

(2019) 08 KAR CK 0014

In the Karnataka High Court

Case No : Writ Petition No. 48938, 48939 Of 2014 (Gm-St/Rn)

Motwani Builders

APPELLANT

Vs

B. Alim Builders

RESPONDENT

Date of Decision : 05-08-2019

Acts Referred:

Karnataka Stamp Act, 1957 — Section 4, 30, 31, 32, 32A, 46A
Indian Stamp Act, 1899 — Section 40
Stamp Act, 1899 — Article 6, 26, 34, 34(a), 34, 40(a), 40(b)
Maharashtra Stamp Act, 1958 — Article 25

Citation : (2019) 08 KAR CK 0014

Hon'ble Judges : B.Veerappa, J

Bench : Single Bench

Advocate : Rajesh Chander Kumar, S.N.Dinesh Rao, S.Chandrashekaraiah

Final Decision : Allowed

Judgement

1. These two writ petitions are filed by the owner and builder against the order dated 02.09.2014 made in Appeal Nos.20/2011 and 21/2011 by the Karnataka Appellate Tribunal, Bangalore, confirming the order dated 11.10.2010 made in No.SJR/HLS/46-A/01/2010-2011/234 passed by the District Registrar and Deputy Commissioner for Detection of Under Valuation of Stamps, Shivajinagar Registration District, Bangalore, directing the petitioners to pay the stamp duty and registration fee on Rs.1,69,40,000/-, within ninety days.

2. It is the case of the petitioners in both the writ petitions that the petitioner in W.P.No.48939/2014 is the owner of the land and petitioner in W.P.No.48938/2014 is the builder. Both have entered into a Joint Development Agreement on 13.02.1995 and modified the Joint Development Agreement, which also came to be executed on 22.03.2007. According to the Joint Development Agreements, the petitioners - owner and developer jointly executed a mortgage deed in favour of the New India Co-operative Bank Limited. The mortgage deed created charge on building and provided for the transfer of title to the building upon a separate

conveyance to be executed on demand. It was noted that there was no conveyance of document executed by the petitioners. The mortgage deed was registered and duly stamped. When the things stood thus, based on the misconception of the terms of the mortgage deed, a notice dated 15.4.2010 came to be issued by the District Registrar & Deputy Commissioner of Stamps under Section 46A of the Karnataka Stamp Act, 1957 that the possession has already been transferred and thereby alleging payment of deficit stamp duty on the mortgage deed.

3. Both the petitioners filed objections on 28.04.2010 and referred to the detailed objections to the letter issued by the authority dated 8.3.2010 wherein it is clearly stated that the observation made by the Indian Audit and Accounts Department is not tenable. Article 34(a) of the Stamp Act is applicable only to a case when possession of property comprised in such deed is given by the mortgagor or agreed to be given. In other words, the instrument which is registered should be a usufructuary mortgage where either possession is given or agreed to be given.

4. In the instant case, the mortgage deed registered is not a usufructuary mortgage. Where the mortgagor delivers possession or expressly or by implication binds himself to deliver possession of the mortgaged property to the mortgagee, and authorizes him to retain such possession until payment of the mortgage-money, and to receive the rents and profits accruing from the property or any part of such rents and profits and to appropriate the same in lieu of interest or in payment of the mortgage-money, or partly in lieu of interest or partly in payment of the mortgage-money, the transaction is called an usufructuary mortgage and the mortgagee a usufructuary mortgagee.

5. At para-9 of the mortgage deed, it was specifically contended that mortgagors hereby on demand undertake to assign, convey, transfer and handover vacant possession of premises two floors admeasuring 28,600 sq.ft. area situated in the said building to the Bank until entire dues of the Long Term and Short Term Loan amounts together with interest and other costs, charges and expenses are repaid completely to the Bank by the Mortgagor Builder and No Due Certificate issued by the Bank to that effect. The same would clearly indicate that there is neither giving of possession in presentii nor there is an agreement to give possession simplicitor in future. Giving of possession is a precedent upon the condition that there is a transfer of the building area by assignment/conveyance. The expressions 'assign, convey, transfer' preceding the words and handover possession of premises makes it abundantly clear that there is no agreement to give possession simplicitor. Being a title holder of such property, the Bank would be secured of the repayment of the debt. Such a sale would be a conditional sale/transfer such that upon payment of the debt, the property would stand to revert to the Mortgagor and the Mortgagee would be bound to transfer the property back to the Mortgagor/seller.

6. What is envisaged in Article 34(a) of the Stamp Act is a case where the

mortgage is one whereby possession is given or agreed to be given. Therefore, it is stated that the stamp duty and registration fee paid at the time of registration was proper. There is thus no deficit stamp duty or registration fee payable in the matter. Therefore, requests to close the proceedings.

7. The original authority considering the entire material on record by the order dated 11.10.2010 based on the averments made in the Power of Attorney has come to the conclusion that after careful examination of statement of objections (both written and oral) made by the respondent, the relevant recitals and documents i.e., Mortgage deed and General Power of Attorney, it can be seen that the Mortgagor has given the possession of the premises of two floors admeasuring 28600 sq.ft. Therefore, the petitioners are liable to pay stamp duty and registration fee of Rs.1,69,40,000/-.

8. Aggrieved by the said order, the petitioners filed Appeal Nos.20/2011 and 21/2011 before the Karnataka Appellate Tribunal at Bangalore. The Tribunal considering the entire material on record concurred with the findings recorded by the District Registrar has dismissed the appeals by the impugned order dated 2nd September 2014. Hence, these two writ petitions are filed.

9. I have heard the learned Counsel for the parties to the lis.

10. Sri.Rajesh Chander Kumar, learned Counsel for the petitioners contended with vehemence that the impugned order passed by the first respondent confirming the order passed by the second respondent is erroneous and contrary to the material on record.

11. He would further contend that both the authorities failed to appreciate that the mortgage deed does not depict either delivery of possession or agreed to deliver as contemplated under Article 34(a) of the Stamp Act. He would further contend that both the Appellate Tribunal as well as the original authority held that notice in terms of clause (9) of the mortgage deed clearly depicts that mortgagors hereby on demand undertake to assign, convey, transfer and handover vacant possession of premises two floors in case of any default. Therefore, by reading of Clauses (3), (9) and (17) of the Mortgage Deed, nowhere it depicts either delivery of possession or agreed to deliver the possession. Therefore, the order passed by the original authority confirmed by the Karnataka Appellate cannot be sustained.

12. He would further contend that explanation to Article 34(a) clearly depicts that a mortgagor who gives to the mortgagee a power of attorney to collect rents, or a lease of the property mortgaged or part thereof is deemed to give possession thereof within the meaning of the said Article. 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.1,000/- - stamp duty is Rs.10/- and for every Rs.1,000/- or part thereof, secured in excess of Rs.1,000/- - stamp duty is ten rupees plus one rupee. Therefore, the stamp duty paid on the

mortgage deed executed by both the petitioners in favour of the Bank was just and proper.

13. He would further contend that both the Karnataka Appellate Tribunal as well as the District Registrar and Deputy Commissioner for Detection of Undervaluation of Stamps, proceeded to record the terms and conditions of the General Power of Attorney. When notice issued by the original authority under Section 46A of the Stamp Act only with regard to mortgage deed and absolutely no reference to the General Power of Attorney in the notice dated 15.4.2010, the Karnataka Appellate Tribunal and original authority have erred in proceeding relying upon the terms and conditions of the General Power of Attorney, which is impermissible. Therefore, he sought to allow the writ petitions.

14. In support of his contentions, learned Counsel for the petitioners relied upon the following judgments:

(1) Rashtrothana Parishat -vs- State of Karnataka - ILR 1992 Kar 561 - Paragraphs-6, 8, 12, 13, 14 and 18;

(2) Dharati Developers and Another -vs-Madhukar Atmaram Patil and Others - 2018(2) Mh.L.J. 525 - Paragraphs-12 and 14.

He also refers to a Full Bench decision of Delhi High Court in M/s.Dhoomi Mal Ram Chand -vs- The Collector of Stamps - ILR (1972) I Delhi 755, to the effect that a transaction was a simple mortgage as the mortgagor did not transfer the possession of the whole or a part of the property to the mortgagee while mortgaging the property to him. The fact that the mortgagee was also a lessee in respect of a portion of the property mortgaged did not change the nature of lessee's possession into one of mortgagee. Therefore, the duty payable is under Article 40(b) and not under Article 40(a) of Schedule 1-A (Delhi) of the Stamp Act. Therefore, he sought to allow these writ petitions.

15. Per contra, Sri.N.Dinesh Rao, learned Additional Advocate General sought to justify the impugned order passed by the original authority viz., District Registrar as well as the K.A.T. and contended that in view of the provisions of Article 34(a) of the Stamp Act, which clearly depicts that the petitioners undertake on demand to deliver possession by executing the document, it amounts to "agreed" as contemplated under Article 34(a) of the Stamp Act.

16. He would further contend that under Clause 16(2) of the mortgage deed clearly depicts that the Mortgagors have executed a Power of Attorney which shall during the pendency of the loan shall remain irrevocable, valid and subsisting and the said power of sale shall be extended so as to authorize the Bank to sell the said flats on such terms as the Bank shall in its absolute discretion think fit. Therefore, he created interest based on the General Power of Attorney, which is also a part and parcel of the mortgage deed. Therefore, the District Registrar is justified in holding that the document deficitly stamped under Article 34(a) of the Stamp Act, 1957 and levying stamp duty and registration fee,

which is confirmed by the Appellate Tribunal. Therefore, he sought to dismiss these petitions.

17. Having heard the learned Counsel for the parties, it is undisputed fact that both the petitioners, who are owner and developer, have entered into a Joint Development Agreement on 13.2.1995 and subsequently modified Joint Development Agreement came into existence on 13.3.2007 between the parties. According to the Joint Development Agreement, out of 69 flats to be constructed by the builder, 60% to the owner i.e., 39 flats and 40% to the builder i.e., 30 flats has to be allotted.

18. It is also not in dispute that both the parties agreed to mortgage the property to the Bank to obtain financial assistance. Accordingly, they executed a mortgage deed on 26.6.2008. Both the petitioners executed separate Power of Attorney on 25th June 2008. It is stated in page-2 that "Whereas in the event of M/s.Motwani Builders and M/s.B.Alim Builders committing defaults and/or committing any breach of the terms and conditions entered by and between the Bank, the Bank is authorized to perform certain acts, deeds and things including to sell, transfer and assign, etc.

19. In the mortgage deed executed on 26.6.2008, it is clearly stated at Clause-15(3) that the Mortgagor Builder shall strictly observe and perform certain stipulations. Sub-clause (3) of Clause-15 stipulates as under:

"The Mortgagors shall sell the flats from time to time under the building agreement, they will at once notify that fact to the Bank in writing and cause every such sum of money received as sale consideration therefrom in repayment of the Bank's loan by depositing the said sale consideration in the said account No.4200 with Gunbow Street Branch of the Bank, moreover that Mortgagors shall ensure that all its Flat Purchasers shall draw all the cheques/Pay Orders/Demand Drafts in favour of "Motwani Builders Account No.4200" being the designated account of the Bank, as also ensure that all receivables from this project of "Fairmont Towers" shall be deposited in the said designated account. That Mortgagor Builder shall insert such a clause in their Standard Agreement to be executed with various Flat/shop/garage purchasers and get the same approved by the Legal Consultants of the Bank."

20. It is further stated at Clause-9 of the Mortgage deed that Mortgagors hereby on demand undertake to assign, convey, transfer and handover vacant possession of premises two floors admeasuring 28,600 sq.ft. area situated in the said building to the Bank, until entire dues of the Long Term and Short Term Loan amounts together with interest and other costs, charges and expenses are repaid completely to the Bank by the Mortgagor Builder, and No Due Certificate issued by the Bank to that effect.

21. Under Clause (17) of the Mortgage Deed, it is specifically stated that if and when the said power of sale shall become exercisable, it shall also be lawful for the Bank to enter upon and take possession of the said flats or any of them and

of all erections and fixtures whatsoever therein and if all or any of the said dwelling flats or buildings shall then remain unfinished to complete the same in accordance with the requirements of the building agreement.

22. By careful perusal of the contents of the Mortgage Deed, it clearly depicts, that the Mortgage Deed executed in favour of the Bank for financial assistance by both Builder and Owner is nothing but security for the amount, in case of default of payment, it was authorized to the Bank on demand undertake to assign, convey, transfer and handover vacant possession of premises two floors admeasuring 28,600 sq.ft. area for security of the amount paid by the Bank to the mortgagors.

23. It is stated at the Bar by the learned Counsel for the petitioners that as on the date of the Mortgage Deed i.e., on 26.6.2008, the Builders sold seven flats and paid stamp duty on the said flats. It is also stated that as on the date of the mortgage deed executed in favour of the Bank, both the petitioners have paid the stamp duty and registration charges on the mortgage deed.

24. Admittedly, respondent No.2 issued notice under Section 46A of the Karnataka Stamp Act dated 15.4.2010 in respect of the mortgage deed dated 26.6.2008 executed by both the petitioners directing petitioners to pay stamp duty of Rs.1,69,40,000/-. In the objections, both the petitioners have clearly stated that both the petitioners have not delivered possession of the two floors or agreed to deliver as stated either in the General Power of Attorney or in the mortgage deed. An additional clause was included in the General Power of Attorney that in case of any default, for security of the amount lent by the Bank to the petitioners, on demand undertaking was given and nowhere it is stated either as agreed or delivery of possession of two floors as stated in the mortgage deed. Therefore, question of stamp duty payable would not arise and Article 34 of the Stamp Act would not attract.

25. The original authority i.e., District Registrar & Deputy Commissioner proceeded to record a finding that as per the Clause (1) of General Power of Attorney executed by the mortgagor, it was stated that the Bank has agreed to make available the said loan on executing irrevocable Power of Attorney in favour of the Bank in respect of the property more particularly set out in the schedule written thereunder till the outstanding of the said Term Loan facilities are cleared to the satisfaction of the aforesaid Bank and that the powers granted herein shall remain irrevocable till the entire loan amount together with interest, costs, charges and expenses are paid to the satisfaction of the Bank. Based on the said clauses mentioned in the Power of Attorney, the original authority i.e., District Registrar seems to have come to the conclusion that it can be seen that the Mortgagor has given possession of the premises of two floors measuring 28600 sq.ft. and proceeded to pass the impugned order.

26. On re-appreciation by the Karnataka Appellate Tribunal, the Revenue Appellate Court, relying upon Clause-17 of the Mortgage Deed and Article 34 has

proceeded to order that the wordings used in Clause-9 and Clause-16 incorporated in the Mortgage Deed coupled with General Power of Attorney executed by the petitioners in favour of the Bank attract provisions of Article 34(a) of the Schedule to the Stamp Act and dismissed the appeals.

27. In view of the above, it is appropriate to extract Article 34(a) of the Stamp Act, which reads as under:

Description of Instrument Proper Stamp Duty "Article 34: Mortgage deed, not being an agreement relating to 1 [Deposit of title deeds, 2 [pawn or pledge] (No.6)], Bottomry Bond (No.13), Mortgage of a Crop (No.35), Respondentia Bond (No.46), or Security Bond (No.47)

(a) When possession of the property or any part of the property comprised in such deed is given by mortgagor or agreed to be given;

The same duty as Conveyance (No.26) for a market value equal to the amount secured by such deed."

28. A careful reading of the provisions of Article 34(a) clearly indicates that when possession of the property or any part of the property comprised in such deed is given by mortgagor or agreed to be given, the stamp duty is as Conveyance under Article 26 for a market value equal to the amount secured by such deed.

29. Admittedly, when the Mortgage Deed was registered before the Senior Sub-Registrar, Ulsoor, both the petitioners paid stamp duty of Rs.50,000/- and registration fee of Rs.10,750/-. Therefore, the Registrar did not object for registration fee, since the stamp duty was paid in terms of the conditions mentioned in the mortgage. Subsequently, notice issued by the District Registrar on 15.4.2010 under Section 46-A of the Stamp Act with respect to the Mortgage deed registered on 26.6.2008. When the notice was replied by the petitioners stating that the stamp duty is not payable in law, as there was no delivery of possession or agreed to delivery of possession, the District Registrar erroneously proceeded to invoke terms and conditions of General Power of Attorney, which was not intended to adjudicate in terms of the notice issued under Section 46-A of the Stamp Act. Unfortunately, both the District Registrar as well as the Karnataka Appellate Tribunal proceeded to invoke terms and conditions of the General Power of Attorney, which was not part of the mortgage deed registered.

30. The provisions of Section 46-A of the Stamp Act, envisages power that where any instrument chargeable, with duty has not been duly stamped, the Chief Controlling Revenue Authority or any other officer authorized by the State Government may within five years from the date of commencement of the Karnataka Stamp (Amendment) Act, 1980 or the date on which the duty became payable whichever is later, serve notice on the person by whom the duty was payable requiring him to show cause why the proper duty or the amount required to make up the same should not be collected from him.

31. Admittedly, in the present case, notice was issued for deficit stamp duty

payable on the mortgage deed. While adjudicating the deed of mortgage, the authorities cannot invoke the contents of the General Power of Attorney, which was not the subject matter of the notice issued and proceeded to pass the impugned orders contrary to law.

32. By a careful reading of the provisions of Section 46-A of the Stamp Act, it is clear that short levy of duty has to be computed by examining the original instrument, the only basic document for proceeding to value the said document itself, levy of stamp duty on the copy of Power of Attorney is not at all contemplated by the Act.

33. It is not in dispute that at the time of registration of mortgage deed before the registering authority, there was no suppression of any fact on the part of the petitioners. The bonafides of the parties are not doubted that notice issued under Section 46A of the Karnataka Stamp Act, 1957, directing the parties to pay the stamp duty relying on the contents of the General Power of Attorney. When either General Power of Attorney or mortgage deed, nowhere depicts either delivery of possession or agreed to deliver possession, a mere undertaking in case of any default does not amount to agreed to deliver possession, which attracts the provisions of Article 34(a) of the Act. Therefore, the impugned order passed by the original authority directing the petitioner to pay the stamp duty based on the conditions of the General Power of Attorney, when notice is issued under Section 46A of the Act directing the petitioner to pay stamp duty on mortgage deed is erroneous and contrary to material on record.

34. The document-Mortgage Deed recited that in the event of default, the Bank-mortgagee may take possession of the property, it was only stating the legal consequences of an equitable mortgage and the alleged undertaking at Clause-9 of the Mortgage Deed, if fructified into action, then only the stamp duty as contemplated under Article 34(a) would be attracted. Admittedly in the present case, the mortgagors have paid the amount in terms of the mortgage deed to the bank and discharged the loan. Therefore, the undertaking was not fructified into action. Hence, the question of payment of duty as demanded in the notice issued under Section 46A of the Stamp Act would not arise.

35. This Court while considering the provisions of Section 46A of the Stamp Act and 58(f) of the Transfer of Property Act, in the case of *Rashthrohana Parishat - vs-State of Karnataka* reported in ILR 1992 Kar 561 at paragraphs-6, 7, 8, 9, 12, 13, 14, 15, 18 and 19 held as under:

"6. Several contentions were urged before me. But I confine myself to the two questions :--

(1) Whether an order under Sec. 46A to pay deficit duty can be made without the presence of the original instrument; and

(2) Whether the document (instrument) in question is a simple mortgage, or an equitable mortgage?

7. The stamp duty is charged on the instrument in question as per Section 30. Section 30 merely states that "the expense of providing the proper stamp shall be borne" by the person executing such an instrument stated in Sec. 30(a) - deeds falling under Articles 6 and 34 come under this provision; this again is subject to any contract to the contrary between the parties. Mode of paying the duty in respect of an instrument is as prescribed by virtue of Sec. 10; and the payment shall be indicated on such an instrument. Sections 31 and 32 provide for an opinion and adjudication by the Dy. Commissioner as to the duty payable on an instrument, when such an instrument is brought and applied to the Dy. Commissioner. Effect of not duly stamped instrument is stated in Chapter IV of the Act and such an instrument is to be impounded whenever insufficiently stamped instrument is tendered in evidence or is produced before an authority stated therein; an instrument not duly stamped is inadmissible in evidence. Sec. 37 provides for levy of penalty in respect of such an instrument and the person so impounding shall send it in original to the Dy. Commissioner. Sec. 41 provides for endorsement of instrument on which duty and penalty has been paid under various provisions. Sec. 46 provides for recovery of duties and penalties by the Dy. Commissioner.

8. In the above background, if Sec. 46A is examined, it is clear that short levy of duty has to be computed by examining the original instrument. The only basic document for a proceeding to value an instrument or its classification is said document itself. Levy of stamp duty on the copy of an instrument is not at all contemplated by the Act.

9. If without the instrument in question, balance of stamp duty is levied and collected and it is not endorsed on the original, the person acting on the instrument or producing it in evidence etc., is likely to face the possibility of it being impounded again.

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12. At the time of registration the instrument was before the registering authority; there was no suppression of any fact on the part of the petitioner; bona fide of the parties are not doubted. Nearly after 5 years (though within five years) proceedings were initiated against the petitioner. A provision which enables the taxing authority to go behind the earlier accepted view about the nature of a document will have to be strictly construed. The provision cannot be more liberal than other provisions in the Act governing the assessment for the levy of the stamp duty. All other provisions specifically require the presence of the original instrument for taxation, impounding etc. Therefore, it is not possible to invoke Sec. 46A without the original instrument being before the concerned authority. Admittedly, the Chief Controlling Revenue Authority did not seek the original instrument before deciding the question of stamp levy.

13. The next question pertains to the nature of the document, copy of which is

filed as an annexure to the writ petition. If the document is an "agreement relating to deposit of title deeds", the stamp duty is leviable as per Article 6 of the Schedule to the Act; otherwise, and if it is a mortgage deed, Art. 34 is attracted. Art. 34 is applicable to 'mortgage deed not being an agreement relating to deposit of title deeds' falling under Art. 6. Therefore, the approach ought to be to see whether the instrument is an agreement relating to deposit of title deeds; if it falls within Art.

6, then, question of Art. 34 would not arise.

14. As per Sec. 58(f) of the Transfer of Property Act, where a person delivers to a creditor documents of title to immovable property with intent to create a security thereon, transaction is called a mortgage by deposit of title deeds. The intention is to be that the title deeds shall be the security for the debt. Essence of the transaction is to make the title deeds, security for the debt in question.

15. The only clause which seems to have persuaded the respondents to hold it as creating a charge is a clause wherein, petitioner agreed to give possession of property under certain circumstances. But, it does not speak of any charge. To be a simple mortgage, the mortgagor should bind himself personally, to pay the mortgagor the mortgage money. The petitioner has nowhere bound itself in the nature of personal obligation to pay the mortgage money, failing which the mortgaged property may be sold.

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17....

18. Therefore, when the document recited that in the event of default, the mortgagee (Bank) may take possession of the property, it was only stating the legal consequences of an equitable mortgage. From such a clause, it cannot be held that the instrument ceases to be an equitable mortgage.

19. In these circumstances, I am of the view that the levy of duty under Article 34 of the Schedule to the Act was unwarranted."

36. The learned Judge of Co-ordinate Bench of Bombay High Court in the case of Dharati Developers -vs- Madhukar Atmaram Patil reported in 2018(2) Mh.L.J 525 at paragraphs-7, 12, 13 and 14 has held as under:

"7. In order to substantiate their respective contentions, learned counsel for both parties have relied upon judgments of Division Bench of this Court. However, before advertng to those judgments, it would be useful and advantageous to refer the provisions of Explanation 1 to Article 25 of the Maharashtra Stamp Act and those provisions can be reproduced as follows :-

"[Explanation-I] - For the purpose of this article, where in the case of agreement to sell an immovable property, the possession of any immovable property is transferred or agreed to be transferred to the purchaser before the execution, or at the time of execution, or after the execution of, such agreement, then such

agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly.

Provided that, the provisions of section 32-A shall apply mutatis mutandis to such agreement which is deemed to be a conveyance as aforesaid, as they apply to a conveyance under that section:

Provided further that, where subsequently a conveyance is executed in pursuance of such agreement of sale, the stamp duty, if any, already paid and recovered on the agreement of sale which is deemed to be a conveyance, shall be adjusted towards the total duty leviable on the conveyance.

Provided also that where proper stamp duty is paid on a registered agreement to sell an immovable property, treating it as a deemed conveyance and subsequently a conveyance deed is executed without any modification then such a conveyance shall be treated as other instrument under Section 4 and the duty of one hundred rupees shall be charged"

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11).

12] The real issue for consideration is the clause No.7 which states that the possession of the property was agreed to be given on the date of agreement of sale. According to learned counsel for respondent, this term in clause No.(7) of the MOU clearly attracts Explanation-I to Article 25 of the Maharashtra Stamp Act and therefore, stamp duty is required to be paid as leviable on the conveyance deed.

13] This very term, "possession was agreed to be given" as used in the MOU, came for consideration before the Division Bench of this Court in the case of Balwantgir Ganpatgir Giri through his LRs Nanibai wd/o Balwant Giri and ors -vs- Manasi Construction and Developers, 2006 (5) Mh. L. J. 306, relied upon by the learned counsel for the petitioner. In that case also the argument advanced was that the document of MOU clearly discloses an agreement for delivery of possession in terms of said agreement for sale of the property and therefore it was required to be stamped in accordance with the provisions of law comprised under Explanation-I to Article 25 of the Schedule I of the Maharashtra Stamps Act. This argument was upheld by the trial Court, on the ground that there was clear mention in the agreement that the possession was to be delivered on the date of agreement to sale of property. The point, therefore, raised for consideration before the Division Bench was, whether the document in question discloses agreement for delivery of possession in terms of agreement of sale and, therefore, it was a conveyance within the meaning of Explanation-I to Article 25.

14. While deciding this point, it was held in paragraph 9 of the judgment that, "the fact that, agreement in question clearly contemplates delivery of possession only on execution of the sale deed being not in dispute, in fact, that itself is sufficient to reject all the contentions sought to raise on behalf of appellant".

It was further held that,

"Under the Explanation-I to Article 25, the delivery of possession which transposes the agreement to conveyance in terms of said Explanation-Is only in case of agreement to deliver the possession in terms of the agreement and not in terms of the sale deed agreed to be executed consequent to such agreement. Indeed in case of execution of the sale deed it would carry the stamp duty which is required to be paid on a conveyance in accordance with the Article 25 of Schedule I. Being so, once the sale deed is executed by paying required stamp duty in terms of Article 25, the occasion to deprive the Government revenue cannot arise. For the said reason, once the agreement discloses that delivery would be on execution of the sale deed, it is needless to say that there could be no opportunity for the parties to defraud the Government. Being so, an agreement which restricts delivery of possession or execution of sale deed cannot by any stretch of imagination construed to be a conveyance within the meaning of the said expression under Explanation-I to Article 25 of Schedule I of the said Act".

37. A Full Bench of the Delhi High Court in the case of M/s.Dhoomi Mal Ram Chand -vs- The Collector of Stamps reported in ILR (1972) I Delhi 755 has held as under:

"The law finds no difficulty in contemplating a transaction in which the mortgagee or the mortgagor can be a lessee of one another quite apart from the rights of these two persons arising out of the mortgage. In Mathuralal -vs- Keshar Pai and another AIR 1971 SC 310, the mortgagee was the landlord and the mortgagor the tenant. It was held that the mortgagee could sue independently of the mortgage on the basis of the lease even though his remedy on mortgage had become unenforceable inasmuch as the lease was a separate transaction altogether from the transaction of the mortgage. This principle is applicable to the present case even though the mortgagor happens to be the lessor and the mortgagee the lessee.

For the above reasons our answer to the first question referred to us is that on the facts of the present case, the mortgagor did not transfer the possession of the whole or a part of the property to the mortgagee while mortgaging the property to him. The transaction was, therefore, a simple mortgage and not a usufructuary mortgage. It is dutiable, therefore, under Article 40(b) and not under Article 40(a) of Schedule I-A (Delhi) of the Stamp Act.

In view of the answer to Question No.1, the question of recovering deficiency along with penalty under section 40 of the Stamp Act does not arise in this case. The second question referred to us does not, therefore, arise for consideration in

the present case."

38. It is not the case of the State Government that while issuing notice under Section 46A on 15.4.2010, whether the petitioners delivered the possession or agreed to deliver possession or they pointed out either in General Power of Attorney or the Mortgage Deed the conditions stipulated to attract the provisions of Article 34(a) of the Stamp Act. In the absence of delivery of possession or agreed to deliver possession, the provisions of Article 34(a) would not attract. Therefore, the notice issued under Section 46A of the Act itself was not available to the authorities. For the reasons aforesaid, the impugned order passed by the original authority confirmed by the Karnataka Appellate cannot be sustained.

39. In view of the above, the Writ Petitions are allowed. The judgment order dated 02.09.2014 made in Appeal Nos.20/2011 and 21/2011 by the Karnataka Appellate Tribunal, Bangalore, confirming the order dated 11.10.2010 made in No.SJR/HLS/46-A/01/2010-2011/234 passed by the District Registrar and Deputy Commissioner for Detection of Under Valuation of Stamps, Shivajinagar Registration District, Bangalore, are hereby quashed.

Ordered accordingly.