

# Dispute Resolution Hotline

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## TRANSACTION STRUCTURING NOT A MEANS TO EVADE PAYMENT OF STAMP DUTY

- Supreme Court holds that even a single mortgage deed between a borrower and security trustee on behalf of several lenders may be considered as distinct matters for determination of stamp duty.
- Distinct matters under Section 5 and “description” under Section 6 of the Gujarat Stamp Act, 1958 have different connotations.
- Parties should be mindful in composite transactions as courts may look beyond the form of the instrument and consider collateral documents and surrounding circumstances for imposition of stamp duty.

## BACKGROUND

The Supreme Court of India (“**Supreme Court**”) in its recent decision of *Chief Controlling Revenue Authority v. Coastal Gujarat Power Limited & Others*<sup>1</sup> held that a mortgage executed by a borrower in favour of a security trustee would not be treated as a single document for determining the liability under the Gujarat Stamp Act, 1958 (“**Act**”), in the event the Security Trustee holds the security for the benefit of multiple lenders.

## FACTS

Coastal Gujarat Power Ltd (“**Respondent**”) had entered into loan agreements with a consortium of thirteen lenders (“**Lenders**”) in 2008 seeking financial assistance for setting up an Ultra Mega Power Project in Gujarat. The consortium of lenders entered into a Security Trustee Agreement (“**Agreement**”) appointing State Bank of India - Project Finance Division as the Security Trustee. The Respondent had also executed an Indenture of Mortgage (“**Instrument**”) with the Security Trustee creating a mortgage over its assets as security for the loans for and on behalf of the Lenders. By virtue of this Instrument, the Lenders had a beneficial interest over the mortgaged property. The Instrument was registered upon payment of Rs. 4,21,000 as stamp duty. The Chief Controlling Revenue Authority (“**Appellant**”), however, claimed that the Respondent was liable to pay Rs. 54,62,000/- more and sought payment of the outstanding amounts.

The matter was considered by the Deputy Collector, Stamp Duty Valuation Organisation which directed the Respondent to pay the remaining amounts and also imposed a penalty. The Respondent filed a revision petition before the stamp authorities, which was dismissed. The Respondent deposited the amount claimed by the Appellant under protest.

The Respondent then sought the opinion of the High Court of Gujarat (“**Gujarat HC**”) by way of a Reference under Section 54 (1A) of the Act. The Gujarat HC held that stamp duty was payable on the Instrument and not on the transaction contemplated or affected by it. The Gujarat HC held in favour of the Respondent and observed that no additional stamp duty was payable. The State Bank of India, being the Security Trustee on behalf of all the other lending banks in its capacity as the mortgagee, could seek the enforcement of the mortgage from the Respondent. Further, the Gujarat HC also noted that the Instrument did not involve distinct matters or contemplate distinct transactions.

## ISSUE

The issue before the Supreme Court was whether the Instrument comprised of a single matter, or several distinct matters or distinct transactions under one document.

## ARGUMENTS

### *Appellant's Contentions*

- The Appellant contended that, in essence, there were thirteen different mortgage deeds between the Respondent and various lenders. The formation of the consortium of Lenders and execution of the Instrument were measures taken to evade stamp duty on each mortgage deed.
- The Appellant urged the Supreme Court to look at the substance of the Instrument over its form. In terms of substance, the Instrument was a combination of thirteen mortgage deeds between the Lenders and the Respondent and related to several distinct matters or distinct transactions with distinct loans being taken from the Lenders.

### *Respondent's Contentions*

- The Respondent contended that no independent rights were created in favour of the Lenders through the Instrument. The Security Trustee was only entitled to enforce the mortgage upon the occurrence of an Event of

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Default. Therefore, the Instrument could not be said to contain separate and distinct transactions.

- Further, the Respondent also contended that only the Instrument needs to be looked into for the purpose of stamp duty. Other documents executed between the parties to a transaction could not be relied upon while determining stamp duty since only the Instrument was being stamped.
- The Respondent submitted that where an Instrument contemplates a single matter/ transaction i.e. the mortgage of a property with the Security Trustee, the fact that other lenders held beneficial interests would not alter the nature of the Instrument.
- It was also contended that since lenders shared a common interest in the security, an assumption that the lenders had individual interests would not stand. Further, since the Act was a fiscal statute the benefit of doubt would go in favour of the assessee in case of an ambiguity.

## JUDGEMENT AND ANALYSIS

The Supreme Court concluded on the facts and held that Respondent had entered into separate loan agreements with the Lenders. In a situation, where separate mortgage deeds were created with the Lenders there would have been a separate document recording each of the 13 transactions and stamp duty would be payable accordingly. The Supreme Court examined the scope and object of the Act and judicial precedents to understand the principle on imposition of stamp duty.

### Scope and Object of the Act

It is a settled principle that only an instrument as per the relevant stamp duty legislation may be made liable to duty.<sup>2</sup> Further in case of a dispute relating to stamp duty, courts tend to look at only the form of the instrument. Courts may choose to look at the substance of the instrument but do not consider collateral evidence. Legislations relating to stamp duty are fiscal statutes and it is a settled principle of interpretation that fiscal statutes are to be interpreted in a narrow and strict sense. Further, where there is an ambiguity in the interpretation; the benefit of doubt would be given to the assessee.

Sections 4-6 of the Act describe instances where stamp duty would be chargeable on instruments. Section 4<sup>3</sup> covers instances where several instruments are employed to complete a single transaction and only the principal instrument is chargeable with duty and thus pertaining to single transaction completed through several instruments. Section 5<sup>4</sup> deals only with instruments that comprise of several distinct transactions or distinct matters, therefore one instrument comprising more than one transaction. Section 6 of the Act pertains to instruments coming within different descriptions in Schedule I of the Act.

The Supreme Court referred to the earlier constitutional bench decision in *Member, Board of Revenue v. Arthur Paul Benthall*<sup>5</sup> ("**Benthall**"), where persons authorised to act in several capacities eg. executor, administrator, trustee, liquidator under one instrument would constitute distinct matters as per Section 5 of the Indian Stamp Act, 1899.<sup>6</sup> The Supreme Court in *Benthall* held that factors such as the terms of instruments, nature of the parties, subject matter on which the instrument operates and extent of authority conferred would determine whether the instrument related to a single matter or distinct matters. Further, if number of persons executed a single instrument and there was a community of interest between them in the subject-matter, the instrument would be chargeable with a single duty since different capacities do not constitute distinct matters under Section 5 of the Indian Stamp Act, 1958.

The Supreme Court in *Benthall* held that "*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 as 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.*"

Therefore, the Supreme Court in light of the facts of the present case held that the Gujarat HC had wrongly interpreted the provisions of the Act as the Instrument amounted to thirteen distinct transactions and would fall under the ambit of Section 5 of the Act.

This judgment is a marked departure from the position that only the form of the instrument would be looked at for determination of stamp duty. Further, the Supreme Court has also looked at collateral evidences such as inter-se agreements between the Security Trustee and Lenders and the circumstances surrounding the transaction. Therefore, this expansive interpretation of Section 5 of the Act would mean that even the substance of an instrument may be looked into for determination of the stamp duty.

In situations where similarly worded provisions in other stamp duty related legislations are attracted, the Revenue Authorities may tend to look at the substance of the Instrument and collateral agreements for the determination of stamp duty. This development may cause a degree of uncertainty with respect to the determination of stamp duty since parties will have to be mindful of the effects of collateral documents on the nature of the transaction.

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**Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business**

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<sup>1</sup> Civil Appeal No 6054 of 2015

<sup>2</sup> In Re: Swadeshi Cotton Mills Co AIR 1932 All 291

<sup>3</sup> Section 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 sub-section (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

<sup>4</sup> Section 5 -Instrument 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.

<sup>5</sup> AIR 1956 SC 35

<sup>6</sup> The wording of Section 5 of the Indian Stamp Act, 1899 is similar to Section 5 of the Gujarat Stamp Act, 1958

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