

**(2008) 03 BOM CK 0023**

**In the Bombay High Court**

**Case No : Writ Petition No. 2229 of 2005**

Nanik K. Daryanani

APPELLANT

Vs

Deputy Inspector General of Registration and Deputy  
Controller of Stamps (Enforcement) and Others

RESPONDENT

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**Date of Decision : 19-03-2008**

**Acts Referred:**

Bombay Stamp Act, 1958 — Article 25, 46, 68  
Income Tax Act, 1961 — Section 269(UC), 269(UD), 269(UL)(3), 32A, 33  
Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale,  
Management and Transfer) Act, 1963 — Section 11

**Citation : (2008) 6 ALLMR 778 : (2008) 5 BomCR 490 : (2008) 6 MhLj 618**

**Hon'ble Judges : Khanwilkar A.M., J**

**Bench : Single Bench**

**Advocate : Hiralal Thakkar, instructed by M.R. Dhameja, for the Appellant;  
Niranjan Pandit, A.G.P., for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

Khanwilkar A.M., J.—This writ petition takes exception to the judgment and Order passed by the Chief Controlling Revenue Authority, Maharashtra State, Pune dated 24th September, 2004 in Appeal No. 136 of 1998, which in turn confirmed the direction/ decision dated 24th August, 1998 of the Deputy Inspector General of Registration and Deputy Controller of Stamps (Enforcement), Mumbai passed in exercise of powers vested in him under the provisions of Bombay Stamp Act, 1958 (hereinafter referred to as the Act") to call upon the petitioner to pay an amount of Rs. 28,79,980/- (Rupees Twenty-eight Lakhs Seventy-nine Thousand Nine Hundred Eighty) towards deficit stamp duty and penalty at the rate of 2% per month with effect from 29th December, 1995 till the date of payment of deficit stamp duty-within one month from the receipt of the order, failing which, action for recovery of the said amount along with penalty as arrears of land revenue in terms of Section 46 of the Act was to be initiated.

2. Briefly stated, the above said direction was issued by the Deputy Controller of

Stamps (Enforcement), Mumbai in relation to the document executed by the petitioner (hereinafter referred to as "purchaser") and Indo Saigon Agency (hereinafter referred to as the Vendors") in connection with 40% undivided share in the Office Premises Nos. 91 and 92 on the 9th floor in the proposed commercial complex, to be known as "Dynamix Towers" at General A.K. Vaidya Marg, Goregaon (East), Mumbai - 400 063. The said document is titled as "Memorandum of Understanding" (hereinafter referred to as "M.O.U."), which was executed on 29th December 1995, on stamp paper of Rs. 20/-(Rupees Twenty).

3. The recital of the said document mentions that the Vendors have agreed to purchase the abovesaid office premises for which the M.O.U. dated 30th March, 1995 was executed between Aditya Construction and Developers Pvt. Ltd. (Developers) and the Vendors for total consideration of Rs. 5,89,75,000/- (Rupees Five Crores Eighty-nine Lakhs Seventy-five Thousand) on terms and conditions referred to in the said M.O.U., providing further that the parties would apply in Form No. 37-I to the Appropriate Authority/- Income Tax Department, Mumbai for a No Objection Certificate u/s 269(UL)(3) of the Income Tax Act, 1961(hereinafter referred to as "the I.T. Act"). Consequent thereto, the parties applied to the Appropriate Authority, which in turn, granted requisite Certificate under the A.A. Case No. AA/Bom/Cert/18209/96-96 dated 29th May, 1995. It is then stated in the recital of the subject M.O.U., executed between the Vendors and the petitioner (purchaser), that till the date of execution of the said document, the Vendors have already paid an amount of Rs. 3,00,00,000/- (Rupees Three Crores) to the Developers to discharge their obligation arising out of the M.O.U. executed between them and the Developers. It is then mentioned that the petitioner (purchaser) has agreed to purchase and the Vendors have agreed to sell 40% undivided share in the said office premises on terms and conditions recorded in the subject M.O.U. dated 29th December, 1995.

4. Clause (1) of the subject document provides that the Vendors have agreed to sell to the petitioner (purchaser) and the purchaser has agreed to purchase from the vendors 40% undivided share in the said office premises for consideration of Rs. 2,88,00,000/- (Rupees Two Crores Eighty-eight Lakhs) out of which an amount of Rs. 2,00,00,000/- (Rupees Two Crores) was paid to the Vendors on or before execution of the said document and the Vendors admit receipt thereof. With regard to the balance amount of Rs. 88,00,000/- (Rupees Eighty-eight Lakhs), it is provided that the same would be paid by the purchaser to the Vendors on handing over possession. Clause (2) of the Agreement provides that the agreement for Sale to be executed on usual terms and conditions shall be prepared by the Vendors under the provisions of Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (hereinafter referred to as "M.O.F. Act"), after no objection or permission u/s 269(UL)(3) of the I.T. Act is received from the Appropriate Authority. Clause (3) of the Agreement then provides that in accordance with the requirements of Section 269(UC) of the I.T. Act, the parties have completed and

signed the prescribed Form No. 37-I to be submitted before the Appropriate Authority for permission for sale of the said premises by the Developers to the purchaser within the stipulated time. Clause (4) of the document stipulates that the parties thereto make it clear that the Memorandum does not constitute an Agreement for Sale of the said premises "under the Maharashtra Flats Act, 1963". Clause (5) of the subject document provides that if the period of three months from the end of the month in which Form No. 37-I is filed with the Appropriate Authority expires without any intervening order for purchase of the said premises by the appropriate Authority u/s 269(UD) of the I.T. Act, or if the Appropriate Authority within the said period grants No Objection Certificate (N.O.C.) or permission to the proposed sale of the premises, as required u/s 269(UL)(3) of the I.T. Act, the parties shall thereafter execute an usual agreement for Sale in respect of the said premises which shall be stamped as per the provisions of the Act and lodge for registration with the Registering Authority within the stipulated period and transfer charges, if any, shall entirely be at the cost of the purchaser and the purchaser shall pay all stamp duty and registration charges in respect thereof. Clause (6) of the agreement provides that if the Appropriate Authority makes an order for purchase of the said premises, the purchaser shall be entitled for a refund of the consideration amount of Rs. 2,00,00,000/- (Rupees Two Crores) paid by the purchaser to the Vendors as earnest money along with further sum that may have been paid by the purchaser under the subject document. The Vendors consented for that condition; and further agreed that upon said order being passed by the Appropriate Authority, the M.O.U. would come to an end and stand terminated, and neither of the parties shall have any claim or demand against the other arising by virtue of anything contained in the subject document. Clause (7) of this document stipulates that subject to the other provisions, both the parties shall have the right to enforce against each other the specific performance of the terms and conditions recorded therein.

5. It is not in dispute that the Appropriate Authority (income tax Department) issued N.O.C., on 18th March, 1996. It is the petitioner's case that thereafter, however, the Vendors and the purchasers terminated the agreement under the subject M.O.U. by executing deed of cancellation on 17th January, 1997. As a result whereof, the parties were not required to execute formal agreement for sale, providing for usual terms and conditions as required by the provisions of Maharashtra Ownership Act.

6. The Deputy Inspector General of Registration, however, on 17th March, 1997, in exercise of powers vested in him u/s 68 of the Act, called upon the petitioner to produce the agreement (subject document) for verification to ascertain whether it is properly stamped, failing which, appropriate action would follow. The said show-cause notice states that while going through the office record, it was noticed that the purchaser had applied to the Appropriate Authority for grant of N.O.C. in Form No. 37-I u/s UL of the I.T. Act for sale/purchase of the said office premises for consideration of Rs. 2,88,00,000/- (Rupees Two Crores Eighty-

eight Lakhs). It is also stated that the appropriate Authority has granted required N.O.C. to the purchaser. The notice then refers to the amended Article 25 of Schedule I of the Act, introduced with effect from 10th December 1985, which obligates all the agreements of sale to be treated as deemed conveyance and subjected to levy of stamp duty as conveyance at the rates indicated in Article 25 of Schedule-I.

7. On receipt of the said show-cause notice, the petitioner submitted reply on 27th March, 1997. The Deputy Inspector General of Registration, however, served second notice on the petitioner dated 1st September, 1997. Once again, petitioner submitted reply to the said notice and asserted that the subject document was not amenable to stamp duty as it was not an agreement for sale.

8. Besides submitting reply, the petitioner filed writ petition before this Court questioning the proposed action likely to be initiated by the authority. The said Writ Petition No. 482 of 1998 was allowed by this Court on June 15, 1998. This Court was pleased to set-aside the notice-cum-order dated 1st September, 1997 and permitted the petitioner to produce all the relevant documents including the Deed of Cancellation before the authority within two weeks to enable the authority to take appropriate decision.

Consequent thereto, the Deputy Inspector General of Registration proceeded with the hearing of the case and after considering the documents on record and the stand taken by the petitioner in the reply filed before him. In the first place, he proceeded to examine the scope of the subject documents titled as M.O.U. In his view, though the title of the document was M.O.U., the tenor of the provisions made therein would leave no manner of doubt that it was an Agreement for sale. The circumstances taken into account for reaching this conclusion as noted in the impugned order dated 24th August, 1998, is that, the description of the parties in the document is mentioned as Vendors and purchaser, which description is normally found only in conveyance or agreement for sale. It is then noted that in Clause (1) of the Agreement, it is clearly provided that an amount of Rs. 200,00,000/- (Rupees Two Crores) was paid on or before execution of the said document and the Vendors have admitted receipt thereof. According to the Authority, the earnest money paid by the petitioner/purchaser was almost to the extent of 69.45% of the consideration amount on the execution of the subject document; and that, the balance amount was to be paid at the time of handing over of possession. The authority then took into account that the appropriate Authority of the Income Tax Department has also granted N.O.C. on 18th March, 1996 on the assumption that the document was an agreement of sale. Having found that the said document was an agreement of sale, the authority proceeded to hold that the same was covered by the provisions of Section 32A of the Act and amenable to stamp duty for a sum of Rs. 28,80,000/- (Rupees Twenty-eight Lakhs Eighty Thousand), as per Article 25(b) to Schedule-I of the Act. The Authority, by the said order, accordingly, called upon the petitioner to pay the deficit stamp duty of Rs. 28,79,980/- (Rupees Twenty-eight Lakhs Seventy-nine

Thousand Nine Hundred Eighty) and penalty at the rate of 2% per month with effect from 29th December 1995 till the payment of deficit stamp duty within one month from the date of the order, failing which, further action would be proceeded for recovery of the amount along with penalty as arrears of land revenue.

9. The above said decision was carried in appeal by the petitioner before the Chief Controlling Revenue Authority being Appeal No. 136 of 1998. The Appellate Authority upheld the opinion recorded by the First Authority that the document in question was Agreement to Sell. The Appellate Authority accordingly dismissed the appeal preferred by the petitioner by impugned judgment and order dated 24th September, 2004. This decision is subject-matter of challenge in the present writ petition.

10. According to the petitioner, the authorities below have committed manifest error in treating the document as Agreement] to Sell. In fact, it was only an agreement to enter into an Agreement, which was amply clear from the terms of the document itself. It is then contended that admittedly, the petitioner was not put in possession of the said office premises, consequent to execution of the subject document. According to the petitioner, factum of handing over possession was a crucial factor-only when the deeming provision of the Act would get. attracted and not otherwise. To buttress the argument that document was not an agreement of sale, it was contended that the stipulation in the said document required the parties to apply for N.O.C. from the Income Tax Authority and until such certificate was issued, the question of parties executing any formal document, much less, of vesting any right, title or interest in the property, does not arise. Till such time, there can be no liability to pay stamp duty. It was lastly contended that the arrangement recorded in the subject document was subsequently cancelled by deed of cancellation on 17th January, 1997, for which reason, the liability of paying stamp duty on the subject document on the assumption that it was an agreement of sale cannot be fastened upon the petitioner.

11. Relying on Section 33 of the Act, it was also argued on behalf of the petitioner that there was no occasion for the Deputy Inspector General of Registration to require the petitioner to produce the document in question for examination and impounding the same. Inasmuch as, the circumstance in which such authority can be exercised, is spelt out by Section 33 itself, which was lacking in the present case. On the above basis, it was argued that the conclusion reached by the two Authorities below, though concurrent, cannot stand the test of judicial scrutiny and ought to be set-aside.

12. Counsel for the respondents, on the other hand, supported the view taken by the two Authorities below and would submit that no interference is warranted in exercise of writ jurisdiction in the fact situation of the present case.

13. Having considered the rival submission, the first question that needs to be

addressed is: as to what is the nature of document executed between the Vendors and the purchaser? I have already extensively referred to the contents of the subject document, Exhibit A to the petition, titled as M.O.U., in the opening part of this judgment. From the recitals, it is seen that the description of the parties, as rightly observed by the Authorities below, is that of Vendors and purchaser. Indeed, that by itself, cannot be the basis to assume that the document is an agreement of sale and not an agreement to enter into an Agreement. However, on analysing the document as a whole and even clause by clause, I have no hesitation in upholding the concurrent view of the Authorities below that the document in question is nothing short of Agreement to Sale though titled as "M.O.U.". Thus, on account of deeming provision in the Act, it will have to be treated as Conveyance for the purpose of levy of stamp duty thereon. I shall now elaborate on this aspect. In the recitals, it is stated that the Vendors have purchased whole of Office Premises Nos. 91 and 92 from the Developers under M.O.U. dated 30th March, 1995 in respect of which N.O.C. has already been issued by the Appropriate Authority. It is also noted that the Vendors have already paid the amount of Rs. 3,00,00,000/- (Rupees Three Crores) by way of part consideration to the Developers. It is then stated that out of the undivided share of the Vendors in the said Office, 40% of that share is agreed to be sold by the Vendors and agreed to be purchased by the purchaser. Having said that, Clause (1) makes provision for the consideration amount and the manner in which the same will have to be paid by the purchaser to the Vendors. Once again, in Clause (1) of the document, it is plainly provided that Vendors have agreed to sell to the purchaser and purchaser has agreed to purchase from the Vendors 40% undivided share in the Office. This Clause leaves no manner of doubt that it is a case of concluded contract between the purchaser and the Vendors clearly specifying the consideration amount and the manner of payment. Significantly, Clause (1) provides that an amount of Rs. 2,00,00,000/- (Rupees Two Crores) has already been paid to the Vendors before execution of the document, which amount would represent about 69.45% of the total consideration to be paid by the purchaser as per the Agreement between the parties. More so, Clause (1) unambiguously states that the possession of the office premises would be made over to the purchaser on payment of balance consideration amount of Rs. 88,00,000/- (Rupees Eighty-Eight Lakhs). Indeed, the document does make provision that the parties will have to apply to the Appropriate Authority of the Income Tax Department for issuance of N.O.C. That condition being a statutory obligation, does not mean that the arrangement between the parties was not a concluded contract or an Agreement to Sale. Notwithstanding such provision, the arrangement arrived at between the parties will have to be treated as Agreement to Sale but subject to permission to be granted by the Appropriate Authority. As soon as the Appropriate Authority (income tax Department) would grant N.O.C. or permission u/s 269(UL)(3) of the I.T. Act, the parties would be free to execute formal Agreement in compliance with the provisions of Maharashtra Ownership Act. On the other hand, if the permission was to be refused by the Appropriate Authority (income tax

Department), obviously, the parties cannot precipitate the matter further nor legitimately transfer right, title or interest therein. Thus understood, the provision made in the said document in Clauses (2) and (3) does not mean that there was no concluded contract between the parties. In other words, it is not as if the arrangement was only an Agreement to enter into an Agreement. Indeed, in Clause (4), it is made clear that the Memorandum does not constitute an Agreement for Sale of the said premises "under the Maharashtra Flats Act, 1963". That does not mean that there was no concluded contract or Agreement between the parties at all. It only means that the Memorandum cannot be construed as Agreement for Sale of the premises executed "under the provisions of Maharashtra Ownership Flats Act, 1963"; Whereas, document to comply with the provisions of that Act would be executed in due course. Nevertheless, it cannot be a case of only an Agreement to enter into an Agreement, having regard to all the attending circumstances and more so, the stipulations in the said document. It is well established position that merely because the parties have decided to execute a formal legal document at a later point of time, does not mean that there was no concluded contract so as to treat such arrangement to be an Agreement to enter into an Agreement. Even Clause (6) of the subject document is no indication to treat the arrangement between the parties as an agreement to enter into an Agreement. If there was any doubt, the same stands answered in view of the explicit provision made in Clause (7) of the subject document which clearly provides that both the parties shall have the right to enforce against each other the specific performance of the terms and conditions recorded in the document. The opening words of Clause (7) that "subject to the other provisions" would mean that specific performance can be insisted by the parties subject to permission and/or N.O.C. to be granted by the Appropriate Authority of the Income Tax Department. Significantly, the petitioner asserts that the suit M.O.U. (agreement) was later on cancelled by deed dated 17th January, 1997. If it were to be an arrangement merely of an agreement to enter into an agreement, there was no need of executing a formal cancellation deed so as to absolve the parties of their respective obligations under the M.O.U.

14. Be that as it may, taking any view of the matter, I have no hesitation in upholding the view of the two Authorities below that the subject document is in the nature of Agreement to Sale and amenable to levy of stamp duty, as if, it was a Conveyance; having regard to the legal fiction created by the provisions of the Act as amended.

15. The next question is: whether the Deputy Inspector General of Registration was competent to issue, suo motu, show cause notice on 17th. March, 1997? The argument canvassed on behalf of the petitioner is in the context of Section 33(1) of the Act, which reads thus:

33. Examination and impounding of instruments: (1) Subject to the provisions of Section 32A, every person having by law or consent of parties authority to receive evidence and every person in charge of a public office, except an officer

of police or any other officer, empowered by law to investigate offences under any law for the time being in force, before whom any instrument chargeable, in his opinion, with duty, is produced or comes in the performance of his functions shall, if it appears to him that such instrument is not duly stamped, impound the same irrespective whether the instrument is or is not valid in law.

16. According to the petitioner, impounding of instruments can be done by the specified Authority, who has the authority to receive evidence. It was argued that the power of impounding can be invoked by the Authority before whom any instrument chargeable with duty is produced or comes in the performance of his functions and if it appears to him that such instrument is not duly stamped. Emphasis was placed on the words "produced or comes in the performance of his functions" to contend that from the show cause notice itself, it was amply clear that the document was not produced before the Concerned Officer. It was argued that the expression "comes in the performance of his functions", will have to be understood in the context of such document being produced before the Officer. This interpretation put forth on behalf of the petitioner, in my opinion, only deserves to be "stated to be rejected.

17. The plain language of Section 33 which authorises the specified officers to impound the instruments which are not duly stamped, can be invoked by the concerned Officer not only when the document is produced before him by any person, but also when such document comes to his notice in the performance of his official function or duties. In the present case, the opening recitals of the show cause notice are indicative as to on what basis the Deputy Inspector General of Registration initiated the action against the petitioner. It is mentioned that while he was going through his office record, he noticed that the petitioner had applied to the Appropriate Authority for grant of N.O.C. in Form 37-I u/s 269(UL) of the I.T. Act for the sale/purchase of the Office premises for consideration of Rs. 2,88,00,000/- (Rupees Two Crores Eighty-Eight Lakhs) and that permission has been accorded by the Appropriate Authority. Once such permission was accorded, the document executed between the parties would be amenable to levy of stamp duty as may be applicable. If the Authority has initiated action in this background, the same is legitimate action in exercise of power in terms of Section 33(1) of the Act. Thus understood, there is no substance in the stand taken on behalf of the petitioner about the lack of Authority to initiate the action.

18. That takes me to the next question as to whether stamp duty was leviable in relation to the said document executed between the Vendors and the purchaser. The Authorities have proceeded on the basis that since it is an agreement of sale, will have to be treated as deemed Conveyance and would be covered by the provisions of Section 32A of the Act on which stamp duty of Rs. 28,80,000/- (Rupees Twenty-Eight Lakhs Eighty Thousand) is payable under Article 25(b) to Schedule I of the Act. Section 32A of the Act deals with the instrument of Conveyance and the manner in which the undervalued instrument of Conveyance

will have to be dealt with. If the instrument is deemed to be a Conveyance in relation to immovable property, stamp duty is payable on such document as provided in Article 25(b) of Schedule I of the Act. It is, however, significant to advert to Explanation I below Article 25. The said explanation was renumbered as Explanation I and Explanation II by Maharashtra Act 27 of 1988 with effect from 29th August, 1988. The explanation has been amended from time to time. Firstly, by Maharashtra Act 17 of 1993 with effect from 1st May, 1993, whereby the words "or agreed to be transferred" were inserted in Explanation I. Later on, the Maharashtra Act 29 of 1994 made provision for deletion of Explanation I along with both the provisos. However, the said amendment has not been brought into force. Subsequently, however, Maharashtra Act 38 of 1994, came into force with effect from 17th August, 1994, which has done away with the proposed deletion of Explanation I. In other words, Explanation I along with the provisos has remained in force as earlier. Besides, the Maharashtra Act 38 of 1994 provided for deletion of words "without executing the Conveyance in respect thereof which appeared in Explanation I. This deletion has been brought into force with effect from 17th August 1994. More over, Explanation I in the form in which it existed on 17th August 1994, by legal fiction, has been deemed to come into force with effect from 10th December, 1985, having regard to the Maharashtra Tax Laws (Levy, Amendment and Validation) Act 30 of 1997 which has come into effect from 15th May, 1997.

19. Be that as it may, for considering the controversy on hand, I would straightaway reproduce Explanation-I as it would appear in the Act as applicable on 29th December 1995, the date on which the said document was executed between the Vendors and the purchaser petitioner. The same reads thus:

Explanation I.- For the purposes 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 32A 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.

On plain language of this explanation, it is more than clear that in case of agreement to sell an immovable property, the possession of such 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.

20. While construing different clauses of the subject document, I have already noted that the document makes clear provision regarding handing over of possession of the immovable property-that is agreed to be transferred to the purchaser/petitioner on payment of balance consideration amount of Rs. 88,00,000/- (Rupees Eighty-Eight Lakhs) out of Rs. 2,88,00,000/- (Rupees Two Crores Eighty-eight Lakhs). This is the express provision made in the document. There is no stipulation that the possession of the immovable property will not be handed over to the purchaser. If it is so, on account of the deeming provision in Explanation I, which applies to the case on hand, the Agreement will have to be treated as deemed to be Conveyance for the purpose of levy of stamp duty thereon." The fact that the possession has not been made over to the petitioner or that the balance consideration amount has not been paid, so also, the fact that subsequently the parties have entered into Deed of Cancellation, will not absolve the petitioner from payment of stamp duty leviable on such a document which is deemed to be a Conveyance.

21. Counsel for the petitioner, however, has placed reliance on the exposition in the decisions of the Apex Court in the case of Veena Hasmukh Jain and Another Vs. State of Maharashtra and Others, , also on the case of Crest Hotel Ltd. and another Vs. The Assistant Superintendent of Stamps and another, and the case of Naginbhai P. Desai Vs. Taraben A. Sheth, . All these Authorities deal with the provision, Explanation I, as it existed prior to 1st May, 1993. The provision which existed prior to 1st May, 1993 has been reproduced in Paragraph 7 of the decision of the Apex Court in the case of Veena Hasmukh Jain (supra) which reads thus:

Explanation I.- For the purposes of this article, where in the case of agreement to sell an immovable property, the possession of any immovable property is transferred to the purchaser before the execution, or at the time of execution, or after the execution of, such agreement without executing the conveyance in respect thereof, 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 32A 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 levies, able on the conveyance.

22. Obviously, there is marked difference on account of insertion of words "or agreed to be transferred" by Maharashtra Act 17 of 1993 with effect from 1st May, 1993. Besides, the words "without executing the Conveyance in respect

thereof have been deleted by Maharashtra Act 38 of 1994 with effect from 17th August, 1994. The position in all the three decisions is in the context of unamended provision, which will be of no avail to the petitioner. In the case of Veena Hasmukh Jain (supra), the Apex Court proceeded to examine the issue in the context of unamended provision which required possession of any immovable property to be actually transferred to the purchaser before the execution or at the time of execution or after the execution of such agreement without executing the Conveyance in respect thereof. In contradistinction, the Amending Act would be attracted where the possession of the immovable property is transferred or even "agreed to be transferred" in future, to be treated as deemed to be a Conveyance. The observation of the Apex Court that, if the Agreement provides that possession will be handed over on the execution of a Conveyance as contemplated u/s 11 of the M.O.F. Act, then the explanation shall not be attracted at all, is of no avail to the fact situation of the present case. In the first place, the effect of amendment by Maharashtra Act 17 of 1993 does away with that requirement. Additionally, while construing the relevant clauses of the document in question, I have noticed that there is no provision in this document that possession will be handed over only on the execution of the Conveyance as contemplated under the M.O.F. Act; whereas express provision has been made that possession will be made over on payment of balance amount of Rs. 88,00,000/(Rupees Eighty-eight Lakhs). That presupposes that possession would be handed over irrespective of the formal Conveyance executed u/s 11 of the M.O.F. Act, subject to payment of balance amount.

23. Reliance was then placed on the decision of our High Court in the case of Crest Hotel Ltd. (supra), which took the view that explanation to Article 25 of Schedule I merely creates a legal fiction for the purpose of that Article; and for that limited purpose, it provides that even Agreement for Sale in the circumstances specified therein shall be Agreement to Sell and stamp duty thereon shall be levied accordingly. Even in that case, the Agreement was later on cancelled by the parties by a Deed of Cancellation. The Court went on to observe that the Agreement of Sale which has been cancelled by the Deed of Cancellation in question, there was no Conveyance even for the limited purpose of Article 25 of Schedule I of the Act. This exposition will be of no avail to the fact situation of the present case. Even this case was decided keeping in mind the unamended provision. Insofar as case on hand is concerned, it will have to be answered on the basis of amended provision. A priori, applying the amended provision and keeping in mind the relevant clauses of the said document, it leaves no manner of doubt that the Agreement is an Agreement to Sell and deemed to be a Conveyance, subject to permission to be granted by the Appropriate Authority of the Income Tax Department on which stamp duty was leviable.

24. Reliance was also placed on the decision in the case of Naginbhai P. Desai (supra). The Division Bench of this Court essentially decided the case on the basis of exposition in Veena Hasmukh Jain (supra). Even in this case, the

provisions considered by the Court were unamended provisions applicable to Agreement to Sell dated 1st September, 1988. Clause (4) of the Agreement in that case provided to give vacant and peaceful possession of the flat to the purchaser on final payment before the specified date. The Division Bench treated the said Agreement as squarely covered by Explanation I (unamended) as it clearly contemplated delivery of possession on specified date without executing Conveyance. In my opinion, the exposition in this decision also is of no avail to the petitioner.

25. There is one more decision to which reference was made on behalf of the petitioner before the lower authority, though not cited before me. That is the decision of the Single Judge of our High Court in the case of Kishore K. Shahani and Others Vs. State of Maharashtra and Another, . Once again, this decision pertains to Agreement executed on 9th September, 1992 before the amended provision came into force. Even in that case, provision was made that the parties would apply to appropriate Authority of Income Tax Department for N.O.C. The same, however, was granted on 30th May, 1997. The Court went on to observe that the stamp duty in relation to such document should be leviable as prevalent on 30th May, 1997 and not on the date of Agreement of the said flat. On grant of permission by the Appropriate Authority, parties would be free to transfer their right, title and interest in the immovable property and not in anterior point of time. The right, however, would be inchoate right till such permission is granted. On grant of permission by the Authority, in law, the parties are free to transfer the property and the Agreement to transfer such rights takes effect from that date. In the present case, it is seen that permission has been granted by the Appropriate Authority of the Income Tax Act on 18th March, 1996. Accordingly, in view of the exposition in this decision, stamp duty was leviable as on 18th March, 1996. The subsequent execution of Deed of Cancellation dated 17th January, 1997, would make no difference. I am in agreement with the opinion recorded by the Authority that, the said cancellation would enable the petitioner to claim refund in terms of the extant provisions-but would not absolve the petitioner from paying the stamp duty which became leviable in respect of the document in question.

26. Taking any view of the matter, I find no substance in this writ petition. The same is devoid of merits. It is dismissed with costs.

27. At this stage, Counsel for the petitioner prays that the present order be stayed for a period of six weeks. The said request, being reasonable, is granted. The order is stayed for a period of six weeks from today.