

(2016) 08 GUJ CK 0075
In the Gujarat High Court
Case No : Stamp Reference No. 3 of 2012

O.P.G. Power Ltd.

APPELLANT

Vs

Chief Controlling Revenue Authority

RESPONDENT

Date of Decision : 22-08-2016

Acts Referred:

Bombay Stamp Act, 1958 — Article 36, Article 6, Section 3(a), Section 3(b), Section 5

Citation : (2017) AIR(Gujarat) 102 : (2017) 1 GLR 166 : (2017) 1 GujLH 109

Hon'ble Judges : Mr. M.R. Shah, Mr. J.B. Pardiwala and Mr. N.V. Anjaria, JJ.

Bench : Full Bench

Advocate : Mr. Mihir Thakore, Sr. Advocate with Mr. Sandeep, Mr. Shamik Bhatt, Advocates for Singhi & Co., Advocate, for the Applicant No. 1; Ms. Manisha Lavkumar, Government Pleader with Ms. Nisha Thakore, AGP, for the Respondent No. 1

Final Decision : Disposed Off

Judgement

Mr. M.R. Shah, J. - Present Stamp Reference is made under Section 54(1a) of the Bombay Stamp Act, 1958 (hereinafter referred to as "Stamp Act") by the Chief Controlling Revenue Authority, Gujarat State, Gandhinagar for the opinion of this Court on the following two questions.

(1) The deed of "Memorandum of Entry in the Title Deed" which was registered on dated 21.05.2009 vide registered No. 1778 registered at office of Sub-Registrar, Mundra (District Kutch). The applicant has paid Rs. 3,00,000/-. Whether as per the provision of Sections 5, 3(a), 3(b) and Schedule 1's Article 36(b) the applicant is required to be paid deficit stamp duty of Rs. 39,02,000/- or not?

(2) The deed of "Memorandum of Entry in the Title Deed" which was registered on dated 21.05.2009 vide registered No. 1778, registered at office of Sub-Registrar, Mundra (District Kutch) by the applicant is required to be considered as per Schedule 1's Article 6 as per simple mortgage and whether the applicant is required to pay Rs. 3,00,000/- or not?

2. The brief facts of the case leading to the presentation of this Reference may be summed up thus:

2.1. That one M/s. OPG Power Gujarat Pvt. Limited (hereinafter referred to as "original applicant") has obtained financial common/loans from Punjab National Bank and certain other financial institutions (hereinafter referred to as "Lenders") under, inter alia (a) "Common Terms Schedule" containing the terms and conditions common to the borrowing from each of the Lenders.

2.2. That the said terms and conditions under the Common Terms Schedule, for disbursement of loans Rs. 950 Crores by the Lenders, and also included creation of common security (based on terms and conditions) in favour of the Lenders over the movable and immovable assets of the applicant, pursuant to which applicant had executed inter-creditor agreement (Memorandum of Entry in the Title Deed) for the appointment of trustee in favour of the Punjab National Bank, acting as the "Security Trustee" for the benefit of the Lenders on 12.11.2008, on which a stamp duty of Rs. 3 lac was paid.

2.3. That the Punjab National Bank has been appointed as the Security Trustee under a Memorandum of Entry in the Title Deed dated 21.05.2009 executed between the Lenders and Punjab National Bank.

2.4. That the Lenders have settled the Trust for beneficial interest of the Lenders and appointed Punjab National Bank as the Security Trustee thereunder. That (a) "Common Loan Agreement" dated 12.11.2008 came to be executed which was signed by the original applicant as borrower and Punjab National Bank as Facility Agent as well as Security Trustee. Under the said Agreement the Lenders had agreed to extend to the borrower the facilities as stated to the maximum extent of Rs. 950 Crores. That the said Agreement was signed by all the Lenders including the Punjab National Bank as well as the original applicant.

2.5. That on the very same day i.e. 12.11.2008, another document titled as "Security Trustee Agreement" came to be executed between the Lenders specified in Schedule I as 1st Part of the Agreement and original applicant as 2nd Part of the Agreement and Punjab National Bank "Security Trustee" as 3rd Part of the Agreement. It appears that the said Agreement was executed pursuant to the Common Loan Agreement and to appoint Punjab National Bank to act as the Security Trustee for the Lenders. That the said Agreement was also signed by all the Lenders along with the original applicant (borrowers) thereby accepting and authorizing the Punjab National Bank to act as Security Trustee on behalf of the Lenders.

2.6. It appears that pursuant to the execution of "Common Loan Agreement" and the "Security Trustee Agreement", all the Lenders and the Punjab National Bank entered into another document titled as "Intermediate Credit Agreement". The said document was also executed on the very same day i.e. 12.11.2008 and was also signed between the Lenders ? 10 banks and the Lender's Agent ? Security Trustee i.e. Punjab National Bank.

2.7. It appears that thereafter one another document (impounded document in question) was executed by the original applicant ? borrower viz. "Memorandum of Entry In the Title Deed Register In Respect of Equitable Mortgage Created by M/s. OPG Power Gujarat Pvt. Ltd. On Its Own Property". That the said document was presented for registration before the Sub-Registrar, Mundra on 21.05.2009 whereby stamp duty of Rs. 3 lac has been paid. That the said document came to be impounded for want of payment of deficit stamp duty. That a show-cause notice was issued by the Deputy Collector calling upon the original applicant to show cause why the aforesaid document may not be impounded for want of payment of deficit stamp duty. The said show-cause notice was dated 06.06.2009.

2.8. That the Deputy Collector, Stamp Valuation, Kutch, Bhuj vide order dated 15.05.2010 raised the demand of deficit stamp duty of Rs. 39,02,250/-.

That the Deputy Collector while raising the aforesaid demand of deficit stamp duty held that the document/memorandum of entry dated 21.05.2009 executed by the original applicant comprises of distinct matters and thus become an instrument chargeable with stamp duty as per Section 5 of the Stamp Act. The said Authority also held that the aforesaid instrument is covered under Article 36 of Schedule I to the Stamp Act. Therefore, the aforesaid authority has levied the additional stamp duty on the said instrument as per Section 3a of the Stamp Act.

2.9. Feeling aggrieved and dissatisfied with the order dated 15.05.2010 passed by the Deputy Collector, Stamp Valuation, Kutch, Bhuj, the original applicant preferred appeal before the Chief Controlling Revenue Authority under Section 53 of the Stamp Act. That by order dated 25.06.2012 passed under Section 53 of the Stamp Act, the Chief Controlling Revenue Authority has dismissed the said appeal and upheld the order dated 15.05.2010 of the Deputy Collector, Stamp Valuation, Kutch, Bhuj.

2.10. That being aggrieved by the order dated 25.06.2012 passed by the Chief Controlling Revenue Authority upholding the order dated 15.05.2010 of the Deputy Collector, Stamp Valuation, Kutch, Bhuj, the original applicant submitted an application dated 30.07.2012 before the Chief Controlling Revenue Authority under Section 54 (1a) of the Stamp Act, seeking reference to this Court and thereafter the Chief Controlling Revenue Authority in exercise of powers under Section 54 (1a) of the Stamp Act has made the present Stamp Reference to this Court for its opinion on the following questions.

(1) The deed of "Memorandum of Entry in the Title Deed" which was registered on dated 21.05.2009 vide registered No. 1778 registered at office of Sub-Registrar, Mundra (District Kutch). The applicant has paid Rs. 3,00,000/-. Whether as per the provision of Sections 5, 3(a), 3(b) and Schedule 1's Article 36(b) the applicant is required to be paid deficit stamp duty of Rs. 39,02,000/- or not?

(2) The deed of "Memorandum of Entry in the Title Deed" which was registered

on dated 21.05.2009 vide registered No. 1778, registered at office of Sub-Registrar, Mundra (District Kutch) by the applicant is required to be considered as per Schedule 1's Article 6 as per simple mortgage and whether the applicant is required to pay Rs. 3,00,000/or not?

3. Shri Mihir Thakore, learned Counsel has appeared on behalf of the original applicant and Ms. Manisha Lavkumar, learned Government Pleader has appeared on behalf of the State.

4. Shri Mihir Thakore, learned Counsel appearing on behalf of the original applicant has vehemently submitted that the instrument in question is an instrument covered under Article 6 of Schedule I to the Stamp Act and therefore, cannot be subjected to the levy of additional duty under Section 3a of the Stamp Act.

4.1. It is vehemently submitted by Shri Mihir Thakore, learned Counsel appearing on behalf of the original applicant that the instrument in question is a memorandum of entry executed only by the original applicant, thereby recording the fact of deposit of title deeds of various properties with the Punjab National Bank ? Security Trustee, in order to secure the due repayment, discharge of the facility/loans availed by the original applicant.

4.2. It is further submitted by Shri Mihir Thakore, learned Counsel appearing on behalf of the original applicant that the instrument in question neither constitute bargain between the parties regarding the security nor does it incorporate any terms or conditions, which would lead to creation of rights or liabilities in favour of the parties or lead to extinguishment of the same. It is submitted that the said instrument merely records the fact of the deposit of title deeds, and lists down the details of the title deeds and the documents being deposited with the Security Trustee ? Punjab National Bank in respect of various properties. It is submitted that in fact, the said instrument has not even been executed by the Punjab National Bank ? the Security Agent, but has only been executed by the original applicant.

4.3. Referring to Sections 58(f), 58(a) and 96 of the Transfer of Property Act, it is vehemently submitted by Shri Mihir Thakore, learned Counsel appearing on behalf of the original applicant that the instrument in question merely records deposit of the title deeds by the Director of the original applicant and the mortgage has been so created on the deposit of title deeds, and such a mortgage is akin to a simple mortgage where there would be no question of delivery of possession. It is submitted that therefore the said instrument is not an instrument which results into creation of a mortgage. It is submitted that therefore the instrument in question is merely a memorandum of entry regarding the deposit of title deeds.

In support of his above submissions, Shri Thakore, learned Counsel appearing on behalf of the original applicant has heavily relied upon the following decisions of the Hon''ble Supreme Court as well as Bombay High Court.

1. State of Haryana & Ors. v. Narvir Singh & Anr. (2014) 1 SCC 105 (Paras 10 to 15)

2. United Bank of India Ltd. v. Lekharam Sonaram & Co. & Ors. AIR 1965 SC 1591

3. In re: The Indian Stamp Act, 1899 AIR 1954 Bombay 462 (Paras 2, 3)

4.4. It is further submitted by Shri Mihir Thakore, learned Counsel appearing on behalf of the original applicant that the instrument in question, being a memorandum of entry that merely records the deposit of title deeds, is an instrument covered under Article 6 of the Schedule I to the Stamp Act (as on the date of execution of the said instrument). It is submitted that Article 36 of Schedule I to the Stamp Act specifically excludes the coverage of instrument pertaining to the deposit of title deeds, which is evident from its language. It is submitted that therefore the decision of the Stamp Authorities, whereby the said instrument has been covered under Article 36 of the Schedule I to the Stamp Act is erroneous and bad in law. It is submitted that therefore consequently the demand of additional duty under Section 3a of the Stamp Act on the said instrument is illegal, unjust and bad in law. It is submitted that Section 3a of the Stamp Act provides for levy of additional duty on the instrument covered within specified articles of Schedule I to the Stamp Act but does not provide for levy of instrument covered within Article 6 of Schedule I to the Stamp Act. It is submitted that therefore as the instrument in question being an instrument covered under Article 6 of the Schedule I to the Stamp Act, it cannot be charged with additional duty as per Section 3a of the Stamp Act.

Making above submissions it is requested to answer the question No. (a) accordingly and in favour of the original applicant.

4.5. It is next submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that the instrument in question pertains to a single mortgage by way of deposit of title deeds with a single mortgagee, and therefore the same is not covered under Section 5 of the Stamp Act. It is submitted that the said instrument is a Memorandum of Entry recording the deposit of title deeds by the original applicant with Punjab National Bank, the latter being the Security Trustee acting for the benefit of the Lenders who have extended loans to the original applicant. It is submitted that in light of Section 58(f) of the Transfer of Property Act, 1882, it is clear that on deposit of title deeds with Punjab National Bank, mortgage is created only in favour of Punjab National Bank. It is submitted that no mortgage has been created in favour of the Lenders by way of the said instrument.

4.6. It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that Punjab National Bank is the only mortgagee, and no rights in the mortgage property have been created in favour of the Lenders or any other persons.

4.7. It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that distinct matters would be comprised in an instrument, if different transactions are sought to be evidenced by the same deed. It is submitted that so long as the transaction is one, the instrument cannot be said to compromise distinct matters or transactions. It is submitted that the said instrument records a single transaction of mortgage in favour of Punjab National Bank only. Thus, the said instrument being in respect of a single mortgage, it is not liable to be stamped under Section 5 of the Stamp Act.

4.8. It is submitted that Punjab National Bank alone is empowered to enforce/foreclose the mortgage against the original applicant. It is submitted that the title deeds having been deposited with Punjab National Bank, in case of OPG's default, it is only Punjab National Bank that is entitled to enforce/foreclose the mortgage against the original applicant.

4.9. It is further submitted that it is also evident from the terms of the Security Trustee Agreement, wherein it is provided that the original applicant undertakes and confirms to create security in favour of the Security Trustee i.e. Punjab National Bank for the benefit of the Secured Parties in accordance with the term of the Financing Documents. It is submitted that as per the said Security Trustee would hold the security for the benefit of the secured parties in accordance with the terms thereof.

4.10. It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that there being a community of interest in the subject matter comprised in the said instrument, the said instrument will be chargeable with a single duty. In support of his above submissions, Shri Thakore, learned Counsel appearing on behalf of the original applicant has relied upon the following decisions.

1. The Member, Board of Revenue v. Arthur Paul Benthall AIR 1956 SC 35 (Paras 9, 10)
2. Ram Swarup v. Joti AIR 1933 Allahabad (Page 325)
3. Halsbury's Laws of England [Vol. 44(1)], 4th Edition reissue, Para 1015, Pages 587 to 589
4. Tannan's Banking, 22nd Edition, 2008, Vol.1, Pages 1169 to 1186
5. Bowen v. Ashley (1825)127 ER 467 (Page 469)
6. Goodson v. Forbes (1815)128 ER 999 (Pages 1000 to 1001)
7. Allen v. Morrison (1828) 108 ER 1152 (Pages 1152 to 1153)

4.11. It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that nothing under the Transfer of Property Act, 1882 stipulates that the payment of money advanced or to be advanced by way of loan, etc. is to be done by the mortgagee.

4.12. It is submitted that Section 58(a) of the Transfer of Property Act, 1882 makes it evident that a mortgage may be created to secure payment of money advanced by a person other than the mortgagee. It is submitted that the payment of money to be advanced by way of loan by the Lenders/secured parties cannot lead to an interpretation that mortgage created to secure such loan is in favour of such Lenders/secured parties.

4.13. It is further submitted that even it cannot be interpreted that because the repayment of the money advanced is to be done to the Lenders/secured parties, the mortgage has been created in favour of the Lenders/secured parties.

4.14. It is submitted that in respect of debentures it is a regular practise that a Debenture Trustee is appointed to secure the payments made by multiple debenture holders. It is submitted that in said situation, the security mortgaged in favour of the Debenture Trustee is not inferred to be a mortgage in favour of the debenture holders; and the mortgage deed in favour of the Debenture Trustee cannot be inferred to be an instrument comprising of several distinct matters of several distinct transactions.

4.15. Now, so far as the decision of the Hon''ble Supreme Court in the case of Chief Controlling Revenue Authority v. Coastal Gujarat Power Limited & Ors. reported in (2015)10 SCC 700 is concerned, it is submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that the said decision would not apply to the facts of the present case. It is submitted that the Hon''ble Supreme Court of India in the case of Coastal Gujarat (Supra) had held the instrument in question to be 13 different transactions falling under Section 5 of the Stamp Act. It is submitted that the Hon''ble Supreme Court of India held the aforesaid on the ground that the borrower in the said case had entered into separate loan agreements with 13 financial institutions with regard to separate loan advanced by such Lenders. However, in the facts of the present case, the original applicant had advanced loans by various banks by way of Common Loan Agreement. It is submitted that in the circumstances, the community of interest between the consortium of banks is evident. Thus, the sanction of loan by the consortium of Lenders, especially through a Common Loan Agreement constitutes a single transaction or matter and all Lenders forming part of a consortium have community of interest in the financing of the original applicant.

4.16. It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that the Stamp Authorities have erred in relying upon the circular of the Government of Gujarat. It is submitted that a Taxing Statute is to be interpreted strictly and hence, going behind the intention of a Taxing Statute cannot be entertained. It is submitted that in a Taxing Act, one has to look merely at what is clearly said and there is no room for any intendment. It is submitted that there is no equity about a tax; there is no presumption as to tax. It is submitted that nothing has to be read in, nothing is to be implied. It is submitted that one is required to look fairly at the language used so far as a Taxing Statute is concerned.

In support of his above submissions, Shri Thakore, learned Counsel appearing on behalf of the original applicant has relied upon the following decisions.

1. Cape Brandy Syndicate v. IRC (1921)1 KB 64
2. State of West Bengal v. Kesoram Industries Ltd. and Ors. (2004) 266 ITR 721 (SC)

Making above submissions it is requested to answer both the questions in favour of the original applicant and against the State and the Stamp Authorities.

5. Present Reference is vehemently opposed by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State and the Stamp Duty Authorities.

5.1. It is vehemently submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that in the facts and circumstances of the case no error has been committed by the Deputy Collector, Stamp Duty Valuation confirmed by the Chief Controlling Revenue Authority classifying the document in question as a mortgage deed and directing recovery of deficit stamp duty of Rs. 39,02,250/-.

5.2. Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State has submitted that as per catena of decisions of the Hon"ble Supreme Court as well as this Court and several other High Courts, in order to verify the nature of impounded document what is important is to verify the dominant purpose of the document which has been described by the parties as a deed of "Memorandum of Entry in the Title Deed".

5.3. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that it is a well settled principle of law that in interpreting a fiscal enactment like the Bombay Stamp Act, 1958, an interpretation which is for the benefit of the subject must be accepted. It is submitted that an instrument must be read as a whole to find out its dominant object.

5.4. It is vehemently submitted that the distinction between sections 4, 5 and 6 of the Indian Stamp Act, 1899, which correspond in terms of sections 4, 5 and 6 of the Bombay Stamp Act, 1958, has been brought out and considered by the Hon"ble Supreme Court in the case of Board of Revenue v. A.P. Benthall reported in AIR 1956 SC 85. It is submitted that it is observed in the said decision that the object and scope of sections 4 to 6 are not the same. It is submitted that Section 4 deals with a single transaction completed in several instruments and Section 6 with a single transaction which might be viewed as falling under more than one category, whereas Section 5 applies only when the instrument comprises more than one transaction, and it is immaterial for this purpose whether those transactions are of the same category or of different categories. It is submitted that the test laid down by the Hon"ble Supreme Court is that in order to attract the application of Section 5, the whole question is whether the instrument

comprises more than one transaction.

5.5. It is submitted that Section 5 of the Stamp Act does not apply to such a document which embodies different covenants relating to the same transaction. It is submitted that what is most important is the word "Distinct Matters" as referred in Section 5 which means matters which are separate in transactions. It is submitted that instrument stamped for its leading and principle object covers everything accessory to that object and is not be charged with any further duty by reason of the inclusion of provisions which are merely ancillary to the leading object. It is submitted that separate duty is payable where a provision is not merely ancillary to the main object but is a separate and distinct transaction. It is submitted that therefore in finding out the true character of an instrument, one has to read the instrument as a whole, and then find out its dominant purpose. It is submitted that test is not whether the instrument embodies distinct contracts, but whether it comprises distinct matters. It is submitted that in the present case, though the impounded document being the instrument "Memorandum of Entry in the Title Deed Registry", is styled as one and only one transaction, the subject matter of the Agreement being the repayment of the amount advanced, the mere fact that there is distinct lands mortgaged, distinct commitments of loan advanced by distinct banks, it amounts to different transactions having distinct matters.

5.6. It is further submitted that instrument of transfer in the present case comprises "several distinct matters" within the meaning of Section 5 and that consequently it is chargeable with the aggregate amount of duties payable on transfer of each of the deeds by a separate instrument. It is submitted that the word "matter" signifies in this connection, on transaction or bargain. It is submitted that to determine whether an instrument comprises one matter or more it is essential to find whether the parties negotiated for all the objects transferred as one unit or separate units. It is submitted that an important test is whether one lump sum was settled as the consideration for all the objects transferred by one to the other. It is submitted that another test which may be applied as a rough and ready way of ascertaining whether a document embodies several "distinct matters" is to find whether separate deeds can be executed in respect of each of the alleged "matters" without interfering with the terms of the agreement between the parties.

5.7. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that the Hon'ble Supreme Court of India in the case of Coastal Gujarat Power Ltd. (Supra) while considering the issue of applicability of Section 5 in similar set of facts, has been pleased to set aside the Full Bench decision of this Court while considering the decision of the Constitutional Bench of the Hon'ble Supreme Court in the case of Arthur Paul Benthall (Supra).

5.8. It is vehemently submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that while classifying the impounded

document being the instrument "Memorandum of Entry in the Title Deed Register", the following facts as it emerge from the record are required to be appreciated.

1. That the applicant with the other Lenders which include 10 Banks, have formed the consortium and had executed the present mortgage instead of several distinct instruments of mortgage with the sole purpose of evading Stamp Duty.

2. That admittedly the applicant have availed financial assistance from 10 Lenders for its project and consequently, the applicant/borrower was required to execute different mortgage deed in favour of the 10 Lenders, once the terms and conditions of the transactions were reduced in writing. However, in order to avoid payment of Stamp Duty on each mortgage deed, the applicant/borrower along with the Lenders came together to form a consortium and appointed Punjab National Bank as "Security Trustee". Thus, in substance, "Memorandum of Entry in Title Deed Register" between the Punjab National Bank on behalf of the Lenders as well as itself and applicant/borrower is actually a "Composite Deed" of combination of 10 mortgages dealing with the applicant/borrower and such Lenders. It is submitted that it is not simple memorandum as styled and named so because by reference to the documents under Schedule IV, the parties intended to refer to the terms and conditions so incorporated under respective documents. It is submitted that moreover, each of the documents formed integral part of the various transactions and are therefore, interrelated which cannot be read in isolation to decide the rights, liabilities and duties of the respective parties. At this stage, it is very important to look at few instances of terms and conditions of each document to verify the real object of the impounded document as well as to ascertain the real nature of the document.

3. That at first instance, "Common Loan Agreement" dated 12.11.2008 came to be executed where essentially the said agreement was signed by the original applicant as the borrower and the Punjab National Bank as facility agent as well as security trustee. It is further pertinent to note that reading the terms and conditions of the said agreement the Lenders had agreed to extend to the borrower the facilities as stated to the maximum extent of Rs. 950/- Crores. It is also important to note that under the said agreement, reading the few instances of terms and conditions, it can be found that though the document was termed as Common Loan Agreement, in fact it was a composite document of 10 different loan agreements specifying separate rights and liabilities qua each of the 10 lender banks.

4. That on the very same day i.e. 12.11.2008, another document titled as "Security Trustee Agreement" came to be executed between the Lenders specified in Schedule I as 1st Part of the agreement and original applicant ? borrower as 2nd Part of the agreement and Punjab National Bank " Security Trustee" as 3rd Part of the agreement. It is required to be noted that in the said document it has been specified that the said agreement is executed pursuant to

the Common Loan Agreement to appoint Punjab National Bank to act as the Security Trustee for the Lenders. It is submitted that the said agreement is signed by all the Lenders along with the borrowers thereby accepting and authorizing the Punjab National Bank to act as Security Trustee on behalf of the Lenders. That the said agreement also identified the rights, duties and liabilities of the Security Trustee, however it specifically clarifies that the right of the Security Trustee to take any action shall be subject to the terms and provisions of the said agreement and the financing documents. It also further clarifies that any action to be taken by the Security Trustee or refrain from taking any action shall be in accordance with written instructions of the Lenders. It is submitted that para 2.13 reveals that so far as release of the security is concerned, the same shall be subject to the terms of this agreement and the other financing documents, with the written consent of the Lenders. That further terms and conditions also reveal the fact that there is sever-ability of the security properties as against the commitments of the Lenders in the terms of financing documents.

5. That pursuant to the execution of the Common Loan Agreement and the Security Trustee Agreement as well as other documents, it appears that the parties more particularly, the lender and the Punjab National Bank entered into another document titled as "Intermediate Credit Agreement". It is required to be appreciated that the said document came to be executed on the very same day i.e. 12.11.2008. That again the said document is signed between the Lenders ? 10 Banks and the Lender's Agent ? Security Trustee i.e. Punjab National Bank. That from the plain reading of the purpose so reflected in the said document, the parties have specifically mentioned the earlier documents i.e. the Common Loan Agreement, the Lenders Agent Agreement, the Security Trustee Agreement and the Security Document and thereafter in reference to the said agreement, parties to the said documents have agreed to enter into this Intermediate Credit Agreement with a purpose to coordinate to the enforcement security interests created or to be created under the security documents and the exercise of other rights, power and remedy under this financing documents. It is required to be noted that it is agreement inter se between the creditor/Lenders to which the original applicant has not signed.

6. That so far as the impounded document viz. "Memorandum of Entry in the Title Deed Register in respect of Equitable Mortgage created by M/s. OPG Power Gujarat Pvt. Ltd. on its own property", is concerned the same is executed by the borrower viz. M/s. OPG Power Gujarat Pvt. Ltd. and the Security Trustee acting for itself and the lender in terms of Security Trustee Agreement. That the said document is presented for registration before the Sub-Registrar, Mundra on 21.05.2009, whereby stamp duty of Rs. 3,00,000/- has been paid. That on reading of the said document, it is found that there is specific reference that by said document the borrower with intent to create security by way of joint mortgage by depositing title deed, on the borrower's property together with the building and other structure, fixed plant and machineries, fixtures and fittings, constructed, erected or installed thereon, or to be constructed, erected or

permanently fastened to anything attached to the earth, to secure the due repayment, discharged by the borrower to the Security Trustees acting on behalf of self and other Lenders of the facilities extended by rupees and domestic foreign currency lender aggregating to Rs. 950 Crores.

5.9. It is submitted that therefore the original applicant cannot be allowed to evade the payment of stamp duty by forming a consortium. It is submitted that as such it is evident from the Security Trustee Agreement that altogether 10 Banks lent money to the mortgagor, details of which have been described in the Schedule and for the repayment of money, the borrower entered into separate Loan Agreement with 10 financial institutions. It is submitted that had this borrower entered into a separate mortgage deed with these financial institutions in order to secure the loan, there would have been a separate document for distinct transactions. It is submitted that on proper construction of this indenture of mortgage it can safely be regarded as 10 distinct transactions which falls under Section 5 of the Stamp Act.

5.10. It is further submitted that the instrument in question relates to several distinct matters or distinct transactions inasmuch as the respondent borrower availed distinct loan from 10/13 different Lenders, hence the instrument falls under Section 5 of the Stamp Act. It is further submitted that even as per the Government Circular dated 02.04.2007, more particularly Clause (ii) of the Circular, an instrument like the present one would fall within the purview of Section 5 of the Stamp Act.

5.11. It is further submitted that the clauses incorporated under the Security Trustee Agreement creates independent right in favour of the Lenders and therefore, it consist of separate and distinct transactions between different Lenders on one hand and Security Trustee and borrower on other hand.

5.12. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that as such the question referred to this Court for its opinion is now not res integra in view of the decision of the Hon'ble Supreme Court in the case of Coastal Gujarat Power Limited & Ors. (Supra). Relying upon Sections 2(1), 2(d) and 3 of the Stamp Act, it is vehemently submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that both the authorities have rightly classified the document as Deed of Mortgage.

5.13. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that though the document in question is styled as "Memorandum of Deposit of Title Deeds", it is actually the Document of Mortgage and is Composite Deed which incorporates the terms and conditions, bargain by referring to other documents viz. Common Loan Agreement, Security Trustee Agreement, Intermediate Credit Agreement.

5.14. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that the contention of the original

applicant that under Section 2(1) of the Stamp Act, only a document which "creates right or obligation" alone constitutes an "instrument", is not correct, as is apparent from the definition clause itself. It is submitted that in first place, the definition of the term "instrument" is an inclusive definition and is not an exhaustive definition, as such. It is submitted that moreover, the term "instrument", as defined, will also include, in addition to a document which "creates right or obligation", a document, which "purports to create, transfer, limit, extend, extinguish or record" any right or liability. It is submitted that therefore the term "instrument" so defined, will also include a document, which merely records any right or liability.

5.15. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that the legal position was enunciated by the Appellate Court by holding that the deposit of original documents constitute a security for recovery of money by the creditor and in view of the provisions of Section 59 of the Transfer of Property Act, 1882 would not require registration. However, if the parties chose to reduce the contract into writing, the implication of law is that the document will be the sole evidence of its terms and such a document would require registration under Section 17 of the Registration Act, 1908 being a non-testamentary instrument creating an interest in the immovable property. It is submitted that so far as the State of Gujarat is concerned, Section 17 (amended) of the Registration Act inter alia provides for compulsory registration in case where an agreement evidencing mortgage by way of deposit of title deeds is executed.

5.16. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that in present case the Memorandum of Deposit of Title Deed is the sole document which gives details of the earlier agreements where the terms and conditions have been reduced in writing revealing the bargain between the parties. It is submitted that this document was a Composite Document not in isolation as there were other documents also referred to in the said Memorandum and when the said document is brought to the notice of the Deputy Collector, the authority is under statutory duty to determine the actual correct value of chargeable duty on such instrument and is therefore, right in impounding the instrument. In support of her submission, Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State has relied upon the decision of the Hon"ble Supreme Court in the case of Rachpal Maharaj v. Bhagwandas Daruka and Ors. reported in AIR 1950 SC 272.

5.17. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that so far as impounded document is concerned, the same is an instrument within the meaning of the term "instrument" as defined under the Stamp Act. That under the Stamp Act, the thing which is made liable to stamp duty is the instrument but at the same it is also required to be noted that the said instrument (Memorandum of Entry in Title Deed) consist of 10 different transactions with distinct subject matters and is

therefore, required to be treated as separate instruments. It is submitted that in fact, the respective parties were required to execute 10 different mortgage deeds however, with intention to evade stamp duty, the parties to the deeds have clearly styled the document as Memorandum of Entry in Title Deed Register. It is submitted that so far as Section 3(a) of the Stamp Act is concerned, the surcharge of 40% has rightly been imposed by the Revenue Authority.

5.18. It is further submitted by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State that for deciding the nature of such instrument, the law is well settled that (1) where titles are handed over with nothing except that they are to be security, the law supposes that the scope of the security is the scope of the title; (2) where however, titles are handed over accompanied by a bargain that bargain must rule; (3) lastly, when the bargain is a written bargain, it and it alone must determine what is the scope and extent of security. It is submitted that apart from mentioning the fact that the properties have been mortgaged with the financial institutions for taking loan, that for the first time, the details about the respective properties along with the title documents has been specified in the Schedule I and II. It is submitted that by doing so the parties intended to execute the document so as to create the rights of the mortgagor and the mortgagees over the secured properties. It is submitted that the instrument by referring the documents under Schedule IV, the parties clearly intended to incorporate the bargain between the company on the one hand and the financial institutions on the other for their rights over the secured properties.

5.19. Making above submissions it is vehemently submitted that impounded document in question is the document by which the mortgagee has acquired rights which are proper to have legal mortgage and is not a simple Memorandum of Deposit of Title Deeds. It is submitted that therefore, the Revenue Authorities had rightly held that the document falls under Article 36(b) and not under Article 6 of the Stamp Act and the Revenue Authorities have rightly held the original applicant liable to deposit deficit stamp duty of Rs. 39,02,250/-. Making above submissions it is requested to answer the questions referred to this Court for its opinion in favour of the Revenue and against the original applicant.

6. In reply to the submissions made by Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State and with respect to the submission on behalf of the State that in order to ascertain the nature of the said instrument in question, terms and conditions laid down in various other instruments, viz. Common Loan Agreement, Security Trustee Agreement, Intermediate Credit Agreement etc. have to be read into the said instrument, merely because the said instrument lists down such instruments in its Schedule and the contention that all the aforesaid instruments including the said instrument in question constitute a Composite Deed and that therefore the said instrument constitutes bargain between the parties making it a mortgage deed chargeable under Article 36 of Schedule I to the Stamp Act. It is vehemently

submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that such a stand of the respondent State is untenable and contrary to law, particularly when the deposit of Title Deed creates a mortgage, more particularly known as equitable mortgage and the rights of the parties are identical as that in a simple mortgage by a registered document.

6.1. It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that Section 3 of the Stamp Act provides for levy of stamp duty only on an instrument, and not the transaction. It is submitted that it is not the transaction that is made liable to stamp duty, but it is the instrument which is struck at. Therefore, it is the said instrument alone which has to be seen for the purpose of levying stamp duty. It is submitted that hence, it is not permissible for the stamp authorities to read in the provisions of other instruments to ascertain the nature of the instrument in question. It is submitted that it may be pertinent to note that the applicant has already paid the requisite stamp duty on the other instruments, and the terms of such instruments cannot be relied upon to assess the nature or the chargeability of stamp duty on the said instrument. In support of the above submission, Shri Thakore, learned Counsel has relied upon the following decisions.

1. Hindustan Lever & Anr. v. State of Maharashtra & Anr. (2004)9 SCC 438 (Para 22)
2. The Commissioner of Inland Revenue v. G. Angus & Co. (1889)23 QB 579 (Para 589)

6.2. It is further submitted by Shri Thakore, learned Counsel appearing on behalf of the original applicant that in the facts of the present case, mortgage has been created by the original applicant in favour of Punjab National Bank by deposit of title deeds and not through any instrument, and definitely not by way of the other instruments viz. the Common Loan Agreement, Security Trustee Agreement, the Intermediate Credit Agreement etc. It is submitted that the instrument in question is a Memorandum of Entry dated 21.05.2009, which merely records the deposit of title deeds, and is as such covered under Article 6 of Schedule I to the Stamp Act.

7. Heard Shri Mihir Thakore, learned Counsel appearing on behalf of the original applicant and Ms. Manisha Lavkumar, learned Government Pleader appearing on behalf of the State and Revenue Authorities. As observed herein above, following two questions are referred to the High Court under Section 54(1a) of the Stamp Act for its opinion.

(1) The deed of "Memorandum of Entry in the Title Deed" which was registered on dated 21.05.2009 vide registered No. 1778 registered at office of Sub-Registrar, Mundra (District Kutch). The applicant has paid Rs. 3,00,000/-. Whether as per the provision of Sections 5, 3(a), 3(b) and Schedule 1's Article 36(b) the applicant is required to be paid deficit stamp duty of Rs. 39,02,000/- or not?

(2) The deed of "Memorandum of Entry in the Title Deed" which was registered on dated 21.05.2009 vide registered No. 1778, registered at office of Sub-Registrar, Mundra (District Kutch) by the applicant is required to be considered as per Schedule 1's Article 6 as per simple mortgage and whether the applicant is required to pay Rs. 3,00,000/- or not?

7.1. Now, so far as question No. 1 is concerned, it is required to be noted that on the deed of "Memorandum of Entry in the Title Deed" dated 21.05.2009, which was registered by the original applicant, vide registration No. 1778 registered at office of Sub-Registrar, Mundra (District Kutch) has paid Rs. 3 lac only treating the said document/instrument as single transaction. On the other hand, it is the case on behalf of the State/Revenue Authority that the instrument/document in question relates to several distinct matters or distinct transactions inasmuch as the original applicant ? borrower availed distinct loan from different Lenders, and thereby liable to be charged with stamp duty in accordance with section 5 of the Stamp Act and therefore, according to Revenue Authority, the original applicant was liable to pay Rs. 42,02,000/- and as the original applicant ? borrower had paid only a sum of Rs. 3 lac, the original applicant is liable to pay the balance amount of Rs. 39,02,000/-.

7.2. Having heard learned Advocates appearing for respective parties and considering the decision of the Hon"ble Supreme Court in the case of Coastal Gujarat Power Ltd. (Supra), the aforesaid question No. 1 is now not res integra and the issue involved is squarely held against the original applicant. In the case before the Hon"ble Supreme Court in the case of Coastal Gujarat Power Ltd. (Supra), which arose out of the decision of the Full Bench of this Court, the borrower availed the financial assistance from the Lenders, 13 in number. However, the Lenders, 13 in number, formed the consortium as a Trust and executed the Security Trustee Agreement inter se appointing one banker viz. State Bank of India as a lead Trustee, called, the Security Trustee. The borrower also executed an indenture of the mortgage for "Delayed After Assets Deed" with the State Bank of India, mortgaging its assets as mentioned in the deed itself. That the borrower paid the stamp duty of Rs. 4,21,000/- only treating it as one instrument/transaction. According to the Chief Controlling Revenue Authority, considering the provisions of Sections 5, 3(a), 3(B) and Schedule 1's Article 6 and Section 36(b) of the Stamp Act, the borrower was required to pay deficit stamp duty of Rs. 50,41,600/- as the instrument in question was relating to several distinct matters/distinct transactions. The aforesaid question was referred to this Court for its opinion and by judgment and order dated 03.12.2012, the Full Bench opined that the levy of stamp duty is on instrument and not on object behind instrument. The Full Bench also opined that the relationship between the borrower and the Security Trustee is independent of relationship between the borrower and other lending Bench. The Full Bench also opined that the mortgage deed in question was a single transaction creating security in favour of the Security Trustee, but acquired such status by virtue of another trust deed and therefore, the mortgage deed executed by borrower cannot be construed as

clubbing of "distinct matters" or "distinct transactions". Consequently and therefore the Full Bench opined and held that the stamp duty levied by the Authority treating the mortgage deed as combination of separate mortgage deeds by various Lenders is illegal. The matter was carried before the Hon"ble Supreme Court and in the case of Coastal Gujarat Power Ltd. (Supra), the Hon"ble Supreme Court has allowed the appeal and has quashed and set aside the judgment and order passed by the Full Bench of this Court in the case of Coastal Gujarat Power Ltd. v. Chief Controlling Revenue Authority reported in (2013) 6 CTC 730 and has held that the indenture of mortgage relates to several distinct matters or distinct transactions inasmuch as the borrower availed distinct loan from 13 different Lenders, and thereby liable to be charged with stamp duty in accordance with Section 5 of the Stamp Act. While holding so the Hon"ble Supreme Court in para 30 to 35 has observed and held as under:

"30. Coming to the provisions contained in the Stamp Act, we have to see as to whether the provision of Section 5 is ancillary to Section 4 or a separate and distinct provision. For better appreciation Sections 4, 5 and 6 of the Gujarat Stamp Act is reproduced herein below:

"4. Several instruments used in single transaction of sale, mortgage or settlement. (1) Where, in the case of any sale, mortgage or settlement, several instruments are employed for completing the transaction, the principle instrument only shall be chargeable with the duty prescribed in Schedule I for the conveyance, mortgage or settlement, and each of the other instruments shall be chargeable with a duty of 1 [one hundred rupees] instead of the duty (if any) prescribed for it in that Schedule.

(2) The parties may determine for themselves which of the instruments so employed shall, for the purposes of subsection (1), be deemed to be the principal instrument.

Provided that the duty chargeable on the instrument so determined shall be the highest duty which would be chargeable in respect of any of the said instruments employed.

5. Instruments relating to several distinct matters or distinct transactions. Any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instrument, each comprising or relating to one of such matters or distinct transactions, would be chargeable under this Act.

6. Instruments coming within several descriptions in Schedule-I. Subject to the provisions of the last preceding section, an instrument so framed as to come within two or more of the descriptions in Schedule I, shall, where the duties chargeable thereunder are different, be chargeable only with the highest of such duties: Provided that nothing in this Act contained shall render chargeable with duty exceeding one rupee a counterpart or duplicate of any instrument chargeable with duty and in respect of which the proper duty has been paid."

From bare reading of these provisions, it is clear that Section 4 deals with single transaction completed in several instruments, whereas Section 5 deals only with the instrument which comprises more than one transaction and it is immaterial for the purpose whether those transactions are of the same category or of different categories.

31. It appears from the trustee document that altogether 13 banks lent money to the mortgagor, details of which have been described in the schedule and for the repayment of money, the borrower entered into separate loan agreements with 13 financial institutions. Had this borrower entered into a separate mortgage deed with these financial institutions in order to secure the loan there would have been a separate document for distinct transactions. On proper construction of this indenture of mortgage it can safely be regarded as 13 distinct transactions which falls under Section 5 of the Act.

32. Both the learned counsel put reliance on the five Judges Constitution Bench Judgment of this Court in the Case of The Member, Board of Revenue v. Arthur Paul Benthall (supra). The said case originated from a reference made to the High Court of Calcutta by the Revenue Authorities seeking opinion with regard to the stamp duty payable in the instrument. The respondent in that case was at the material time the Managing Director of M/s. Bird and Co. Ltd. and Messrs F.W. Heilgers and Com. Ltd which were acting Managing Agents of several Companies Act under the Indian Companies Act. The respondents were also Director of a number of other Companies, and had on occasions acted as liquidator of some Companies, as executor or administrator of estates of deceased persons and as trustee of various estates. He proposed to execute power of attorney empowering the M/s. Douglas Chisholm Fairbairn and John James Brims Southerland jointly and severally to act for him in his individual capacity and also as executor administrator, trustee, Managing Agents, liquidator, and all other capacities. The Collector referred the matter under Section 56(2) of the Act to the decision of Chief Controller, Revenue Authority, who eventually referred it to the High Court of Calcutta stating his own opinion that stamp duty was payable on the power "for as many respective capacities as the principal executes the power". The majority view of the Bench held that the different capacities of the executants would not constitute the distinct matter for the purpose of Section 5 of the Act and that the proper duty and instrument was payable under Article 48(d) of Schedule 1(a) of the Stamp Act.

33. Answering the Reference, the Constitution Bench of this Court elaborately discussed the scope and object of Sections 4,5, and 6 of the Stamp Act and finally allowed the appeal. Their Lordship held:

"4.We are unable to accept the contention that the word "matter" in section 5 was intended to convey the same meaning as the word "description" in section 6. In its popular sense, the expression "distinct matters" would connote something different from distinct "categories". Two transactions might be of same description, but all the same, they might be distinct.

If A sells Black-acre to X and mortgages White-acre to Y, the transactions fall under different categories, and they are also distinct matters. But if A mortgages Black-acre to X and White-acre to Y, the two transactions fall under the same category, but they would certainly be distinct matters.

If the intention of the legislature was that the expression "distinct matter" in section 5 should be understood not in its popular sense but narrowly as meaning different categories in the Schedule, nothing would have been easier than to say so. When two words of different import are used in a statute in two consecutive provisions, it would be difficult to maintain that they are used in the same sense, and the conclusion must follow that the expression "distinct matters" in section 5 and "description" in section 6 have different connotations."

34. Their Lordships further held that:

"13. ... When a person possesses both a personal capacity and a representative capacity, such as trustee, and there is a delegation of power by him in both those capacities, the position in law is exactly the same as if different persons join in executing a power in respect of matters which are unrelated.

There being no community of interest between the personal estate belonging to the executant and the trust estate vested in him, they must be held to be distinct matters for purposes of section 5. The position is the same when a person is executor or administrator, because in that capacity he represents the estate of the deceased, whose persona is deemed to continue in him for purposes of administration.

35. We have also gone through the provisions contained in Sections 33, 39, Article 6 and 6(b) of the Act as also Bombay Stamp (Gujarat Second Amendment) Rules, 2007 and the Circular dated 2.4.2007. After giving out anxious consideration to those provisions and also in the light of the ratio decided by the Constitution Bench of this Court in The Benthall case (supra), we are of the definite opinion that the High Court has committed serious error of law in interpreting the provisions of Sections 5 and 6 of the Act. Consequently, the answer given by the High Court on the Reference cannot be sustained in Law."

7.3. Now applying the law laid down by the Hon''ble Supreme Court in the case of Coastal Gujarat Power Ltd. (Supra) to the facts of the case on hand, we are of the opinion that question No. 1 referred to this Court i.e. whether the instrument in question viz. "Deed of Memorandum of Entry in the Title Deed" comprises several distinct matters/distinct transactions falling under Section 5 of the Stamp Act and therefore, considering the provisions of Sections 5, 3(a), 3(b) and Schedule 1's Article 36(b) of the Stamp Act, the original applicant ? borrower is liable to pay Rs. 39,02,000/- as stamp duty is now not res integra and the same is to be held against the original applicant. In the present case also number of Lenders (10 in number) advanced a total sum of Rs. 950 Crores to the original applicant ? borrower and a Common Loan Agreement was entered into and executed amongst the borrower and Punjab National Bank as facility agent and

Punjab National Bank as Security Trustee and the Rupee Lenders ? persons set out in Schedule 2 to the said Common Loan. It is required to be noted that said loan agreement was signed by all the Lenders as well as borrower. In the present case also, thereafter the Security Trustee Agreement came to be executed amongst the Lenders ? the persons set out in Schedule-I to the said Security Trustee Agreement and the borrower and the Punjab National Bank as the Security Trustee. That the said Security Trustee Agreement was also signed by all the Lenders and the borrower. That thereafter in consequence to the aforesaid documents, the borrower has executed the instrument in question viz. "Deed of Memorandum of Entry in the Title Deed". Under the circumstances, the law laid down by the Hon"ble Supreme Court in the case of Coastal Gujarat Power Ltd. (Supra) shall be squarely applicable to the facts of the case on hand. Consequently, it is observed and held that the borrower is liable to pay Rs. 39,02,000/- as deficit stamp duty on the instrument viz. "Deed of Memorandum of Entry in the Title Deed" considering the provisions of Sections 5, 3(a), 3(b) and Schedule 1's Article 36(b) of the Stamp Act and the decision of the Hon"ble Supreme Court in the case of Coastal Gujarat Power Ltd. (Supra). Therefore, we are of the opinion that no error has been committed by the Revenue Authority in demanding the deficit stamp duty of Rs. 39,02,000/- on the instrument in question viz. "Deed of Memorandum of Entry in the Title Deed". Therefore, the question No. 1 referred to this Court for its opinion is answered against the original applicant ? borrower and in favour of the Revenue Authority.

8. The question No. 2 which is referred to this Court for its opinion is whether the instrument in question viz. "Deed of Memorandum of Entry in the Title Deed" which was registered on dated 21.05.2009 vide registered No. 1778, registered at office of Sub-Registrar, Mundra (District Kutch) by the original applicant is required to be considered as per Schedule 1's Article 6 as per simple mortgage and whether the applicant is required to pay Rs. 3,00,000/- or not?

8.1. It is the case on behalf of the original applicant that the instrument in question is an instrument covered under Article 6 of Schedule-I to the Stamp Act and therefore, cannot be subjected to the levy of additional duty under Section 3(a) of the Stamp Act. It is the case on behalf of the duty ? original applicant that the instrument in question is an instrument relating to the deposit of title deeds only, where such deposit has been made by way of security for the repayment of money advanced and therefore, would fall under Article 6 of Schedule-I and would not fall under Article 36 of Schedule-I to the Stamp Act as contended on behalf of the Revenue Authorities. On the other hand it is the case on behalf of the Revenue Authority that the case would fall under Article 36 to Schedule-I to the Stamp Act and therefore, the borrower is liable to pay the additional duty. It is the case on behalf of the Revenue Authority that though the instrument in question is styled as "Memorandum of Entry in the Title Deed", it is actually the document of mortgage and is a composite deed which incorporate the terms and conditions bargain by referring to other documents viz. Common Loan Agreement, Security Trustee Agreement, Intermediate Credit Agreement.

8.2. Having heard learned Counsel appearing on behalf of the respective parties, while considering the question No. 2, the series of documents pre-execution of the instrument in question viz. "Deed of Memorandum of Entry in the Title Deed" are required to be referred to and considered.

From the facts it emerge that the borrower viz. M/s. OPG Power Gujarat Pvt. Ltd. was in need of financial assistance and therefore, it approached the Rupee Lenders ? 10 banks, who in turn agreed to advance financial assistance to the borrower to the extent of Rs. 950 Crores and Rupee Lenders ? 10 in number, agreed to advance a total sum of Rs. 950 Crores as under:

Sr. No.

Lender

Total Commitment

1.

Punjab National Bank

150

2.

Bank of Maharashtra

50

3.

Indian Bank

100

4.

Indian Overseas Bank

100

5.

Oriental Bank of Commerce

50

6.

State Bank of Indore

50

7.

State Bank of Mysore

100

8.

State Bank of Patiala

50

9.

UCO Bank

200

10.

Union Bank of India

100

Therefore, a Common Loan Agreement came to be executed on 12.11.2008. That the said Common Loan Agreement was among M/s. OPG Power Gujarat Pvt. Ltd. as the borrower and Punjab National Bank as facility agent and Punjab National Bank as Security Trustee and the persons set out in Schedule-II as Rupee Lenders and the persons set out in Schedule-III as Domestic Foreign Currency Lenders. The said document/instrument was signed by the borrower as well as Rupee Lenders. That the said Common Loan Agreement contained various terms and conditions in which the Rupee Lenders ? bankers agreed to give the financial assistance to the extent of Rs. 950 Crores (in all) to the borrower. The relevant important conditions are as under:

"1.1 RIGHTS SEVERAL The rights of each Rupee Lender under the Financing Documents are separate and independent. A Rupee Lender may separately enforce any of its rights arising out of the Financing Documents.

1.6 INTEREST

1.6.1 Each Rupee Lender shall notify to the Borrower the Lending Rate for that Rupee Lender at the end of the Availability Period.

1.6.2 The Borrower shall pay to each Rupee Lender, interest on the principal amount of the Loans outstanding for the time being for the interest period at such Lender's Lending Rate as set out in Table B of Schedule II hereto, till the Term Loans are unconditionally discharged and irrevocably repaid in full, in accordance with the provisions of this Agreement. Such interest is payable monthly on the first day of every month including during the holiday period. Interest during construction period is to be capitalized as part of project cost.

1.6.3 The Borrower shall pay the Rupee Lenders, accrued (and therefore unpaid) interest on the Loan, every month on the Interest Payment Dates.

1.6.4 Liquidated Damages

If the Borrower fails to pay any amount due to the Rupee Lenders (except Liquidated Damages) under any Financing Document, the Borrower shall pay on defaulted amounts, liquidated damages ("Liquidated Damages") at the Liquidated Damages Rate for the period of the default. The Liquidated Damages shall be payable in the manner and on the Interest Payment Dates as specified in this Agreement.

1.6.5 Additional Interest

If the Borrower fails to create and perfect the Security to be created in a form and manner satisfactory and within the permitted time to the Rupee Lenders, it shall forthwith on demand by the Rupee Lenders pay Interest on their Loans until such time as such Security is created and perfected to the satisfaction of the Rupee Lenders at a rate of 1.00% plus the applicable Interest Tax per annum above the Lending Rate for the Loans.

1.6.6 Accrual

All interest accruing on amounts outstanding under the Rupee Facility shall accrue from day to day and be calculated on the basis of the actual number of days elapsed and a year of 365 days.

1.6.7 Reset

Interest or the Lending Rate shall be reset first at the time of Commencement of Commercial Operations and thereafter every year till the Term Loans are unconditionally discharged in full by the Borrower.

1.6.8 Each of the Rupee Lenders or the Lenders Agent shall notify the Borrower of any change in interest rate from time to time.

1.6.9 Interest Tax

The Borrower shall pay to the Rupee Lenders" Interest Tax as applicable from time to time.

1.6.10 General

a) The Borrower acknowledges that any sums, interest, default amount including but not limited to the Liquidated Damages under Section 1.6.4 are reasonable and that they represent genuine pre-estimates of the loss incurred by the Rupee Lenders in the even of non payment by the Borrower.

b) The Borrower acknowledges that the Rupee Facility provided under this Agreement is for a commercial transaction and waives any defence available under usury or other laws relating to the charging of interest.

1.7 REPAYMENT

1.7.1 REPAYMENT MECHANISM

a) Subject to Section 1.7.2 hereof, the Borrower shall repay the Loan to the

Rupee Lenders in 35 (Thirty five) equal quarterly instalments as specified in Schedule V(A) to Schedule V(J) (each a "Repayment Instalment"). The first Repayment Instalment shall be due on the First Repayment Date (i.e. 30th June 2011) for the Rupee Lenders and subsequent Repayment Instalments shall be due on each successive Repayment Dates for the respective the Rupee Lenders.

b) The last Repayment Instalment together with all other amounts due and outstanding under this Agreement shall be repaid in full on the Maturity Date (i.e. 31st December 2019);

c) No amounts repaid under the Rupee Facility may be re-borrowed.

d) The Borrower undertakes to repay the Repayment instalments of the Rupee Facility in accordance with the repayment schedule set forth in Schedule V(A) to Schedule V(J) hereto. If, for any reason, the amount finally disbursed by the Rupee Lenders under this Agreement is less than the amount of the Rupee Facility Total Commitment, the amount of Repayment Instalments shall stand reduced proportionately but shall be payable on the same dates as specified in the repayment schedule set forth in Schedule V(A) to Schedule V(J) hereto.

1.7.2 CONFIRMATION OF REPAYMENT INSTALMENTS:

a) The Facility Agent or the Rupee Lenders may conduct one or more reviews of the Project before Final Completion in consultation with the Lender's Engineer. The Borrower shall provide all necessary information to the Facility Agent or the Rupee Lenders as may be required for this purpose.

b) If, as a result of such a review, the Facility Agent or the Rupee Lenders determine, that the Borrower has implemented or is likely to implement the Project in accordance with the Transaction Documents, Section 1.7.1 above shall be deemed to be confirmed and shall apply without amendment.

c) If, as a result of such review, the Facility Agent or the Rupee Lenders determine that the Borrower has not implemented nor is likely to implement the Project in accordance with the Transaction Documents, the Rupee Lenders shall have the right to revise the Repayment Instalments and stipulate such conditions as it may deem fit, which conditions shall be binding on and implemented by the Borrower.

9.11 Security

9.11.1 The Borrower certifies that all Security Documents when executed, delivered and registered (where necessary or desirable) and when appropriate forms are filed as required under Applicable Law, shall create the Security expressed to be created thereby over the assets referred therein and such assets are not subject to any prior Security Interests (other than Permitted Security Interests, if any).

9.11.2 The Borrower confirms that the claims of each of the Secured Parties shall rank *pari passu* as stated in the Security Documents.

9.11.3 The Borrower has not created any Security Interest upon any of its present or future revenues or other assets in favour of any Person other than the Secured Parties nor does it have any obligation to create any Security Interest other than Permitted Security Interest.

9.11.4 The provisions of the Security Documents are effective to create, in favour of the Security Trustee for the benefit of the Secured Parties, legal, valid and enforceable Security Interest on all of the property, assets and revenues of the Borrower on which the Borrower purports to grant Security Interest pursuant thereto, including, without limitation, a legal, valid and enforceable security assignment of all of the Project Documents, and all necessary and appropriate recordings and filings have been made in all appropriate public offices, and all other necessary and appropriate action has been taken so that each such Security Document creates an effective Security Interest on all right, title, estate and interest of the Borrower in the property, assets and revenues of the Borrower.

That on the very day, one another document is executed viz. Security Trustee Agreement among the Lenders (10 in number), the borrower and the Punjab National Bank as the Security Trustee. It is required to be noted that the said document is also signed by all the Lenders ? bankers ? 10 in number. That under the aforesaid agreement, Punjab National Bank has been appointed as Security Trustee. In the said agreement it is provided as under:

"WHEREAS:

(1) Pursuant to the Common Loan Agreement for the purpose of this Agreement [hereinafter referred to as "CLA" in this Agreement] entered into between the Borrower and the Lenders, each of the Lenders has agreed to provide to the Borrower and the Borrower has agreed to avail from each of the Lenders on the terms and conditions contained in the CLA, the Facilities to the maximum extent set out against their respective names in Schedule-II hereto.

(2) The Borrower has agreed that the Facilities together with all interest, Liquidated Damages, Front End Fee, LC Commission and any other amounts due and payable to the Lenders under the CLA, premia on repayment, costs, charges, expenses and other monies including any increase as a result of revaluation/devaluation/fluctuation or otherwise in the rates of exchange of foreign currencies involved, whatsoever stipulated in or payable under this Agreement or the CLA and all amounts payable to the Lenders, the Facility Agent and the Security Trustee under the Financing Documents shall be secured by first ranking. The Borrower shall cause to create the securities enumerated hereunder in favour of the Lenders, on pari passu basis, through the Security Trustee by way of:

(i) First charge by way of mortgage of all immovable properties of the Project (present and future) and first charge by way of hypothecation of all current assets (including receivables) and all other movable assets forming part of fixed assets (both present and future) of the Project;

The Borrower, shall cause to create the mortgage on 235 acres of Project Land within a period of 4 (Four) months from the date of execution of the CLA as per the terms agreed in CLA.

(ii) Assign all rights, titles and interests of all Project related contracts and Insurance Policies.

(iii) First charge on the Trust & Retention Account in favour of the Lenders.

(iv) Provide Personal Guarantee of Mr. Arvind Gupta, Promoter of the Borrower.

(v) The Borrower hereby agrees and undertakes that so long as any monies remain due to the Lenders, if any immovable property is acquired, the same shall be charged to the Lenders by way of first charge in such form and manner to the satisfaction of the Lenders.

These shall be collectively referred to as the "Security". The Security created or to be created to secure each Facility shall rank pari passu with the Security created or to be created to secure the other Facilities.

(4) The Security Interest created or to be created in favour of the Security Trustee as described above shall rank pari passu with the Security Interest created or to be created in favour of the Security Trustee.

(5) The Lenders desire to form a trust for the beneficial interest of the Lenders and to empower the Security Trustee to accept the Security Interests created pursuant to the Security Documents and hereunder from the Borrower and others and to enter into the Financing Documents and to exercise certain rights and perform certain duties in relation thereto, subject only to the execution of the provisions of this Agreement.

(6) At the request of the Lenders, Punjab National bank has agreed to act as Security Trustee for the Lenders on the terms and conditions contained herein and in the Financing Documents and has agreed to accept the trust created hereunder and by virtue of the Financing Documents. It is hereby agreed that the Security Trustee shall act only upon express written instructions and advice of the Lenders."

The relevant terms and conditions set out in the said "Security Trustee Agreement" are as under:

"2.1 Appointment of Security Trustee

Subject to the terms, conditions and covenants contained in this Agreement, Punjab National Bank is hereby appointed as Security Trustee to act on behalf of the Lenders pursuant to the trust created hereunder and under the Financing Documents and Punjab National Bank hereby agrees to act as Security Trustee for the purposes and in accordance with the terms and provisions set forth herein and on the remuneration as mentioned in this Agreement.

The Borrower shall in accordance with the Financing Documents create Security

in favour of the Security Trustee who shall hold the same for the benefit of the Lenders.

2.2 Authority for Certain Actions

2.2.1 The Lenders hereby authorise and direct and the Security Trustee hereby agrees, upon receipt of written instructions from the Lenders, for the benefit of such Lenders:

(i) to execute and deliver the Financing Documents, to accept the deposit of title deeds, to keep in custody the documents, deeds and writings in relation to the properties/assets secured in favour of the Security Trustee and do any other act necessary or required for the creation and perfection of the Security Interest under the Financing Documents.

(ii) to execute and deliver all other documents, agreements, instruments and certificates and do all other actions as set out under the relevant Financing Documents.

(iii) to enforce the Security in accordance with the provisions of the Financing Documents and to receive and disburse all monies in accordance with the Financing Documents.

(iv) to take whatever action that shall be required to be taken by the Security Trustee by the terms and provisions of this Agreement and/or the other Financing Documents to exercise its rights and perform its duties and obligations under each of the documents, agreements, instruments and certificates referred to in this Section 2.2(i) and (ii) as set forth in such documents, agreements, instruments and certificates, and

(v) subject to the terms and provisions of this Agreement and the Financing Documents, to take such other action in connection with the foregoing as the Lenders may from time to time direct.

2.2.2 Notwithstanding anything contained in these presents, the Security Trustee shall, before initiating any action or exercising any right or performing any duty or granting any consent or waiver under this Agreement or any other Financing Documents seek written instructions from the Lenders and only upon receipt of such instructions in accordance with the Financing Documents, the Security Trustee shall exercise its rights and perform its duties and obligations under this Agreement, the other Financing Documents and each of the documents, agreements, instruments and certificates referred to in this Section 2.

2.7 Action

(a) The Security Trustee shall act in accordance with the written instructions of the Lenders and in accordance with the provisions of the other Financing Documents. The Security Trustee shall be under no obligation to exercise any of the rights and remedies conferred on it under any Financing Document unless the Security Trustee receives directions so to do from the Lenders.

(b) Any sale or other conveyance of the right, title and interest in any part of the Secured Property or any assignment of rights under the Security Documents by the Security Trustees made in accordance with the provisions of this Agreement and the Financing Documents shall bind the Lenders and the Borrower and shall be effective, to the extent of any such sale or conveyance or assignment, to transfer and convey all rights, title and interest of the Security Trustee and the Lenders in and to such part of the Secured Property that is the subject of any such sale or conveyance. No purchaser or other grantee shall be required to inquire as to the authorization, necessity, expediency or regularity of such sale or conveyance or as to the application of any sale or other proceeds with respect thereto by the Security Trustee. The Security Trustee shall not, sell, convey or otherwise assign or transfer any of the estate, right, title or interest in, to or under the Security Interest except in accordance with the provisions of the Financing Documents.

2.8 Duty to provide information The Security Trustee shall, if the Lenders request for any information which the Security Trustee has received in its capacity as the Security Trustee from the Borrower or any other person forthwith provide the same to the Lenders."

8.3. That on the very day, a third document/instrument has been executed viz. "Intermediate Credit Agreement" among the Lenders ? 10 in number and Punjab National Bank as facility agent and Punjab National Bank as the Security Trustee. The said agreement provides as follows:

"WHEREAS

OPG Power Gujarat Private Limited, a company registered under the Companies Act, 1956 (1 of 1956) and having its Registered Office at No. 21 K.B. Dasan Road, Teynampet, Chennai ? 600018 India (hereinafter referred to as the "Borrower") proposes to design, finance, operate and maintain a 270 MW Coal Based Thermal Power Project at Kutch, Gujarat in the State of Gujarat ("Project") at a cost of Rs. 1282.23 Crores.

Pursuant to the Common Loan Agreement, dated 12th November 2008 and the other Financing Documents, between, inter alia, the Borrower, the Lender's Agent, and the Lenders listed in Part A of Schedule I (hereinafter referred to as "the Lenders"), the Lenders have agreed, inter alia, subject to the terms and conditions contained therein, to provide to the Borrower, financial assistance to the extent of Rs. 950.00 Crores on the terms mentioned in the Common Loan Agreement.

Pursuant to the Lenders Agent Agreement dated 12th November 2008 between the Lenders' Agent, the Borrower and the Lenders, the Lenders have appointed Punjab National Bank ("PNB") as the Lenders' agent of the Lenders to act on behalf of each of them in connection with the financing documents entered into by the Lenders in connection with the Project.

Pursuant to the Security Trustee Agreement dated 12th November 2008 between the Security Trustee, the Lenders and the Borrower, the Lenders have appointed PNB to act as the Security Trustee for the Lenders.

Pursuant to the Security Documents, the Security Interest has been/shall be created in favour of the Security Trustee for the benefit of the Lenders on the terms and conditions contained in the Security Documents.

The parties hereto have agreed to enter into this Agreement for the purpose of, inter alia, coordinating the enforcement of Security Interests created or to be created under the Security Documents and the exercise of other rights, powers and remedies under the Financing Documents."

On the said agreement it was agreed that all the title deeds and the documents relating to security shall be held by and remained with the Security Trustee in its custody for the mutual benefit of the secured parties and the Security Trustee shall as and when other secured parties for one or more of them, makes available to them said title deeds and documents against their/his accountable receipt or furnish copy thereof.

8.4. That after execution of the aforesaid three instruments/agreements viz. (1) Common Loan Agreement; (2) Security Trustee Agreement and (3) Inter-creditor Agreement, the instrument in question viz. Deed of Memorandum of Entry in the Title Deed has been executed by the borrower. In the said instrument it is specifically stated that the executant of the said document was doing so in his capacity as a Director of the borrower with intent to create security by way of joint mortgage by deposit of title deeds on the borrower's properties together with the building and other structures, fixed plant and machinery, fixtures and fittings constructed, erected or anything attached to the earth, to secure the due repayment, discharge by the borrower to the Security Trustee acting on behalf of self and other Lenders of the facilities extended by the Rupee and Domestic Foreign Currency Lenders aggregating to Rs. 950 Crores for setting up a project, together with interest, liquidated damages, premia on prepayment, costs, charges, expenses and other monies payable under the Common Loan Agreement and other financing documents, the aforesaid is inclusive of the piece and parcel of agricultural land measuring 232.60 Acre together with all the buildings, structures and sheds constructed and/or to be constructed thereon. At this stage it is required to be noted that the (1) Common Loan Agreement; (2) Security Trustee Agreement and (3) Inter-creditor Agreement etc. are part of the instrument in question viz. Deed of Memorandum of Entry in the Title Deed as Schedule-IV.

8.5. Thus, all the documents viz. (1) Common Loan Agreement; (2) Security Trustee Agreement and (3) Intermediate Credit Agreement are required to be read along with the instrument in question viz. Deed of Memorandum of Entry in the Title Deed so as to appreciate the real intent. On conjoint reading of the aforesaid series of agreements, it can be said that the instrument in question viz.

Deed of Memorandum of Entry in the Title Deed, though styled as "Memorandum of Deposit of Title Deeds", it is actually the document of mortgage and is composite deed which incorporates the terms and conditions, bargain by referring to other documents/agreements viz. (1) Common Loan Agreement; (2) Security Trustee Agreement and (3) Intermediate Credit Agreement. It is required to be noted that as mentioned in the Security Trustee Agreement, the borrower has agreed to cause to create the mortgage on 235 Acre of the project land and has also agreed to cause to create first charge by way of mortgage of all immovable properties of the project (present and future) and first charge by way of hypothecation of all current assets and all other movable assets forming part of fixed assets of the project and on the aforesaid the Lenders have agreed to give financial assistance to the extent of Rs. 950 Crores to the borrower. That thereafter the borrower has executed the instrument in question viz. Deed of Memorandum of Entry in the Title Deed" though titled as "Memorandum of Deposit of Title Deeds". It is in essence a deed of mortgage on which the financial assistance to the extent of Rs. 950 Crores has been given to the borrower by different Rupee Lenders ? bankers. If the contention on behalf of the original applicant that the instrument in question is a document of deposit of title only and would fall under Article 6 of Schedule-I is accepted, in that case, the applicant would be successful in evading the additional stamp duty chargeable under Section 3 of the Stamp Act. It appears that in order to avoid the payment of actual stamp duty, additional stamp duty payable under the Stamp Act, the original applicant has titled the document in question as "Memorandum of Deposit of Title Deeds". To appreciate the nature of document/instrument, one is required to consider the intent behind the same. When the other documents/agreements are referred to the instrument in question viz. Deed of Memorandum of Entry in the Title Deed more particularly as Schedule-IV, the same are also required to be considered while considering the intent and the purpose and object of the execution of the instrument in question and one cannot go by the title only. Thus, on conjoint reading of all the agreements viz. (1) Common Loan Agreement; (2) Security Trustee Agreement and (3) Intermediate Credit Agreement and the instrument in question, we are of the opinion that the instrument in question would fall under Article 6 of the Schedule-I to the Stamp Act as contended on behalf of the borrower, but it shall fall within Article 36 of Schedule-I to the Stamp Act and is chargeable with additional stamp duty as demanded by the Revenue Authority.

9. Now, so far as the decisions of the Hon''ble Supreme Court in the case of Arthur Paul Benthall (Supra) and the decision of the Full Bench of the Allahabad High Court in the case of Ram Swarup (Supra) relied upon by the learned Counsel appearing on behalf of the original applicant ? borrower in support of his submission that with respect to the instrument in question, Section 5 of the Stamp Act shall not be applicable and it should be considered as a single document/transaction is concerned, in view of the direct decision of the Hon''ble Supreme Court in the case of Coastal Gujarat Power Ltd. (Supra), the aforesaid

decisions shall not be of any assistance and/or shall not be helpful to the original applicant. At this stage it is required to be noted that as such in the case of Coastal Gujarat Power Ltd. (Supra), the Hon''ble Supreme Court had considered its earlier decision in the case of Arthur Paul Benthall (Supra) and thereafter the aforesaid view has been taken against the borrower.

9.1. Now, so far as the decision of the Hon''ble Supreme Court in the case of Hindustan Lever & Anr. (Supra) and another decision of the Hon''ble Supreme Court in the case of Lekharam Sonaram & Co. & Ors. (Supra) and the decision of the Bombay High Court in the case of Re: Indian Stamp Act, 1889 (Supra) relied upon by the learned Counsel appearing on behalf of the original applicant ? borrower in support of his submission that the instrument in question would fall under Article 6 of Schedule-I to the Stamp Act and would not fall under Article 36 of Schedule-I to the Stamp Act and therefore, the borrower is not liable to pay additional stamp duty under Section 3(a) of the Stamp Act is concerned, in view of our above discussion, that on conjoint reading and considering the series of documents viz.(1) Common Loan Agreement; (2) Security Trustee Agreement and (3) Intermediate Credit Agreement, the instrument in question would not fall under Article 6 of Schedule-I to the Stamp Act, the said decisions shall not be applicable to the facts of the case on hand. On conjoint reading of the aforesaid series of documents/instruments, the instrument in question can be said to be the deed of mortgage and merely because the nomenclature is given "Memorandum of Deposit of Title Deeds", it cannot be construed and read as a "Deed of Deposit of Title" only.

10. In view of our above discussions, we are of the opinion that authorities below have not committed any error and/or illegality in holding that the instrument in question viz. "Deed of Memorandum of Entry in the Title Deed" would not fall under Article 6 of Schedule-I to the Stamp Act and it is rightly held that the instrument in question would fall under Article 36 of Schedule-I to the Stamp Act and therefore, the borrower is liable to pay the additional stamp duty leviable under Section 3(a) of the Stamp Act. Therefore, both the questions are answered against the original applicant ? borrower and in favour of the Revenue Authority. Present Reference is answered accordingly.