IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4061 OF 2016
AND
WRIT PETITION NO.6347 OF 2016

Mytrah Vayu (Krishna) Pvt. Ltd. .....Petitioner
V/s.
Chief Controlling Revenue Authority
and Ors. .....Respondents

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Mr. Rafiq Dada, Senior Advocate a/w. Mr. Shanay Shah a/w. Ms. Soniya Putta a/w. Ms. Kinjal Shah i/by. Solomon & Co.,
Advocate for the petitioner.

Ms. Neha Bhide, 'B' Panel, Advocate for respondents no.1 to 3.

Mr. Fredun Devitre, Senior Advocate a/w. Vikash Kumar i/by. Mr. Anil T. Agarwal, Advocate for respondent no.4.

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CORAM :- SMT. R.P. SONDURBALDOTA, J.

DATED :- 25TH JULY, 2016.

P.C. :-

1 Rule. Rule made returnable forthwith. Heard the Advocates.

2 This is a common order on the above two petitions between the same parties which give rise to the identical issue as regards the stamp duty payable by the petitioner on the

documents of mortgage.

3 The petitioner had availed loan facility to the extent of Rs.400/- Crores from Consortium of Banks and Financial Institutions ("Lenders" for short) under common loan agreement dtd. 30th March, 2013. On the same day, respondent no.4- Company was appointed as Security Trustee by the Lenders to hold the security created in trust for and to the benefit of the Lenders. One of the conditions in the common loan agreement was that the loan shall be secured interalia by first charge by way of mortgage over the property at land at Block no. 42/2, plot no.210, survey No. 42/2, admeasuring 130.87 sq. mtrs. situate at village Valki in District Ahmednagar. Prior to execution of the indenture of mortgage, for that purpose, the petitioner submitted draft indenture under Section 31(1) of the Maharashtra Stamp Act, 1958 ("The Act" for short) to the Joint District Registrar, Class-I and Stamp Collector, Ahmednagar as and by way of an application for adjudication of the indenture of mortgage. The Joint Registrar, Class I, Ahmednagar passed the order of adjudication dtd. 30th May, 2013 stating that the indenture fell within the purview of Article 40(b) of Schedule I of the Act as the mortgage was without possession. Accordingly, he assessed the stamp duty valuation of the indenture at Rs.10.00 Lacs. Thereafter

indenture of mortgage was executed by the petitioner on 26th June, 2013. It was stamped in accordance with the order of adjudication and registered with the Joint Sub-Registrar, Ahmednagar.

4 Later the petitioner sought further financial assistance and an additional loan of Rs.183,86,00,000/- was approved by the lenders. The terms and conditions for providing further financial assistance were recorded in the amended and restated common loan agreement dtd. 26th September, 2013. The amended loan agreement also provided for the security by way of mortgage of immovable property. Therefore, the parties were desirous that the indenture of mortgage dtd. 27th June, 2013 be rectified and amended to include the second understanding between the parties. Once again prior to execution of the rectification deed, the petitioner submitted it's draft under Section 31(1) of the Act to the Joint District Registrar, Class-I for adjudication of the stamp duty payable thereon. The Joint Registrar, Class I, Ahmednagar passed the order of adjudication dtd.10th December, 2013 wherein it was stated that the rectification deed fell within the purview of "further charge" under Article 33(b) of Schedule I of the Act and assessed the same at Rs.10.00 Lacs for payment of the stamp duty. The petitioner then executed the rectification

deed on 11th December, 2013, paid the stamp duty thereon and registered the same on the same date.

5 It appears that the office of the Inspector General of Registration and Controller of Stamps, Maharashtra, Pune, respondent no.1 received complaint dtd. 17th November, 2014 from one Mr.Amarsingh Shivajirao Pandit (M.L.A.) alleging evasion of stamp duty by the petitioner in respect of the deed of mortgage and the rectification deed. According to the complaint, the indenture ought to have been classified under Article 40(a) instead of Article 40(b) of Schedule I of the Act and the Rectification Deed should have been classified under Article 33(a) instead of Article 33(b) of the Schedule. On the basis of the complaint, respondent no.1 initiated revision proceedings under Section 53(A) of the Act in respect of the two documents being Revision Proceedings No. 192 of 2014 and 193 of 2014. They were disposed off by respondent no.1 by the orders dtd.16th July, 2015 holding that deficit stamp duty of Rs.15,90,00,000/- and Rs.7,25,40,000/- was required to be paid on the indenture of mortgage and the rectification deed respectively, with a direction to the petitioner to deposit the amounts of deficit stamp duty within 30 day from the receipt of the orders.

6 Being aggrieved by the orders, the petitioners approached this court by Writ Petitions No.8427 of 2015 and 8437 of 2015 respectively. By the order dtd. 23rd September, 2013, the petitions were allowed and the matter remanded to respondent no.1 for fresh consideration. The order also directed the petitioner to deposit Rs.70.00 Lacs in respect of the indenture of mortgage and Rs.26,77,000/- in respect of the rectification deed with the Collector of Stamps, Ahmednagar. The petitioner has complied with the direction. Respondent no.1 then heard the revisions afresh and by the order dtd. 8th February, 2016 disposed off the same holding that the deficit stamp duty payable on the indenture of mortgage was of Rs.15,20,00,000/- because the indenture was classified and charged under Article 40(a) of Schedule I of the Act. As regards the rectification deed, he held that the petitioner was liable to pay deficit stamp duty of Rs.6,90,63,000/- because the rectification deed was classified and charged under Article 33(a) of Schedule I of the Act. Being aggrieved by the orders, the petitioner has approached this court.

7 Respondent no.4 supports the petitioner in the objection raised to the impugned orders.

8 Mr. Rafique Dada, the learned Senior Counsel appearing for the petitioner submits that, the impugned order is absolutely perverse as respondent no.1 has disregarded the decisions of this Court cited before him as also the relevant clauses from the two deeds as regards the possession of the property mortgaged. The clauses from the agreement referred to by Mr. Dada are as under:

> "**Clause 8.1 – The Borrower does hereby further covenant that**.-
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> **Clause 8.1(a) Enter Possession etc**.
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> Upon happening of an Event of Default, it shall be lawful for the Security Trustee or the Lenders to enter into and take possession of the Mortgaged Premises and henceforth the Borrower shall take no action inconsistent with or prejudicial to the right of the Lenders quietly to possess, use and enjoy the benefits thereof without interruption or hindrance by the Borrower and upon the taking of such action, the Security Trustee and the Lenders shall also be indemnified, from and against all former and other estates, title, claims, demands and encumbrances whatsoever in, to or upon the Mortgaged Premises, unless causes by the fraud, gross negligence or willful misconduct of the Security Trustee or that of its officers or employees.
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> **Clause 8.1(b) Further Assurances**
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> The Borrower and all other persons lawfully or equitably claiming or being entitled to claim any estate, right, title or further assurances, interest in, to or upon the Mortgaged Premises and any further assets comprised in this Indenture or any of them or any parts thereof respectively shall and will, from

time to time and of all times, at the cost of the Borrower or the other person (as appropriate), execute, make and do or cause and procure to be executed, made and done every such assurance, act and thing for further and more perfectly assuring all or any of the Mortgaged Premises and any future assets comprised in this Indenture unto and to the use of the Security Trustee in trust for the benefit of the Lenders on the terms of this Indenture as shall be reasonably required."

Clause.16.2 – Continued Possession

16.2 It shall be lawful for the Borrower to retain possession of and the Borrower may use the Mortgaged Premises in accordance with the Financing Documents (including any disposal expressly permitted and subject to the terms of the Financing Documents) until the security Trustee shall be entitled to take possession thereof under this Indenture and shall take possession thereof accordingly."

9 It would also convenient to take note at this place of the relevant provisions under Schedule I to the Act. The same are Articles 33 and 40 to the Schedule, which read as under:

Article	Description of Instrument	Proper Stamp Duty
33	**FURTHER CHARGE-** Instrument of that is to say, any instrument imposing a further charge on mortgaged premises.	
33(a)	When the original mortgage is one of the description referred to in clause (a) of Article 40	The same duty as is leviable on a Conveyance under

	(that is, with possession)	clause (a), (b) [or (c)], as the case may be, of Article 25, for the amount of the further charge secured by such instrument.
33(b)	When such mortgage is one of the description referred to clause (b) of Article 40 (that is, without possession)	
(i)	If at the time of execution of the instrument of further charge, possession of the property is given under such instrument.	The same duty as is leviable on a Conveyance under clause (a), (b) [or (c)], as the case may be, of Article 25, for the total amount of the charge (including the original mortgage and any further charge already made) less the duty already paid on such original mortgage and further charge.
(ii)	If possession is not so given	[Five Rupees for every [one thousand] or part thereof for the amount of further charge secured by such instrument

		subject to minimum of the one hundred rupees and the maximum of [ten lakh rupees]
40	MORTGAGE DEED, not being an agreement relating to [Deposit of Title Deeds, Pawn or Pledge or Hypothecation (Article 6)], Bottomry Bond (Article 14), Mortgage of a Crop (Article 41), Respondentia Bond (Article 53), or Security Bond or Mortgage Deed (Article 54)-	
(a)	When possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given	The same duty as is leviable on a conveyance under clauses (a), (b) [or (c)], as the case may be, of Article 25,f or the amount secured by such deed.
(b)	When possession is not given or agreed to be given as aforesaid	[0.5 percent. of]the amount secured by such deed, subject to the minimum of one hundred rupees and the maximum of [ten lakhs rupees];
(c)	....	

10 The orders impugned in the two petitions are identical in every respect. The issue raised by respondent no.1 for consideration in the two revision applications is also similar. The short and single issue raised therein respectively for consideration was-

> whether instrument under consideration is "mortgaged with possession" or "mortgaged without possession
>
> and
>
> whether the instrument under consideration is "further charge with possession" and/or "further charge without possession".

11 For the purpose of deciding the issues, the authority considered Clause 3 of the documents in addition to clause 16. The title of clause 3 is "Grant and Transfer". Clause 3(i) provides that for the consideration of the loan and as continuing security for repayment of it, the borrower, subject to the proviso for redemption, contained therein, "grant, assign, convey, assure, charge and transfer, by way of first charge, unto the Security Trustee in trust for the benefit of Lenders by way of continuing security, all and singular the beneficial right, title and interest of the borrower in respect of the mortgaged property. Similarly Clause 3(ii) to 3(vii) provide for grant etc. of the right of the petitioner in tangible movable assets, rights in project documents, money receivable by the petitioner under

insurance contracts, bank accounts of the project, book debts and current assets. Thus except for clause 3(i), all other properties stated therein are movable assets and there is no question of handing over possession of such movable assets. If the interpretation in the impugned order is to be accepted, all the movables mentioned at clause 3(ii) to 3(vi) will also have to be held to be in possession of respondent no.4. This is simply not possible. There are three provisos to this clause. The impugned orders rely upon proviso no.3, which reads as under.

> "(iii) the Borrower has not given not agreed to give possession of the First Mortgaged Premises or the Second Mortgaged Premises to the Security Trustee until the occurrence of an Event of Default under the Common Loan Agreement."

On appreciation of Clause 3 along with the third proviso, the impugned order reasons as follows:

> "Thus, it is found that it is condition to the availing of the Term Loan Facilities that the Mortgager shall secure the Term Loan Facilities, inter alia, by a pari passu priority first mortgage and charge on all the Mortgagor's immovable and movable properties, both the tangible and intangible present and future. From the recital in third proviso mentioned above, it is clear that the Non-Applicant has not waited till the event of default occur and prior to that has taken power."

12 The impugned orders next interpret Clause 16.2 of the mortgage deed in following words :-

> "Now coming to clause 16 on page no.17 of the document in respect of non-applicability of certain provisions of the Transfer of Property Act, 1882 it is observed that the parties have agreed that the provisions of section 67A of the said Act would not be applicable to the document. This necessarily means that the Non-Applicant is not at liberty to lease out the premises.
>
> Similarly, in clause 16.2 it is mentioned that it shall be lawful for the borrower to retain possession and borrower may use the mortgaged premises in accordance with the financing document. The subtitle mentioned as "continued possession" makes it clear that the possession is given to the lender or security trust. Had it been the case that the lender is not in possession of premises, this clause never exists in the document."

13 One more clause from the deeds taken into consideration in the impugned orders is clause 21, which provides for appointment of Lender and Security Trustee as "attorney". Based thereon, the impugned orders hold :

> "In Clause 21.1, Lender and Security Trustee have been appointed to do act and execute all deeds and things. Similarly under Clause 22.2, every act and the things done by such attorney is rectified and confirmed as if that it is done by the mortgager itself. It is no doubt, that such attorney has power

> to act and execute all deeds and things. Therefore, the present power is not restricted to any specific document, but includes all deeds, therefore, includes power to execute conveyance."

14 The final conclusion drawn by the authority in the two orders at para 5.20 is in following terms:

> "Thus, it is clear that present is an instrument falling within two descriptions in Schedule I as to "Mortgage with Possession" of all that part and parcel of properties mentioned in Schedule annexed to the document and "Grant of Power Attorney". Thus the document is falling under two distinct description as to Article 40(a) as well as Article 48(f) liable for stamp duty. Therefore, stamp duty will be charged on the highest of duties of the two i.e. under Article 40(a) and Article 48(f)."

15 Bare reading of the reasons quoted above is sufficient to hold that there was perverse reading of the clauses by the authority. Clause 3, the proviso thereto and Clause 16.2 clearly indicate that, possession of the property would continue with the borrower i.e. the petitioner. The different grants under Clause 3 of the deeds are patently subject to occurrence of an event of default under the Common Loan Agreement. It is nobody's case that such situation has occurred. Same is the case of clause 16.2. Further Clause 21 would also come into operation only in case of default in payment by the petitioner. This position is made crystal clear by Clause 8.1 quoted

hereinabove. It states that only upon happening of an event of default, it shall be lawful for respondent no.4 to enter into and take possession of the mortgaged property. As already noted above, if the interpretation put by respondent no.1 on Clause 3 is accepted, it would mean that possession of all the movable assets mentioned at sub-clause (ii) to (vi) would stand transferred to respondent no.4. In that case, it would be impossible for the petitioner to carry on their project, for which it has taken financial assistance.

16 Mr. Dada for the petitioner submits next that the main concern in the two petitions is about interpretation of the term "agreed to be given" in cases of a document where the possession is to be given on the happening of a future event. Mr. Dada relies upon the decision of Full Bench of the Madras High Court in the case of **Board of Revenue, Madras-Referring Authority v. Moopanna Somarazu and another, reported in AIR 1926 Madras page 1038** wherein in a similar set of facts, the Full Bench of Madras High Court has held that the words "agreed to be given" should not be construed as covering cases of agreement to give possession on the breach of a certain covenant, or on the happening of a future event which may or may not happen but only cases where by the words of the document possession is directly

agreed to be given.

17 Mr. Dada next submits that the Stamp Act is a Revenue Act, which imposes pecuniary burden and the rule of construction in respect of such acts is that in case of a doubt, the construction must beneficial to the subject is to be adopted. In this connection, he relies upon decision of the Calcutta High Court in the case of **In Re:Anonymous, reported in (1884) ILR 10 Cal page 274**. In the decision of the Calcutta High Court, identical question under the Stamp Act (1 of 1879) Schedule-I Article 44, Clauses (a) and (b) fell for consideration. Calcutta High Court while interpreting the word "given" observes that :

> "9. ..... The word "given" in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security of the mortgage money. But where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply".

and

> 13. "Now the Stamp Act is a Revenue Act, an Act which imposes pecuniary burdens; and the rule of construction in respect of such Acts is that in case of a doubt the construction most beneficial to the subject is to be adopted.The subject is not to be taxed,and

> therefore not to be compelled in this case to pay the higher duty,unless the language is clear and unambiguous".

18 Mr. Devitre, the learned Senior Counsel appearing for respondent no.4 supports the petitioner in every argument. He refers to decision of Single Judge of our High Court in **Maharashtra State Financial Corporation vs. Masvi and Company Pvt. Ltd. And another, reported in (1993) 76 Comp Cas, page 168** to support the contentions. In the decision of Single Judge of this Court, the question does not directly arise. However, an objection had been taken to the stamp duty paid on a mortgage deed on the ground that under Article 40, the stamp duty ought to have been paid as if the possession had been handed over. The learned Single Judge found no substance in the contention and held that under Article 40 of the Bombay Stamp Fees Act, a deed of mortgage is to be stamped as if on a bond unless possession is given or agreed to be given under the instrument. The provisions in the mortgage deed before the Court in that case did not provide for giving possession of the properties and that the mortgagee had a right to take possession on a default.

19 In the above-stated clear legal and factual position, it must be held that the initial adjudication of the documents was the correct adjudication and the impugned orders cannot be

sustained. Hence, the petitions are allowed in terms of prayer clauses (a) and (b). Rule is accordingly made absolute.

(SMT. R.P. SONDURBALDOTA, J)