

Whether Registration & Stamping of memorandum of deposit of Title Deeds is essential for creation of a valid mortgage?

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The mortgage by deposit of title deeds (EMTD), occurs immediate on the deposit of title documents by the mortgagor to the mortgagee.

The Section 58(f) of the Transfer of Property Act, 1882 defines EMTD as: *“(f) Mortgage by deposit of title-deeds-Where a person in any of the following towns, namely, the towns of Calcutta, Madras, and Bombay, and in any other town which the State Government concerned may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds.”*

It can be clearly understood from the above stated provision that for the purpose of creation of an equitable mortgage by deposit of title deeds in favour of a mortgagee, what is required is “delivery of title documents” of immoveable property to the “creditor or its agent” “with an intention to create security”. The debt can be both, an existing debt, or a future debt. In the event an amount of money has been advanced as a loan, and the debtor has deposited the title deeds with the creditor, then such a transaction will be prima facie evidence of an equitable mortgage. The delivery can either be physical (actual deposition) or constructive (evident from the conduct of the parties).

Here, we can see that the intention to create security has been an important element, and this has led the banks get the memorandum for entry or deposit signed by the depositor (mortgagor) at the time of deposit.

Now coming to the issue regarding need of registering the document in which the deposit is recorded.

Section 59 of the Transfer of Property Act, specifically excludes mortgages by deposit of title deeds from compulsion of getting registered. A mortgage by deposit of title deeds may be effected orally, but when the parties reduce it to writing, and the writing itself constitutes a contract of mortgage, which essentially creates the mortgage, then the memorandum has to be registered.

In Ishwar Das Malhotra v. Dhanwant Singh, [AIR 1985 Del 83], The Delhi High Court took the view that- *“Where the memorandum contained the terms of the contract, mentioned the amount of loan, rate of interest and details of the property in respect of which equitable mortgage was stated to have been already created, it required registration and was, therefore, inadmissible (in evidence).”* This view has been confirmed by the Supreme Court in State of Haryana v. Narvir Singh, [(2014) 1 SCC 105], wherein the Supreme Court has held that *“In a mortgage by deposit of title deeds.....where the memorandum recorded in writing creates rights, liabilities or extinguishes those, the same requires registration... but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration.”*

Therefore, notwithstanding the exclusion of mortgage by deposit of title deeds in Section 59 of the TP Act, the jurisprudence on the subject requires memorandums to be registered, if they contain the terms and conditions of the

mortgage.

Hence, if the memorandum of receipt of title documents, states the amount of loan, rate of interest and details of the property, or other terms and is executed as an instrument by both parties, then only it needs to be registered.

Further, as per Section 89B of the Registration Act, 1908 (as applicable in Madhya Pradesh), every person who has mortgaged immovable property by depositing title deeds under clause (f) of Section 58 of the Transfer of Property Act, 1882 shall within thirty days from the date of the mortgage, file a notice of intimation of his having so mortgaged the property, giving details of his name and address, and name and address of the mortgagee, date of mortgage, amount received under the mortgage, rate of interest payable list of documents deposited and description of immovable property as detailed in Section 21, before the Registering Officer within the limits of whose jurisdiction the whole or any part of the property is situated. If the person who has mortgaged the property as aforesaid fails to file a notice within thirty days before the Registering Officer or Officers, as the case may be, and enters into any transaction in relation to or affecting the immovable property which is the subject matter of the mortgage, with a third party, such a transaction shall be void and the third party shall be entitled to refund of any amount paid by him together with simple interest at the rate of 12 percent per annum from the date of payment and also to compensation of any damages suffered by him, from his transferor.

Section 89B, clears that even if the instrument is to be registered then, the mortgagor shall file intimation, and on its failure any subsequent transaction with the property shall be void, but there will not be any impact on the charge/interests of the bank/mortgagee.

Now coming to the issue relating to stamping or payment of stamp duty on memorandum for deposit of title deeds.

Article 7 of the Schedule 1A to Indian Stamp Act, 1899, as applicable to M.P. provides that, Any instrument evidencing an agreement relating to the deposit of title deeds or instruments constituting or being evidence of the title to any property, where such deposit has been made by way of security for the repayment of money advanced or to be advanced by way of loan or an existing or future debt. The Explanation II to this Article specifically states that, "any letter, note or memorandum or writing, relating to the deposit of title deeds, whether written or made before, or at the time of, or after, the deposit of title deeds is effected, and whether it is in respect of the first loan or any subsequent loan, such loan, such letter, note, memorandum or writing shall, in the absence of any separate agreement relating to the deposit of title deeds, be deemed to be an instrument evidencing an agreement relating to the deposit of title deeds."

In simpler terms, what the explanation says is that when the terms of mortgage have been reduced to writing upon deposit of title deeds, it will be deemed to be an agreement governing the deposit of title deeds and such a written agreement is not enforceable unless duly stamped in pursuance to section 35 of the Indian Stamp Act.

In this article I have provided a brief overview upon the laws applicable to creation, stamping and registration of memorandum of deposit of title deeds. But, any opinion as to any particular transaction may be different on case to case basis.