to mention here that the word “for” used here can only mean “in consideration of” in view of the overall scheme of Article 35 of the Stamp Act and the definition of lease in Section 105 of the Transfer of Property Act wherein only two types of considerations are mentioned for the grant of lease. This expression certainly cannot be equated to rent and, therefore, must be treated at par with or akin to premium/fine. Thus, the expression “for money advanced” as used in Article 35 (b) and (c) of the Stamp Act also means a one time payment from the lessee to the landlord for the grant of benefit of the lease, which money is not to revert back to the lessee.

13. In the present case, however, the security deposit mentioned in the rent deed is to return to the lessee on the determination of the lease. It is further stipulated, quite clearly, in the rent deed executed between the petitioners that petitioner No. 1/landlord cannot deduct rent out the said security deposit even if petitioner No. 2/lessee defaults in payment of the rent. Can this security deposit in such a circumstance be termed as “money advanced” used in Article 35 (c) (i) of the First Schedule to the Stamp Act? The answer is in negative. The construction of the rent deed in question does not admit of any other conclusion except that it does not fall within the mischief of Article 35 (c) (i) of the Stamp Act and the amount of security deposit mentioned therein does not come within the expression “for money advanced”.

14. The respondents also relied upon Notification No. 2701-83/846-ST(II) dated 24.01.1985 issued by the Board of Revenue, Punjab/ Chief Revenue Authority. In the said Notification, two judgments from the Indian jurisdiction reported as In re Chief Controlling Revenue Authority AIR 1952 Bombay 285 and Board of Revenue, Madras, Referring Authority v. M/s Simpson and Mc Conechy Limited, Madras AIR 1961 Madras 210 were relied upon by the Chief Revenue Authority in order to arrive at the conclusion that the amount of security deposit is liable to be assessed to stamp duty. In re Chief Controlling Revenue Authority AIR 1952 Bombay 285 was a case where the applicability of Article 35 (a) (ii) and Articles 35 (b) of the Stamp Act on a lease deed was in issue and it was held therein that amounts paid to the lessor by the lessee prior to the liability of rent arising under the lease deed was an advance. It was held thus “*The liability to pay rent can only arise under the lease and at stated periods or specific occasions mentioned in the lease, till the stated period or specific occasion arises, there is no liability on the part of the lessee to pay rent. Therefore, if the lessee pays an amount in respect of the rent prior to the liability arising, that payment is nothing*

*more than advance made by the lessee to the lessor. He makes an advance, and the agreement is that the lessor will satisfy the lessee's liability out of that amount when that liability arises. But the legal character of that payment is not rent, but money advanced by the lessee to the lessor. The liability only crystallises and takes on the character of rent when the stated period or the specific occasion arrives under the lease and the lessee becomes liable to pay the rent."* On the facts, the Bombay High Court came to the conclusion that the lease deed in question falls under Article 35 (b) and not under Article 35 (a) (ii) of the Stamp Act. It may, however, be mentioned that in Citibank v. District Registrar/District Collector/Deputy Commissioner, Lahore and another **1999 MLD 1101**, this Court to the extent of advance rent took a contrary view and held that rent paid in advance does not constitute "money advanced". In similar circumstances, in Union of India through Chief Controlling Revenue Authority, Delhi and others v. M/s Caltex (India) Limited, New Delhi **AIR 1966 Punjab 488** it was held that "An amount for which there is both a liability and a covenant to pay as rent cannot be termed as advance. It cannot in the circumstances be said that this is a case of granting a lease for money advanced in addition to rent reserved. The legal character of Rs.25,500 is rent and merely because that rent is paid in advance under a covenant its character does not change."

15. Similarly, in Board of Revenue, Madras, Referring Authority v. M/s Simpson and Mc Conechy Limited, Madras **AIR 1961 Madras 210**, the lease deed in question contained a clause whereby the lessor applied to the lessee for an advance of Rs.75,000/- for discharging the subsisting encumbrances on the property. The said instrument also provided for rent in the sum of Rs.17,750/- per month and allowed the lessee to withhold a sum of Rs.750/- from the said amount per month for appropriating the same in liquidation of the sum of Rs.75,000/- advanced to the lessor. On facts of that case, the Madras High Court came to the conclusion that the afore-mentioned lease instrument comes within the mischief of Article 30 (c) of Schedule 1 of the Indian Stamp Act.

16. It is, therefore, clear that the ratio of the above mentioned decisions relied upon by the Chief Revenue Authority/Board of Revenue are not relevant to the interpretation of Article 35 (c) (i) of the First Schedule to the Stamp Act and were wrongly pressed into service for making security deposits assessable to stamp duty. The said decisions, in any event, are not applicable to the facts of the present case.

17. The respondents have also raised the preliminary objection regarding the maintainability of the writ petition on the ground that the remedy of revision

before the Chief Revenue Officer is available to the petitioners against the order of respondent No. 2. I am also not ready to accept the preliminary objection raised by the respondents. The remedy of revision was meaningless as the Chief Revenue Authority, as mentioned above, has already expressed its opinion against the stance of the petitioners in the Notification relied upon by the respondents. Furthermore, as a question of law is involved in this writ petition and keeping in view the established position that it is the duty of the superior Courts to interpret law, the objection of the respondents regarding the maintainability of the writ petition is repelled. Reference in this regard is made to the judgment reported as Attock Cement Pakistan Limited v. Collector of Customs, Collectorate of Customs and Central Excise, Quetta etc **1999 PTD 1892**.

18. In the result, this writ petition is accepted and it is held that the rent deed executed between the petitioners and the amount of security deposit mentioned therein does not come within the mischief of Article 35 (c) (i) of the First Schedule to the Stamp Act. Accordingly, orders dated 15.07.2013 and 26.09.2013 passed by respondents No. 1 and 2 respectively are set aside being without lawful authority and of no legal effect. The petitioners shall, of course, make up the admitted deficiency of Rs.3720/- in the stamp duty on the instrument in question.

Approved for reporting.

JUDGE:

Announced in open Court today on \_\_\_\_\_

JUDGE: