

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ WRIT PETITION (CIVIL) NOS. 427 AND 2663 OF 2005

% Reserved on : 27th July, 2009.
Date of Decision : 27th August 2009.

WRIT PETITION (CIVIL) NO.427 OF 2005

ASHOK KAMAL CAPITAL BUILDERS Petitioner.

Through Mr.Milanka Chaudhary,
Mr.Abhishek Sharma, advocates.

VERSUS

STATE & ANOTHER Respondents.

Through Ms.Zubeda Begum, Ms.Sana
Ansari, Advocates for respondent no.1.

Ms.Mamta Tandon, Mr.Vivek Tandon,
advocates for respondent no.2.

WRIT PETITION (CIVIL) NO.2663 OF 2005

M/S. DYER'S STONE LIME COMPANY
PVT. LTD. Petitioner.

Through Mr.Milanka Chaudhary, Mr.Abhishek
Sharma, advocates.

VERSUS

COLLECTOR OF STAMPS Respondent.

Ms.Mamta Tandon, Mr.Vivek Tandon,
advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES.
3. Whether the judgment should be reported in the Digest ? YES.

SANJIV KHANNA, J.:

As identical issues arise for consideration, Writ Petition (Civil) No. 427/2005 filed by M/s. Ashok Kamal Capital Builders Pvt. Ltd. and Writ Petition (Civil) No. 2663/2005 filed by M/s.Dyer's Stone Lime Company Pvt. Ltd. (hereinafter referred to as Capital Builders and Dyer's Stone respectively, for short) are being disposed of this by this common judgment.

2. Dyer's Stone purchased property no.10, Alipur Road, Civil Lines, Delhi (herein after referred to as the property, for short) from the erstwhile owners vide sale deed dated 3rd December, 1956.

3. On 30th October, 1985 Dyer's Stone obtained permission from Delhi Administration (Land & Building Department) to develop the property as a group housing project. On 23rd December, 1987, Dyer's Stone entered into an agreement with the Capital Builders for development and construction of dwelling units. The dwelling units were constructed and sold to various third parties on execution of registered sale deeds. Requisite stamp duty has been paid on these sale deeds.

4. A portion of the property was requisitioned for Delhi Metro Rail Project w.e.f. 5th February, 2002 for a period of three years. Dyer's Stone received notice dated 24th December, 2002 from Sub Divisional Magistrate, Civil Lines to discuss the question of payment of compensation for the requisitioned land. By letter dated 15th January 2003, Dyer's Stone was asked to submit details of expenses incurred with regard to the requisitioned property and also to file lease deed, conveyance deed, etc in support of their ownership rights. On 23rd January, 2003 Dyer's Stone submitted photocopy of the agreement dated 23rd December, 1987 between them and Capital Builders.

5. Dyer's Stone and Capital Builders thereafter received two show cause notices both dated 19th August, 2003 stating that the agreement dated 23rd December, 1987 between Dyer's Stone and the Capital Builders amounted to conveyance under Article 23 of Schedule IA of the Indian Stamps Act, 1899 (hereinafter referred to as the Act, for short) and therefore the petitioners should be asked to pay deficient stamp duty and penalty under Sections 33 and 35 of the Act and show cause why penal action should not be taken against them under Sections 62 and 64 of the Act. The relevant portion of the show cause notice dated 19th August, 2003 issued under Sections 33 and 35 of the Act reads :

"No.F./Temp./Req./SDM/CL/07/422 Dated 19/8/2003

"Whereas the said documents is definitely under stamped and thus cannot be taken as evidence in support of the ownership

of the said property till stamp duty plus penalty is paid in full.

In view of the above you are directed to deposit the original agreement of sale in the office of the undersigned and also show cause as to why deficient stamp duty along with penalty under section 35 of Indian Stamp Act should not be deposited by you before the documents is taken into evidence in support of your claim of the ownership of this property.

You are therefore directed to appear on 25.8.2003 3 P.M. in person or through your representative along with your reply failing which necessary action under the stamp act and other relevant law of land will be taken to recover the deficient stamp duty, penalty and other penal action." (emphasis supplied)

6. From the above, it is clear that the Sub Divisional Magistrate who was also the Collector of Stamps did not have before him the original agreement dated 23rd December, 1987 and the petitioners were called upon to deposit the original document before the Sub Divisional Magistrate in case they wanted to rely upon the same in support of their claim.

7. A similar show cause notice was issued for action under Sections 62 and 64 of the Act on 19th August, 2003. The relevant portion of the notice reads;

"No.F./Temp./Req./SDM/CL/07/429 Dated 19/8/2003

x x x x x

Since the intention to evade stamp duty on this document is established after going through the document i.e. agreement of sale, the action under section 62 and 64 under the Indian Stamp Act along with other relevant

provision of Indian Penal Code for prosecution is required to be taken against all the person involved in this act. Before any action is taken you are served a show cause notice to explain as to why action under the above mentioned provision for intentional evasion and avoidance of legitimate govt. revenue to the govt. should not be taken against you. A separate action to deposit the deficient stamp duty plus penalty has already been initiated against you and this show cause notice is issued as an opportunity to explain as to why proposed action for prosecution should not be taken against you.

You are directed to appear before the undersigned on 25.8.2003 3 P.M. along with your reply failing which it will be presumed that you have nothing to say in the matter and proposed action will be taken against you accordingly."

8. Dyer's Stone submitted detailed replies dated 24th September, 2003 to the two show cause notices. The relevant portion of the reply to the notice under Sections 33 and 35 of the Act reads:

"1. The purported "document" which, in terms of your notice is being termed as an "Agreement of Sale" between us and Ashok Kamal Capital Builders Pvt. Ltd. ("Builder") is only a photocopy of a property development Agreement executed between us and the Builder. (The said photocopy is hereinafter referred to as the "Disputed Document"). Since the Disputed Document is only a photocopy, we are advised that it is not an "instrument chargeable with duty" under Section 33 or any other provision of the Indian Stamp Act 1899 and cannot be impounded under Section 33.

2. Without prejudice to the above, it is submitted that we are advised that there is no power or jurisdiction in the Collector of Stamps under the Indian Stamp Act, 1899 to direct any person to file an original document either under Section 33 or under Section 35 or otherwise, and as such your said show cause notice, to the extent it directs us to "deposit the original Agreement for

Sale”, is without any jurisdiction. In any event, the original document is not in our possession.

3(a) Without prejudice to the above it is submitted that the Disputed Document was filed by us under cover of our letter dated 21.1.2003 only to provide you with background information and not either as evidence or as a document in support of “ownership of the property” mentioned in your said notice. We do not tender the Disputed Document as evidence of our ownership of the said Property and you may disregard it completely for the same and we do not rely on it as proof or evidence of our ownership of the said Property. In law, ownership of immovable property can only be established by a registered instrument of title. In this case the title document is the Sale Deed dated 3.12.1956 in our favour, a photocopy whereof was also filed under cover of our aforesaid letter dated 21.1.2003 at S.No.4. Since the said Disputed Document has neither been tendered by us nor intended to be submitted by us, as proof of ownership of this Property, the question of its impounding and/or any additional stamp duty or penalty thereon as contemplated by Sections 33 and 35 does not arise.

x x x x x

5(a) Without prejudice to the above and in spite of the fact that the Disputed Document is only a photo-copy and cannot constitute and has not been submitted as evidence of ownership, a perusal of the same will clearly show that, in any event, it does not purport to be a document by which any part of the said Property has been sold or transferred by us to the Builder. The said Disputed Document is a photo-copy of a property development Agreement by which the entire Property No.10, Alipur Road became the subject matter of a development project in which the entire development and construction work was to be carried on by the Builder at its own cost on a portion of the Property which was termed as the “Builder’s Site”, and on the balance (termed as the “Owner’s site”) the Builder was to construct residential accommodation for the owner as an independent contractor against payment. An Agreement of this nature is a mere license granted to the Builder to enter upon owner’s property and to develop the same on payment of license fee,

with an opportunity in the Builder to make profit from sale of the construction made on the Builder's Ste specifically allocated to the Builder. The Builder does not acquire any right in the said Property and no right in the said Property or in any portion thereof, is transferred to the Builder. In this behalf your attention is invited to a Division Bench Judgment of the Hon'ble Delhi High Court in the matter of "R.K.Apartments Pvt. Ltd. & Anr Vs Smt. Aruna Bahree & Ors" (77 (1999) Delhi Law Times (193) DB) where the Hon'ble Delhi High Court has exhaustively examined the nature of such Agreement and Builder's right in the property thereunder, and has clearly held that a Builder's possession of the property or a portion thereof under such Agreement "was only by way of temporary measure for undertaking the construction work by them and the exclusive possession thereof in legal sense remained with the executants (owners) of the said Agreement." The said judgment further goes on to state that the Builder is not even entitled to any protection under Section 53A of the Transfer of Property Act, implying thereby, that there is no element of an agreement to transfer any rights in the Property to a Builder under such an arrangement." (emphasis supplied)

9. Similar response was given to notices under Sections 62 and 64 of the Act. Capital Builders also filed their response raising objections.

10. The two show cause notices in the case of Capital Builders and Dyer's Stone were disposed of by common Order dated 29th November, 2004. Common Order notices the contentions raised by Dyer's Stone and it was observed:

"In response to the above notice M/s.Dyer's Stone Lime Co. (P) Ltd. replied vide its letter dated 24.9.2003 that the copies of document are not liable to be called instrument and the document is not deficiently stamped and they don't have the original document with them. It is a mere licensee to the Builder and not a conveyance/sale and have

concluded that, it is not deficiently stamped and notices be withdrawn.” (emphasis supplied).

11. However, the Order dated 29th November, 2004 does not specifically deal with the contention of the Dyer’s Stone, quoted above, that the photocopy of an agreement/ document is not an “instrument” and cannot be subjected to impounding or penalty. Order dated 29th November, 2004 goes on to hold that the agreement dated 23rd December, 1987 is a conveyance deed which was under-stamped and therefore liable to be impounded and the two petitioners should be asked to pay stamp duty of Rs. 3.66 lacs and also be subjected to penalty equivalent to ten times the deficient stamp duty i.e. Rs.36.60 lacs. Thus penalty of Rs.40.26 lacs was imposed. In addition the Collector of Stamps/Sub Divisional Magistrate has directed that the two petitioners are liable to pay 5% transfer duty to Municipal Corporation of Delhi (hereinafter referred to as MCD, for short) amounting to Rs.6.10 lacs. The last portion of the said Order records as under:-

“Keeping in view the ill intention of the executants to evade the stamp duty and transfer MCD duty, it is a fit case for imposing penalty to the highest extent as provided U/s. 35 of Indian Stamp Act, 1899 and therefore considering the whole issue, a penalty equivalent to 10 times of deficient stamp duty is imposed i.e. Rs.3.66 X 10 = Rs.36.60 lakhs. The total stamp duty including penalty and transfer MCD duty thus comes to Rs.3.66 Lakhs + Rs.36.60 Lakhs = 40.26 lakhs + Rs.6.10 as transfer MCD duty. Under Section 29 of Indian Stamp Act and as

per clause 5 of article XIII of the agreement the duty etc. is to be paid by the builder i.e. M/s.Ashok Kamal Capital Builders (P) Ltd. The Promoters/Directors/Owners of Ashok Kamal Capital Builder (P) Ltd. at the first instance are directed to deposit the said amount of Rs.46.36 Lakhs within 1 month of receipt of this order with the direction to both the parties i.e. M/s.Dyer's Stone Lime Co.(P) Ltd. and Ashok Kamal Capital Builder (P) Ltd. to deposit the original agreement within the above period. In case they fail to deposit the said amount within stipulated period, the amount will be recovered U/s48 of Indian Stamp Act, 1899 as an arrear of land revenue and in addition to the above action U/s. 62/64 of Indian Stamp Act read with relevant provision of I.P.C. and Cr.P.C. will be initiated against all concerned and all executants."

12. Section 2(14) of the Act defines an "instrument" as under:-

"Instrument".- "Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished, or recorded."

13. Relevant portions of Section 33, Section 35 and Section 36 of the Act read as under:-

"S.33. Examination and impounding of instruments.- (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to

ascertain whether it is stamped with a stamp of the value and description required by the law in force in India when such instrument was executed or first executed:

X X X X X “

“S.35. Instruments not duly stamped inadmissible in evidence, etc.- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that –

- (a) any such instrument not being an instrument chargeable with a duty not exceeding ten naye paise only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;
- (b) where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;
- (c) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;
- (d) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;
- (e) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate

of the Collector as provided by Section 32 or any other provision of this Act.”

S. 36. Admission of instrument where not to be questioned.- Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not duly stamped.”

14. Section 33 applies when an “instrument” is produced before, a person having by law or consent of the parties the authority to receive evidence, or a person in charge of a public office. The said person is required to examine the “instrument” to ascertain whether it is properly stamped in terms of value and description required by law in force in India at the time when it was executed. If the same is not duly stamped, the person should impound the said instrument. However, an instrument once admitted in evidence, cannot be impounded later on (Section 36 of the Act).

15. The question whether photocopy/copy of a document is as an “instrument” under Section 2(14) of the Act and can be impounded or subjected to penalty and validated, was examined by the Supreme Court in the case of **State of Bihar versus Karamchand Thapar and Bros. Ltd.,** AIR 1962 SC 110 and it was opined:

“6. It is next contended that as the copy of the award in court was unstamped, no decree could have been passed thereon. The facts are that the arbitrator sent to each of the parties a copy of the award signed by him and a third copy also signed by him was sent to the court. The copy of the award which was sent to the Government would appear to have been insufficiently stamped. If that had been produced in court, it could have been validated on payment of the deficiency and penalty under Section 35 of the Indian Stamp Act, 1899.

But the Government has failed to produce the same. The copy of the award which was sent to the respondents is said to have been seized by the police along with other papers and is not now available. When the third copy was received in court, the respondents paid the requisite stamp duty under Section 35 of the Stamp Act and had it validated. Now the contention of the appellant is that the instrument actually before the court is, what it purports to be, 'a certified copy', and that under Section 35 of the Stamp Act there can be validation only of the original, when it is unstamped or insufficiently stamped, that the document in court which is a copy cannot be validated and 'acted upon' and that in consequence no decree could be passed thereon. The law is no doubt well settled that the copy of an instrument cannot be validated. That was held in *Rajah of Bobbili v. Inuganti China Sitarasami Garu* where it was observed:

'The provisions of this section (Section 35) which allow a document to be admitted in evidence on payment of penalty, have no application when the original document, which was unstamped or was insufficiently stamped, has not been produced; and, accordingly, secondary evidence of its contents cannot be given. To hold otherwise would be to add to the Act a provision which it does not contain. Payment of penalty will not render secondary evidence admissible, for under the stamp law penalty is leviable only on an unstamped or insufficiently stamped document actually produced in court and that law does not provide for the levy of any penalty on lost documents. '
(emphasis supplied)

16. The Supreme Court in the aforementioned case held that a copy or secondary evidence of the original document is not an "instrument" within the meaning of the Act. Copy of a document which is unstamped or not duly stamped cannot be validated by payment of stamp duty and penalty.

17. The Supreme Court again examined Sections 33 and 35 along with other provisions of the Act in the case of ***Jupudi Kesava Rao***

versus Pulavarthi Venkata Subbarao (1971) 1 SCC 545. In the said case, one of the parties wanted to lead oral evidence by way of secondary evidence, to prove terms of a lease which was in writing and duly executed, but was not duly stamped. The contention was rejected after making reference to Indian Evidence Act, 1872 and the provisions of the Act. It was observed that the Indian Evidence Act, 1872 does not purport to deal with the admissibility of documents, which are required to be stamped under the Act. It was held:

"13. The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (a) is only applicable when the original instrument is actually before the Court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfil the requirements of the proviso which enjoins upon the authority to receive nothing in evidence .except the instrument itself. Section 25 is not concerned with any copy of an instrument and a party can only be allowed to rely on a document which is an instrument for the purpose of Section 35. "Instrument" is defined in Section 2(14) as including every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.

14. If Section 35 only deals with original instruments and not copies Section 36 cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit. The words “an instrument” in Section 36 must have the same meaning as that in Section 35. The legislature only relented from the strict provisions of Section 35 in cases where the original instrument was admitted in evidence without objection at the initial stage of a suit or proceeding. In other words, although the objection is based on the insufficiency of the stamp affixed to the document, a party who has a right to object to the reception of it must do so when the document is first tendered. Once the time for raising objection to the admission of the documentary evidence is passed, no objection based on the same ground can be raised at a later stage. But this in no way extends the applicability of Section 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped.” (emphasis supplied)

18. The Supreme Court in the said case referred to the earlier judgments of the Privy Council and High Courts wherein, barring some exceptions, consistently the view taken was that a copy of an original document is not an “instrument” and cannot be validated by payment of unpaid/insufficient stamp duty and penalty. A reading of the aforesaid passages from the decision of the Supreme Court predicates that the term “instrument” as defined in Section 2(14) of the Act refers to the original instrument and not a copy or photocopy of the same. It is only on production of the original instrument that deficiency in the stamp duty/penalty can be paid to validate the same.

19. In ***Hari Om Aggarwal versus Prakash Chand Sharma***, (2007) 8 SCC 514, eviction proceedings were initiated by the

landlord against the tenant who had relied upon copy of the agreement and wanted to produce the same as a secondary evidence. Copy of the agreement carried a notarized stamp of Rs.4/- and was therefore a stamp of improper description. Reference was made to the judgment in **Karamchand Thapar** (supra) and **Jupudy Kesava Rao** (supra) and it was observed:

“10. It is clear from the decisions of this Court and a plain reading of Sections 33, 35 and 2(14) of the Act that an instrument which is not duly stamped can be impounded and when the required fee and penalty has been paid for such instrument it can be taken in evidence under Section 35 of the Stamp Act. Sections 33 or 35 are not concerned with any copy of the instrument and party can only be allowed to rely on the document which is an instrument within the meaning of Section 2(14). There is no scope for the inclusion of the copy of the document for the purposes of the Stamp Act. Law is now no doubt well settled that copy of the instrument cannot be validated by impounding and this cannot be admitted as secondary evidence under the Stamp Act, 1899.” (emphasis supplied)

20. Thereafter, the Supreme Court examined the amendments made to the Act by the Stamp (Madhya Pradesh) Act, 1990. Reference was made to Section 48-B introduced in the Act by the aforesaid Amendment Act. The said Section which is applicable to the State of Madhya Pradesh reads as under:-

“48-B. Original instrument to be produced before the Collector in case of deficiency.—Where the deficiency of stamp duty is noticed from a copy of any instrument, the Collector may, by order, require the production of original instrument from a person in possession or in custody of the original instrument for the purpose of satisfying himself as to the adequacy of amount of duty paid thereon. If the original instrument is not produced before him within the period specified in the order, it shall be

presumed that the original document is not duly stamped and the Collector may proceed in the manner provided in this Chapter:

Provided that no action under this section shall be taken after a period of five years from the date of execution of such instrument.”

21. The Supreme Court on reading of Section 48-B observed:

“19. On a plain reading of Section 48-B, we do not find that the submission of the learned counsel for the appellant that by virtue of this provision the Collector has been authorised to impound even copy of the instrument, is correct. Under this section where the deficiency of stamp duty is noticed from the copy of any instrument, the Collector may call for the original document for inspection, and on failure to produce the original instrument could presume that proper stamp duty was not paid on the original instrument and, thus, recover the same from the person concerned. Section 48-B does not relate to the instrument i.e. the original document to be presented before any person who is authorised to receive the document in evidence to be impounded on inadequacy of stamp duty found. The section uses the phraseology “where the deficiency of stamp duty is noticed from a copy of any instrument”. Therefore, when the deficiency of stamp duty from a copy of the instrument is noticed by the Collector, the Collector is authorised to act under this section. On deficiency of stamp duty being noticed from the copy of the instrument, the Collector would order production of original instrument from a person in possession or in custody of the original instrument. Production is required by the Collector for the purpose of satisfying himself whether adequate stamp duty had been paid on the original instrument or not. In the notice given to person in possession or in custody of original instrument, the Collector shall provide for time within which the original document is required to be produced before him. If, in spite of the notice, the original is not produced before the Collector, the Collector would draw a presumption that original document is not duly stamped and thereafter may proceed in the manner provided in Chapter IV. By virtue of the proviso, the step for recovery of adequate stamp duty on the original instrument on insufficiency of the stamp duty paid being noticed from the copy of the instrument, can only be taken within five years from the date of execution of such instrument. The words “the Collector may proceed in the manner provided in this Chapter” have reference to Section 48 of the Act. Under this section, all duties, penalties and other sums required to be

paid under Chapter IV, which includes stamp duty, would be recovered by the Collector by distress and sale of the movable property of the person who has been called upon to pay the adequate stamp duty or he can implement the method of recovery of arrears of land revenue for the dues of stamp duty. By virtue of proviso to Section 48-B, the Collector's power to adjudicate upon the adequacy of stamp duty on the original instrument on the basis of copy of the instrument is restricted to the period of five years from the date of execution of the original instrument. This section only authorises the Collector to recover the adequate stamp duty which has been avoided at the time of execution of the original instrument. This section does not authorise the Collector to impound the copy of the instrument." (emphasis supplied)

22. Section 48-B which is applicable to the State of Madhya Pradesh is not applicable in the National Capital Territory of Delhi. Similar or identical provisions, under which action can be taken by the authorities on production of a copy or secondary evidence exist in some other States, in view of the State specific amendments e.g., Indian Stamp (Orissa Second Amendment) Act, 1986, Tamil Nadu by Pondicherry Act XXI of 1970, Rajasthan Act No.17 of 1989 and Uttar Pradesh Act No.22 of 1998 and West Bengal Act No.17 of 1990. However, in the National Capital Territory of Delhi no such power vests with the authorities to compel production of an original document from a party to impound the same or levy penalty or for direction to pay proper stamp duty/penalty on failure to produce the original. In several amendments, limitation period has been prescribed when an order for production of the original document or for imposition of penalty on basis of the copy can be passed.

23. State of Andhra Pradesh had made amendments in the Act, which included power to conduct search and seizure of invalidly

stamped documents. These amendments made by the Andhra Pradesh Act, 1976 and the Rules became subject matter of challenge before the High Court. Some provisions were struck down. The State of Andhra Pradesh thereupon filed an appeal before the Supreme Court, which was decided by the judgment reported in ***District Registrar and Collector, Hyderabad and another versus Canara Bank and others*, (2005) 1 SCC 496**. The Supreme Court noticed that the Act is a fiscal legislation and imposed burden on the public and therefore is to be strictly construed. There is no scope for equity and judiciousness, if the language is clear and unambiguous. Further, benefit of ambiguity and conflict of opinions goes to the subject. Referring to the provisions of the Act, it was observed:

“12. The provisions of Section 29 providing for the persons by whom duties are payable have been left untouched. So is with Section 31 dealing with “adjudication as to proper stamp” which confers power on the Collector to adjudicate upon the duty with which a document shall be chargeable, though such document may or may not have been executed. The scheme of Section 31 involves an element of voluntariness. The person seeking adjudication must have brought the document to the Collector and also applied for such adjudication. The document cannot be compelled to be brought before him by the Collector. Section 33 confers power of impounding a document not duly stamped subject to the document being produced before an authority competent to receive evidence or a person in charge of a public office. It is necessary that the document must have been produced or come before such authority or person in charge in performance of its functions. The document should have been voluntarily produced. At the same time, Section 36 imposes an embargo on the power to impound vesting in the authority competent to

receive evidence, by providing that it cannot question the admission of document in evidence once it has been admitted. None of these provisions have been amended by the State of Andhra Pradesh.

13. In *Surajmull Nagoremull v. Triton Insurance Co. Ltd.* Their Lordships of the Privy Council made it clear that the provisions of the Stamp Act cannot be held to have been framed solely for the protection of revenue and for the purpose of being enforced solely at the instance of the revenue officials."

24. The Supreme Court in the aforesaid paragraphs has emphasized that while exercising the power of impounding under Section 33 of the Act, the authority competent and entitled to receive evidence or a person in charge of public office cannot compel a person to produce the "instrument". The "instrument" has to be produced voluntarily. The Supreme Court approved of two judgments of the Lahore High Court in ***Jai Devi versus Gokal Chand*** (1906) 7 Punjab Law Reporter 428(FB) and ***Munshi Ram versus Harnam Singh*** AIR 1934 Lah. 637. In the case of ***Jai Devi*** (supra) it was held that a document not duly stamped but filed with the plaint, which was dismissed for non prosecution, cannot be subsequently impounded as it was not produced in the court in evidence. It was further observed that the Court cannot call for production of the original document and impound the same. In the case of ***Munshi Ram*** (supra) the suit was compromised at the first hearing and the original bahi was not put in evidence. It was held that the bahi was not liable to be impounded. Reference was also made with approval to the judgment ***L. Puran Chand versus***

Emperor AIR 1942 Lah. 257. It was observed that when an unduly stamped document was directed to be returned as not proved, the same cannot be impounded even if the document had not been physically returned.

25. The Supreme Court in the ***District Collector and Registrar (Supra)*** made reference to Section 62 of the Act which deals with punishment/penal offences in cases of unstamped or under-stamped documents. It was observed:

“15. Though an instrument not duly stamped may attract criminal prosecution under Section 62 of the Act but Parliament and the legislature have both treated it to be a minor offence punishable with fine only and not cognizable. Here again it is well settled that such offence is liable to be condoned by payment of duty and penalty on the document and no prosecution can be launched except in the case of a criminal intention to evade the stamp law or in case of a fraud and that too after giving the person liable to be proceeded against, an opportunity of being heard.”

26. In the subsequent portion of the same judgment provisions of search and seizure were held violating right to privacy. It was observed;

“58. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence and it cannot be acted upon by that person or by any public officer. This is the penalty which is imposed by law on the person who may seek to claim any benefit under an instrument if it is not duly stamped. Once detected, the authority competent to impound the document can recover not only duty but also penalty, which provision protects the interest of revenue. In the event of

there being criminal intention or fraud, the persons responsible may be liable to be prosecuted. The availability of these provisions, in our opinion, adequately protects the interest of revenue. Unbridled power available to be exercised by any person whom the Collector may think proper to authorise, without laying down any guidelines as to the persons who may be authorised and without recording the availability of grounds which would give rise to the belief, on the existence whereof only, the power may be exercised, deprives the provision of the quality of reasonableness. Possessing a document not duly stamped is not by itself any offence. Under the garb of the power conferred by Section 73 the person authorised may go on a rampage searching house after house i.e. residences of the persons or the places used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73, the provision impugned herein, the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved and, therefore, a reasonable nexus between stringency of the provision and the purpose sought to be achieved ceases to exist."(Emphasis supplied).

27. In the light of the aforesaid judgments it is clear that the Sub Divisional Magistrate who was also the Collector of Stamps could not have directed production of the original agreement dated 23rd December, 1987 or impounded the photocopy and passed an order directing the petitioners to pay the deficient stamp duty and penalty. Photocopy of the agreement dated 23rd December, 1987 is not an "instrument" as defined in Section 2(14) of the Act. The impugned Order dated 29th November, 2004 therefore cannot be sustained to the extent that it impounds the photocopy of the agreement dated 23rd December, 1987 and directs payment of

deficient stamp duty and imposes penalty under Sections 33 and 35 of the Act. It may be appropriate to refer to the decision of three Judges' Bench of the Delhi High Court in **Dayal Singh versus Collector of Stamps** AIR 1972 Del. 131, wherein it was observed:-

"10. Section 2(6) of the Stamp Act defines "chargeable" to mean "chargeable under this Act". Section 2(11) of the Stamp Act defines "duly stamped" to mean "that such stamp has been affixed or used in accordance with the law for the time being in force in India". Under Section 33 it is only when an instrument is "chargeable with duty" and it "not duly stamped" that it can be impounded. Can the sale deed in question be impounded under Section 33 because the transfer duty is either not paid or is insufficiently paid? The answer must be "No". For, the meaning of the expression "any instrument chargeable" or the expression "instrument not duly stamped" used in Section 33 of the Stamp Act is to be understood in the light of the definitions in Sections 2(6) and 2(11). "Chargeable" means chargeable under the Stamp Act only and not under any other Act. The Stamp Act authorizes the levy of stamp duty only and not of the duty on transfer of property. The latter is authorized by the Corporation Act alone. The sale deed in question is not, therefore, "chargeable" to transfer duty under the Stamp Act at all. It is not, therefore, an instrument chargeable to duty within the meaning of Section 33 of the Stamp Act."

28. Thus the impugned order imposing penalty and directing payment of stamp duty on basis of photocopy cannot be sustained. In **Dayal Singh's** case (supra) reference was also made to Delhi Municipal Corporation Act, 1957 and it was observed that the surcharge payable under the said Act cannot be made subject matter of impounding under Sections 33 and penalty under 35 of the Act.

29. In view of the above, direction to pay transfer fee is liable to be set aside and quashed. It is directed accordingly.

30. The only question left for determination is relating to Sections 62 and 64 of the Act which deal with penal action in cases of under-stamped or unstamped documents. The said Sections read:-

“62. Penalty for executing, etc., instrument not duly stamped.--- (1) Any person –

(a) drawing, making, issuing, endorsing or transferring, or signing otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of or in any manner negotiating, any bill of exchange payable otherwise than on demand or promissory note without the same being duly stamped; or

(b) executing or signing otherwise than as a witness any other instrument chargeable with duty without the same being duly stamped; or

(c) voting or attempting to vote under any proxy not duly stamped, shall for every such offence be punishable with fine which may extend to five hundred rupees;

Provided that, when any penalty has been paid in respect of any instrument under section 35, section 40 or section 61, the amount of such penalty shall be allowed in reduction of the fine (if any) subsequently imposed under this section in respect of the same instrument upon the person who paid such penalty.

(2) If a share warrant is issued without being duly stamped, the company issuing the same, and also every person who, at the time when it is issued, is the managing director or secretary or other principal officer of the company, shall be punishable with fine which may extend to five hundred rupees.”

“64. Penalty for omission to comply with provisions of section 27.- Any person who, with intent to defraud the Government,-

(a)executes any instrument in which all the facts and circumstances required by section 27 to be set forth in such instrument are not fully and truly set forth; or

(b)being employed or concerned in or about the preparation of any instruments, neglects or omits fully and truly to set forth therein all such facts and circumstances; or

(c)does any other act calculated to deprive the Government of any duty or penalty under this Act,

shall be punishable with fine which may extend to five thousand rupees.”

31. Section 62 of the Act does not require criminal intention or malafides to defraud the Government. Intention to defraud is necessary under Section 64 of the Act. Prosecution under the said Sections can be initiated on sanction of a Collector, an officer authorized by the State Government or the Collector (See, Section 70 of the Act). Moreover, the Chief Controlling Revenue Authority or an officer generally or specifically authorized can compound or stay such prosecution. The impugned Order dated 29th November, 2004 does not deal with the question of mental intention to defraud on the part of the petitioners. It will be open to the competent authority to examine whether, prosecution under Sections 62 and 64 of the Act should be sanctioned against the petitioners. If and when prosecution is lodged, the petitioners will be entitled to challenge and question the sanction, if so advised in accordance with law. However, it may be noticed that for the purpose of Sections 62 and 64 of the Act, production of original document is not necessary. This Court is not expressing any opinion on the

question whether the agreement dated 23rd December, 1987 is validly stamped or not. The said question is left open to be decided in case prosecution is initiated and the petitioners are summoned.

32. The respondents have raised a preliminary objection on the question of maintainability of the petition on account of an alternative remedy in form of an appeal against an order passed under Sections 33 and 35 of the Act. Power to issue prerogative Writs under Article 226 of the Constitution of India is plenary in nature. High Courts, however, show restraint and exercise their discretion and not entertain writ petitions when an effective and equally efficacious remedy is available. However, there are exceptions when Writ Petitions under Article 226 are entertained. The exceptions are: (i) when a writ petition is filed for enforcement of a Fundamental Right, (ii) when an Order violates principles of natural justice and (iii) when an order or proceedings are wholly without jurisdiction or the vires of an Act is challenged (See, ***Whirlpool Corporation versus Registrar of Trade Mark and another*** (1998) 8 SCC 1). In the present case, there has been violation of principles of natural justice as the objection of Dyer's Stone on the question whether a photocopy of an agreement is an instrument that can be impounded and subjected to penalty under the Act has been ignored/not considered. The question relates to jurisdiction as the respondents have acted on a photocopy of the document which is not an "instrument". In these circumstances, the objection to maintainability of the Writ Petition is rejected.

33. In view of the aforesaid discussion the Writ Petitions are partly allowed quashing the Order under Sections 33 and 35 of the Act directing the petitioners to pay the alleged deficient stamp duty and penalty. The question of violation of Sections 62 and 64 of the Act are left open to be decided in case the petitioners challenge prosecution, if and when, it is filed upon grant of sanction under Section 70 of the Act.

Writ Petitions are accordingly disposed of. In the facts and circumstances of the case, there will be no order as to costs.

(SANJIV KHANNA)
JUDGE

AUGUST 27, 2009.
P