

**ANALYSIS OF THE AMENDMENT TO THE REGISTRATION (MAHARASHTRA AMENDMENT) ACT,
2010 INTRODUCING COMPULSORY REGISTRATION OF INSTRUMENTS RELATING TO
MORTGAGE BY DEPOSIT OF TITLE DEEDS EFFECTIVE FROM 1ST APRIL, 2013.**

B.Gopalakrishnan - President & Head (Legal) - Axis Bank Limited

The Government of Maharashtra has introduced a state amendment to the Registration Act, 1908 by through the Registration (Maharashtra Amendment) Act, 2010 passed in the State Legislature and received the assent of the Hon'ble President of India. The Amendment Act was published in the Maharashtra Government Gazette on 25.05.2012, while the same had not been notified to come into effect. Now, on 7th March 2013, the Government of Maharashtra has issued a Notification, appointing 01st April 2013 as the date on which the said Amendment Act shall come into force and become effective in the State of Maharashtra.

The amendment made by the State, to the Registration Act, has far reaching implication on the property deals by the individuals or institutions, including Bank, in the State and therefore the State has widely publicized the passing and effectuating of the Amendment Act, by way of various advertisements.

The purpose of this Article is to highlight the practical difficulties, which has arisen out of this amendment and issues which needs to be addressed on priority. While the amendment is most welcome, in order to sustain the amendment and make it workable, we are of the opinion that the following issues should be seriously considered.

The first issue is that in terms of the Bombay Stamp Act, 1958, the Equitable Mortgage by deposit of title deeds attracts ad valorem stamp duty whereas the registered mortgage or simple mortgage as it is known in the banking parlance attracts stamp duty with a cap of Rs.10 lacs. By virtue of the heavy stamp duty for creation of mortgage by deposit of title deeds in the State of Maharashtra, it is a fact that most of the corporates tend to

create equitable mortgage by deposit of title deeds outside Maharashtra. By virtue of this amendment, even if such equitable mortgage by deposit of title deeds as created outside Maharashtra pertaining to a property which is situated in Maharashtra, under Section 89(B) of the said Registration Act (as amended), the notice of intimation has to be given to the Registrar in Maharashtra within 30 days of creation of a Mortgage. This is nothing new because such clauses exist in the State of Gujarat and in the State of Tamilnadu.

While in the State of Maharashtra, a format of the notice which is to be issued in such case, is specifically mentioned and is made available. The fact of the matter is that, there exists no infrastructure both with the banks/lenders/ mortgagees on one hand and with the registrar on the other hand with regard to the e-filing of the notice. In the absence of such infrastructure, a deadline of 30 days from the date of creation of mortgage by deposit of title deeds is an impracticable solution and till such time the issues are stabilized, it should be given atleast a time of 180 days. Besides the onus of issuing such a notice, is left to the Borrowers. This will mean that the Banks/Lenders/ Mortgagees are left at the mercy of the borrowers.

It is therefore necessary to form a core group of the officials of the Government and banking fraternity and chalk out a fool proof system, which should be user friendly and which would be easily accessible to the bank's officials for carrying out registration.

We now deal with the amendment.

By the above said amendment, the State has amended and extended the scope of the Section 17 and inserted sub-sections in Section 7, 32, 34, 35 and 69 and added new Sections as 89A to 89D and also deleted Section 22A of the said Act. The most important amendments, as far as the Mortgagee is concerned, are insertion of sub-sections in Section 17 and addition of Section 89A to 89D. The said amendments and the effect of the same are detailed hereunder:

The Amendment to the Section 17 reads as follows:

17. Documents, of which registration is compulsory

(1) The following documents shall be registered, if the property to which they relates is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877 or this Act, came or comes into force, namely:

- (a)
- (b)
- (c)
- (d)
- (e)

“(f) Agreement relating to the Deposit of Title Deeds, where such deposit has been made by way of security for the repayment of a loan or an existing or future debts;

(g) Sale Certificate issued by any competent officer or authority under any recovery Act;

(h) Irrevocable Power of Attorney relating to transfer of immovable property in any way, executed on or after the commencement of the Registration (Maharashtra Amendment) Act, 2010.”

Sections 32, 34, 35 and 69 have been amended to facilitate the presentation of documents through electronic means, instead of personally being present in the Sub Registered Office for registration of documents. It has been intimated by the Inspector

General of Registration & Controller of Stamps, Maharashtra State, Pune to the Convener of the State Level Banks Committee that the said Department, with the help of NIC is developing an on-line application system called “e-Registration” for registration of the agreements and also an on-line application called e-filing for filing of the notices as referred below. Accordingly, the Government has issued necessary Rules as “Maharashtra e-Registration and e-Filing Rules, 2013” on 30.03.2013. The salient features of the same are provided later in this circular.

The next amendment is incorporation of Sections 89A to 89D.

Section 89A mandates the Courts passing:

- (i) Any decree or order, whereby title or interest is created, declared, transferred, limited or extinguished, to or in immovable properties;*
- (ii) An order for interim attachment or attachment, or release of such attachment*

To send a copy of such decree or order, in accordance with Section 21 of the Act, to the Registering Officer of the local limits within which whole or any part of the property concerned situate.

The other major amendment made to the Act by inserting Section 89B, reads as follows:

“89B. Notice to be sent to registering officers by mortgagor in case of mortgage by depositing title deeds and provisions for compensation in favour of subsequent transferee.

(1) Every person who has mortgaged immovable property by way of a mortgage 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, 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 the immovable property in the manner required by section 21, to the registering officer within the local limits of whose jurisdiction the whole or any part of the property is situate, and the said officer shall file the same in his Book No. 1:

Provided that, if the property so mortgaged falls within the jurisdiction of more than one registering officer, the procedure specified in this sub-section shall be followed in respect of the property within the jurisdiction of each such officers.

(2) If, the person who has mortgaged the property as aforesaid fails to file a notice within thirty days as stated in sub-section (1) 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 interest at twelve per cent. from the date of payment and also to compensation for any damages suffered by him, from the transferor.

(3) The amount recoverable by such transferee as specified in sub-section (2) shall be a charge on the interest of the mortgagor, in the mortgaged property;

Provided that, nothing in this section shall apply to the instruments of agreement relating to mortgage by deposit of title deeds which are duly registered as per the provisions of this Act.

89C. Punishment for failure to file notice under section 89B.

Any person who failed to file a notice under section 89B to the registering officer along with fees, within the period specified in that section, shall be punished with imprisonment for a term which shall not be less than one year but which may be for a term which may extend to three years and shall also be liable to fine.

Pursuant to the notification of the Amendment Act, with effect from 01.04.2013, the Mortgages by Deposit of Title Deeds with regard to the properties situated in the State of Maharashtra has become compulsorily registerable either under Section 17(1)(f) or under Section 89B.

Registration under Section 17(1)(f):

Wherever an EM is created by executing an Agreement relating or evidencing the Deposit of Title Deeds, where such deposit has been made by way of security for the repayment of a loan or an existing or future debt, such Agreement will have to be registered with the SRO having jurisdiction over the place where the property is situated. Hence, if the Banks/Mortgagees are executing any Memorandum of Agreement etc. for creating the EM, then the same shall have to be registered in terms of this Section. However, if there is no Agreement being executed for creation of EM, then the registration under this Section is not applicable and Section 89B will apply in such cases.

Here comes the major question as to whether the MOE can be considered as a agreement relating to mortgage or not. If so, why should it attract stamp duty of an MOE under Bombay Stamp Act. Ideally it should attract only the stamp duty pertaining to that of a simple registered mortgage.

Registration under Section 89B:

As extracted above, as per Section 89B, the Mortgagor, once he has created mortgage by way of Deposit of Title Deeds, but where no Agreement has been executed for evidencing the same, shall within 30 days of the creation of mortgage, file a notice of intimation for having created the EM, with the SRO within whose jurisdiction the property is situated and with each of the SROs if the property(ies) is/are situated within jurisdiction of more than one SRO, with the particulars as mentioned in the said Section. Upon filing such notice, the SRO concerned shall file/record the same in Book No.1 kept with them.

Hence, it shall be ensured that all the Mortgages by Deposit of Title Deeds, pertaining to the properties situated in the State of Maharashtra (irrespective of whether the EM is created within Maharashtra or outside Maharashtra) are registered with the Sub-Registrar Offices within whose jurisdiction the property/ies is/are situated either under Section 17(1)(f) or Section 89B as stated above.

It has been clarified in Rule 21 of the Maharashtra e-Registration and e-Filing Rules, 2013 that the Stamp Duty or Registration fees for e-registration or e-filing shall be the same as provided under the Maharashtra Stamp Act and the fee table prescribed under Section 78 of the Registration Act, 1908. Hence, one may opt for MOA or MOE route. Either way the appropriate stamp duty and registration charges will have to be paid.

Registration of Power of Attorney:

As per Section 17(1)(h), extracted above, pursuant to the amendment, **an Irrevocable Power of Attorney relating to transfer of immovable property in any way**, executed on or after commencement of this amendment act shall be compulsorily registerable. Hence, if a PoA is being obtained in lieu of mortgage, enabling the Mortgagee/Lender to create a mortgage in an eventuality, then such PoA also shall be registerable. This is for the reason that a mortgage is a transfer of immovable property, within the meaning of Transfer of Property Act, 1882 and further the said section has qualified the word transfer by adding “...**in any way**..” For this reason, it shall be ensured that all the PoAs that may be obtained by the Mortgagees for creation of a Mortgage or in lieu of a mortgage are registered with the SROs concerned. Please note that, such registration will be necessary for the PoAs that may be given by one or more of the Mortgagors to another person or mortgagor to represent such issuer for creating the mortgage on account of issuer’s inability or absence.

In the nutshell, with effect from 01.04.2013:

- An Agreement relating to Deposit of Title Deeds, for creating an EM pertaining to the property situated in the State of Maharashtra, irrespective of the State/place where the EM is created, shall have to be registered with the SRO concerned, within whose jurisdiction the property or part thereof situates.

- In case there is no agreement being executed for creation of an EM and if the EM is created by mere deposit of title deeds with or without a Memorandum of Entry, the Mortgagor shall have to file a Notice of Intimation of mortgage within 30 days of creation of such EM.

- All Powers of Attorney, where there is an authorization for creation of a mortgage, sale or any other manner of transfer of property, either issued in favour of the Mortgagee or to any other person, shall be compulsorily registered.

- E-registration or e-filing facility provided under the Maharashtra e-Registration and e-Filing Rules, 2013, can now be used.

- A Sale Certificate issued pursuant to a SARFAESI action shall be registered with the SRO concerned, as provided in Section 17(1)(g).

Needless to say, the provisions implemented through the Amendment Act is applicable on all the properties situated in the State of Maharashtra which are being taken as security by way of Mortgage by Deposit of Title Deeds and the process under the said Act needs to be meticulously followed, failing which the EM so created will not be valid and enforceable in view of Section 49 of the Registration Act, 1908.

“The views expressed herein are that of the Author of the Article and may not represent the views of the institution wherein he is employed.”

=====*****=====