

On examination of the records of the proceedings before the Debts Recovery Tribunal and the Memorandum of Understanding, referred to later, it appears that this company had taken loans and advances of substantial amounts from United Bank of India and West Bengal Financial Corporation. Each of these creditors claimed that both the portions of 2 Biren Roy Road were mortgaged to them to secure the loan.

On or about 11<sup>th</sup> March, 1993 United Bank of India filed a suit in this court to realize its claim of over Rs.2 crores against this company and its directors.

By an order passed by this court in liquidation proceedings, on 21<sup>st</sup> December, 1994 the company was directed to be wound up.

The Recovery of Debts due to Banks and Financial Institutions Act, 1993 came into force shortly thereafter.

The suit was transferred to the Debts Recovery Tribunal where the proceeding was numbered as TA 41 of 2002. The Corporation applied before the Tribunal to be added as a party to it and was so added. They made a claim based inter alia on mortgage of the said property: 2, Biren Roy Road. This claim was disputed by United Bank of India. The Corporation prayed for sale of this property and for payment of their claim from the sale proceeds in protanto satisfaction thereof.

Our company court by its order dated 16<sup>th</sup> January, 1998 followed by its order dated 6<sup>th</sup> January, 2005 in Company Petition No. 151 of 1985 sold the front portion of the said property to Efcalon. The Corporation objected to that sale and preferred an appeal before a division bench of this court on the ground that neither the front nor the rear portion could be sold to Efcalon.

Apart from the front portion, the Corporation also claimed an interest in the rear portion of the property. Concurrently, Efcalon joined the proceedings before the tribunal.

On 7<sup>th</sup> July, 2008 a Memorandum of Understanding was executed between the Corporation described therein as the creditor and Efcalon described as the purchaser. The preamble part of this Memorandum made it abundantly plain that the entire claims of the Corporation including actionable claims against the company-in-liquidation were being transferred to Efcalon.

In the Memorandum, Recital F is of paramount importance. It narrates that the parties with the view to settle their disputes and differences “against the said order dated 6<sup>th</sup> January, 2005” have agreed that the Corporation would transfer “its entire claim against the company-in-liquidation and against its directors, Gouranga Sundar Das and Sunil Kr. Das to Efcalon and had assigned all its actionable claims including those mentioned in TA No. 41 of 2003.” In those circumstances, the appeal (before the division bench) would be withdrawn.

Now, I come to the habendum portion. Clause 3 is of most significance. The Corporation would be “deemed to have transferred, conveyed, assured and assigned all its claims against the company-in-liquidation and against the said Gouranga Sundar Das and Sunil Kr. Das.....including its claim in TA No. 41 of 2003 and charge being claimed by it over and in respect of the premises of Biren Roy Road (West) at and for the consideration of Rs.53,70,000/-.” The Corporation relinquished its rights over these claims. Only Efcalon would have the right to enforce them against the company-in-liquidation and against the two directors. In Clause 4 the Corporation recorded its no-objection to the Official Liquidator executing and registering a deed of conveyance of the front portion of the said premises in favour of Efcalon. Under Clause 5 the Corporation would execute a purported irrevocable power of attorney in favour of Efcalon.

The appeal against the order dated 6<sup>th</sup> January, 2005 was withdrawn. The Corporation issued a power of attorney in favour of Efcalon in the Debts Recovery proceedings.

In the proceedings before the Debts Recovery Tribunal by an order dated 6<sup>th</sup> August, 2013 the rear portion of the said property was sold for Rs.2,63,61,000/-.

By its final order on 21<sup>st</sup> August, 2015 the tribunal directed payment of Rs.1,91,14,712.78/- along with simple interest @ 2% per annum from 1<sup>st</sup>

April, 2003 till realization to the Corporation. By virtue of this order dated 21<sup>st</sup> August, 2015 the Corporation recovered Rs.2,38,72,006.94/- from the sale proceeds lying with the tribunal.

What is recorded in the judgment and order of the tribunal is also of great importance for the purpose of the decision on the issue involved.

It appears in paragraph 41 of the tribunal's order that there was a conflict between the Corporation and United Bank of India over alleged concurrent charges of these parties over the said property and their respective claims. In paragraph 44 of its order the tribunal recorded that the original title deeds of the said property were deposited by the directors of the said company with the Corporation. The bank could not show any charge. The tribunal held "the Corporation is entitled to receive the sale proceeds of the landed property of the mortgage towards recovery of their dues. The rear portion of the said property has been sold by the tribunal. The said amount of sale proceeds is liable to be remitted to the Corporation towards recovery of their dues." The Corporation was entitled to recover Rs.1,91,14,712.78/- as principal amount from the sale proceeds of the mortgaged property.

On the basis of the said Memorandum of Understanding Efcalon instituted the present suit CS 138 of 2016 in this court and claimed the said amount of Rs.2,38,72,006.094/- from the Corporation together with interest.

On or about 13<sup>th</sup> February, 2017 the Corporation affirmed and filed its written statement in court, broadly narrating the above facts.

After discovery of documents, their inspection and preparation of judges' brief of documents, the suit came up for hearing before a learned judge of this court. During examination-in-chief, learned counsel for the appellant plaintiff tried to tender the Memorandum of Understanding in evidence. It was made on Rs.500/- non-judicial stamp paper. Its admission was objected to by learned counsel for the Corporation on two grounds. First,

it was required to be stamped under Section 35 of the Indian Stamp Act, 1899. Secondly, it was registrable under Section 17 of the Indian Registration Act. It was submitted that the document was inadmissible in evidence. It was argued on behalf of the appellant plaintiff that the document did not create any interest in immovable property, was transfer of an actionable claim and was sufficiently stamped and did not require registration.

On these points, very extensive arguments were made. Numerous decisions were cited.

After consideration of all materials, the learned judge by this final judgment and order dated 30<sup>th</sup> October, 2017 came to the finding that the claim based on the Memorandum of Understanding was with regard to the land in question and the money claim was not separable from the claim in respect of land.

Therefore, both Section 35 of the Stamp Act and Section 17 of the Indian Registration Act were applicable and the Memorandum of Understanding had to be registered. It was directed to be impounded under Section 33 of the Indian Stamp Act, 1899 and was directed to be placed in the custody of the Collector for taking necessary steps for its adjudication under the said Act.

Aggrieved by this order, the appellant has preferred this appeal. The entire argument of learned counsel for both the parties centered around the point whether what was being acquired from the Corporation by Efcalon was an actionable claim or whether it was immovable property, movable property and actionable claim all rolled into one. If the former was true, the document required neither registration nor stamping. If the latter was the case, it required both stamping and registration. For insufficient stamping it was inadmissible in evidence.

**Submissions:**

As on 31<sup>st</sup> March, 2003 the claim of the Corporation was Rs.1,91,14,712.78/- against the company in liquidation according to the certificate issued under Section 32G of the State Financial Corporation Act, 1951. It was recoverable through the Collector. However, the Corporation chose to approach the Debts Recovery Tribunal for recovery of the certificate amount.

Mr. S. N. Mookherjee, learned Advocate General assisted by Mr. Sabyasachi Chowdhury, learned Advocate made the following submissions:-

Even if under the Memorandum of Understanding, there was mortgage or charge of immovable property namely, 2, Biren Roy Road, according to the certificate issued by the Corporation that Rs.1,91,14,712.78/- was payable to them. It was like a preliminary decree, in a mortgage suit. This certificate was recognized as such by the Debts Recovery Tribunal allocating the said amount to the Corporation. Hence, the mortgage transaction in the Memorandum of Understanding was converted into actionable claim which was assigned. Reliance was placed on the following passage in **Gyarsi Bai and Ors. vs. Dhansukh Lal and Ors.** reported in **AIR 1965 SC 1055**:

*“6.....It is true that a preliminary decree is final in respect of the matters to be decided before it is made : see Venkata Reddy v. Pethi Reddy [AIR 1963 SC 992] and Section 97 of the Code of Civil Procedure. It is indisputable that in a mortgage suit there will be two decrees, namely, preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights : see Talebali v. Abdul Azia [(1930) ILR 57 Cal 1013], and Kausalya v. Kauleshwar [(1945) ILR 25 Pat 305] . It cannot also be disputed that a mortgage merges in the preliminary decree and the rights of the parties are thereafter governed by the said decree : see Kusum Kumari v. Debi Prosad Dhandhanian. (AIR 1936 PC 63).”*

Learned counsel also cited **Indian Bank vs. Official Liquidator Chemmeens Exports (P) Ltd. and Ors.** reported in **(1998) 5 SCC 401** to support the above argument. They argued citing **Imperial Bank of India vs. Bengal National Bank, in Liquidation** reported in **AIR 1931 PC 245** that a debt secured by mortgage of immovable property could be transferred as an actionable claim by transfer of the debt without the security.

It was also submitted that the court had the power to look into changed circumstances and interpret the chargeability to stamp duty in a transaction, relying on **Prema vs. Nanje Gowda and Ors.** reported in **(2011) 6 SCC 462**. Therefore, the Memorandum of Understanding according to the learned counsel transferred debts and did not transfer any property.

Mr. Anindya Kumar Mitra, learned senior advocate appearing for the respondent Corporation argued that the Memorandum of Understanding was a conveyance inter alia transferring immovable property valued at over Rs.100. An unstamped or an insufficiently stamped document could not be used even for a collateral purpose. He cited **Bipin Shantilal Panchal vs. State of Gujarat and Anr.** reported in **(2001) 3 SCC 1**, **Bondar Singh and Ors. vs. Nihal Singh and Ors.** reported in **(2003) 4 SCC 161**, **Omprakash vs. Laxminarayan and Ors.** reported in **(2014) 1 SCC 618**.

Hence, it required both registration and stamping. An insufficiently stamped instrument was inadmissible in evidence under Section 35 of the Indian Stamp Act, 1899. In fact, it could not be used as evidence for any purpose whatsoever. However, any authority before whom the document was sought to be used may impound it. After impounding of the instrument it was required to be sent to the Collector for determination of the duty payable thereon.

Learned counsel submitted that the Memorandum of Understanding involved transaction in immovable property together with transfer of actionable claim and was thus liable to payment of stamp duty and registration under Section 17 of the Indian Registration Act.

Learned counsel also contended that for the purpose of assessing whether an instrument was liable to duty and to what extent, the transaction mentioned in the document on the date of its execution was to be properly identified and duty collected on it accordingly.

On the date of execution of the document what was proposed to be transferred by the Corporation to Efcalon was its interest in land in premises no. 2, Biren Roy Road mortgaged to secure the loan advanced by the Corporation to the company-in-liquidation, together with its debts. The transfer of its rights as mortgagee of the immovable property of the company in liquidation was certainly transfer of immovable property and liable to stamp duty.

When an instrument is assessed to stamp, the whole instrument on the date of its execution is scrutinized to ascertain the nature, purport and scope of it. It is the date of execution that is relevant. I will discuss the cases cited by learned counsel when I deal with the arguments.

After execution of the Memorandum of Understanding, the Corporation issued a certificate in proceedings claiming the amount due to it by the company in liquidation. The rear portion of the property, 2, Biren Roy Road was sold by the order of the tribunal and a portion of the sale proceeds appropriated towards the dues of the Corporation.

Just because these events occurred which had the effect of conversion of the mortgaged property into cash did not imply that the Memorandum of Understanding which transferred immovable property became exempted from stamp duty and that the document was to be taken as one dealing with the transfer of debts or actionable claim, learned counsel contended.

## **DISCUSSION:-**

Before proceeding further with the matter one has to appreciate what is meant by an actionable claim. It is what is known in English law as “choses in action”. It is intangible personal property that does not exist physically and cannot be physically possessed. It is opposed to “choses in possession” which concerns tangible personal property i.e. goods. The concept has to be clearly understood to ascertain the class of claims which can qualify as actionable claims. Now, the types of movable properties that fit this definition of an actionable claim are inter alia benefits under a contract, debts, damages in tort, intellectual property rights, shares and equitable rights in a trust fund.

The assignment gives only a right to the assignee to realize the assigned claim by a legal action.

The actionable claims which are recognized in our country are found in its definition in Section 3 of the Transfer of Property Act, 1882. It is in the following terms:-

*“actionable claim” means a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.”*

Section 130 says that transfer of an actionable claim shall be by execution of a written instrument. On its execution all rights and remedies of the transferor shall vest in the transferee. The transferee of an actionable claim can institute proceedings in his own name.

If we study Recitals B, C and D of the Memorandum of Understanding, we will see that Efcalon claimed to be the purchasers of the front portion of the Biren Roy Road property in liquidation proceedings concerning Das Reprographics Ltd. The Corporation contended that this portion was

subject to mortgage in their favour by the company as security for a loan. In Recital E we will find the Corporation claiming “an interest” in the rear portion also, referring to their interest as a mortgagee. These claims were contested by Efcalon which became the subject matter of the said appeal in this court which was settled by the Memorandum of Understanding. By the instrument, the Corporation transferred its “entire claim against the company-in-liquidation and assigned all actionable claims including those mentioned in the Debts Recovery Tribunal proceedings TA No. 41 of 2003” to Efcalon.

The Memorandum is skilfully drafted. In paragraph 3 it is stated that the Corporation has “transferred, conveyed, assured and assigned all its claims against the company-in-liquidation including all claims in the Debts Recovery Tribunal proceedings” and the “charge being claimed by it for Biren Roy Road.” I say that the Memorandum is skilfully drafted because of the use of the word “claim”, as if to suggest that only intangible rights, debt, benefit of contract etc. were sought to be transferred. But on a literal, realistic and meaningful interpretation of the Memorandum of Understanding whatever rights the Corporation had in the immovable properties in Biren Roy Road were sought to be transferred to the assignee, Efcalon. If the Memorandum was given effect to, it would result in transfer of the interest of the Corporation as mortgagee of the land on Biren Roy Road. The Memorandum surely did not transfer only a right of action to recover the claims. The document, in my opinion, made a transfer of both landed interest i.e. choses in possession as well as choses in action to the assignee.

Therefore, this type of a transaction would constitute “conveyance” described in Section 3(a) read with the definition of “conveyance” in Section 2(10) and Entry No. 23 of Schedule I of the Indian Stamp Act, 1899.

In **New Central Jute Mills Co. Ltd. and Ors. vs. State of West Bengal and Ors.** reported in **AIR 1963 SC 1307**, the Supreme Court laid down that “the liability of an instrument to stamp duty arises on execution”.

This decision was followed and applied by a division bench of the Kerala High Court in **State of Kerala & Ors. vs. George Jacob & Ors.** reported in **AIR 2006 Ker 111**.

A division bench of the Andhra Pradesh High Court in **Media Anasuyamma and Anr. vs. Choppela Lakshamma** reported in **AIR 1992 Andhra Pradesh 183** said that the chargeability or the amount of stamp duty to be paid on a document was on the date of its execution.

All these decisions were shown to us by Mr. Mitra, Senior advocate.

Moreover, the word “chargeable” has been defined in Section 2(6) of the Indian Stamp Act, 1899 in the following manner:-

*“(6) “Chargeable” means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as applied to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, first executed.”*

It is clear from the above definition that the duty chargeable on an instrument is on the date of its execution.

Mr. Mitra submitted that any subsequent development after execution of the document could not be looked into by the court to rule whether the Memorandum of Understanding was chargeable to stamp duty or not. The document as on the date of its execution was relevant. He argued that the specific reference to the interest of his client in the premises at Biren Roy Road and to transfer of “the charge being claimed by it over and in respect of the premises of Biren Roy Road” in Clause 3 clearly showed that there was transfer of an interest in the property in favour of Efcalon or a debt secured by mortgage of immovable property which could not be categorized as transfer of an actionable claim.

Some other provisions of the Stamp Act are equally important. For example, Section 5 which says that any instrument relating to distinct matters shall be chargeable to the aggregate amount of duties with which separate instruments each comprising or relating to one of such matters would be chargeable.

In other words, if the Memorandum of Understanding is to be interpreted as a transfer of the mortgagee's interest in immovable property, together with actionable claims, the duty in each of the transfers is to be computed separately and made chargeable to duty.

Section 27 of the said Act provides that all facts and circumstances affecting chargeability of any instrument to duty has to be fully stated in the instrument itself. Under Section 41 of the said Act, the Collector when called upon to assess the duty payable is empowered to ask the applicant to file an affidavit or produce other evidence to prove the declaration in the instrument with regard to chargeability of duty.

Thus it would be clear that the duty payable on an instrument is to be assessed on ex facie examination of the matters covered by the instrument itself on a plain and literal interpretation thereof. There is no scope of taking into account extraneous matters like change of circumstances.

Therefore, the decision relied upon by the appellant **Gyarsi Bai and Ors. vs. Dhansukh Lal and Ors.** reported in **AIR 1965 SC 1055** has no application in the facts and circumstances of the case inasmuch as even if the certificate issued by the Corporation is to be taken as a preliminary decree which was worked out by sale of the mortgaged properties, this subsequent development, assuming that it subsequently resulted in conversion of the mortgage interest into an actionable claim did not change the incidence of duty on the date of execution of the instrument. Duty was payable on the basis of the transaction pleaded in the Memorandum of Understanding on the date of its execution. The

Memorandum of Understanding, in my opinion, provided for transfer of an interest in immovable property together with actionable claims.

The Memorandum of Understanding is atleast partly a conveyance, in my view.

For all those reasons, I find no infirmity in the judgment of the learned court below.

We affirm the impugned judgment and order. The parties are directed to take steps before the learned single judge for implementation of the said impugned judgment and order so that the stamp duty can be assessed and paid and the defect in the instrument with regard to deficit stamp duty be cured as soon as possible. In the special facts and circumstances of the case, the parties Efcalon and the Corporation shall bear the stamp duty equally.

We also desire that this exercise be carried out as soon as possible and the suit be tried and determined expeditiously.

The appeal is dismissed.

No order as to costs.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

**I agree.**

**(BISWAROOP CHOWDHURY, J.)**

**(I. P. MUKERJI, J.)**