

CASE NO.:
Appeal (civil) 4696 of 2007

PETITIONER:
Hariom Agrawal

RESPONDENT:
Prakash Chand Malviya

DATE OF JUDGMENT: 08/10/2007

BENCH:
B.N. AGRAWAL, P.P. NAOLEKAR & P. SATHASIVAM

JUDGMENT:
J U D G M E N T
(arising out of Special Leave Petition (Civil) No.12573 of 2006)

P.P. NAOLEKAR, J.:

1. Leave granted.

2. The facts necessary for deciding the question involved in the case are that one Maganlal Jain was the original tenant of Prakash Chand Malviya, the respondent-landlord. Maganlal Jain had given the shop to the appellant for carrying out the business. On a dispute being arisen between the respondent-landlord, the original tenant Maganlal Jain and the appellant herein, an agreement was executed on 28.3.1988 by the respondent (landlord) and the appellant (subsequent tenant), whereby the landlord tenanted the shop to the appellant on payment of an advance amount of Rs.4,75,000/- which was received by the landlord in cash in front of the witnesses. The agreement further provided that in case the landlord requires eviction of the tenant from the shop he will have to give notice of 6 months to the tenant and will also refund the payment of Rs.4,75,000/- to the tenant. On the other hand, if the tenant wants to vacate the shop he will have to give prior notice of 6 months to the landlord and the landlord will pay back Rs.4,75,000/- to the tenant. This document was affixed with a notarial stamp of Rs.4/-. Under the Indian Stamp Act, 1899 (for short 'the Act'), agreement of this nature requires affixture of a stamp of Re.1/- under Schedule I, Item 42 of the said Act.

3. On 12.5.2003 a suit for eviction was filed by the respondent-landlord before the Civil Judge, Bhopal under Section 12(1)(f) of the Madhya Pradesh Accommodation Control Act, stating the bonafide need for the use of the accommodation by his elder son. It was the case of the appellant-tenant that the original copy of the agreement which was with him was stolen and thus he was unable to produce the original document dated 28.3.1988, but was in possession of a photostat copy of the agreement and made a prayer for receipt of the photocopy of the agreement as secondary evidence under Section 63 of the Indian Evidence Act, 1872. The trial court allowed the application for admission of the photocopy of the document and admitted it as secondary evidence under Section 63 of the Evidence Act.

4. On being aggrieved by the order of the trial court, the respondent-landlord filed a writ petition before the High Court. The High Court set aside the order of the trial court and

remitted the matter back to decide the question as to whether a photocopy of an improperly stamped original document can be received in secondary evidence. After hearing the parties, the trial court by its order dated 9.8.2005 ordered that the document be impounded, it being insufficiently stamped; the document was sent to the Collector of Stamps for affixing appropriate stamp duty and thereafter for sending the document back to the court. This order was challenged by the respondent in a review petition which was dismissed by the trial court. Thereafter, a writ petition was filed before the High Court. The High Court by its judgment dated 3.5.2006 held that the impugned document which is a photocopy of the agreement, original of which is lost, cannot be admitted in evidence; and that such a document can neither be impounded nor can be accepted in secondary evidence.

5. It is an admitted fact that the photostat copy which is sought to be produced as secondary evidence does not show that on the original agreement proper stamp duty was paid. The photostat copy of the agreement shows that the original agreement carried only a notarial stamp of Rs.4/-. Thus the original instrument bears the stamp of sufficient amount but of improper description. From the facts of the case, the issue which requires consideration is: Whether the court can impound the photocopy of the instrument (document) of improper description exercising its power under the provisions of the Indian Stamp Act, 1899?. For answering this question, Sections 33 and 35 of the Act might render some help. Relevant extracts of the Sections are :

\02333. Examination and impounding of instruments \026 (1) Every person 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:

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\02335. Instruments not duly stamped inadmissible in evidence, etc. - No instrument chargeable with duty shall be admitted in evidence for any person having by law or consent of parties 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:

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6. Section 33 gives power to the authority to check whether the instrument has been duly stamped and in case it is not duly stamped, to take steps to impound the same by

proper stamp duty on the said document. This power can be exercised in regard to an 'instrument'. Section 2(14) of the Act defines 'instrument' as:

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

7. The instrument as per definition under Section 2(14) has a reference to the original instrument. In *State of Bihar v. M/s. Karam Chand Thapar & Brothers Ltd.*, AIR 1962 SC 110, this Court in paragraph 6 of the judgment held as under :-

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 S.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 S.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 S.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 Sitaramasami Garu*, 26 Ind App 262, 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\024

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This Court had an occasion again to consider the scope and ambit of Sections 33(1), 35 and 36 of the Act and Section 63 of the Indian Evidence Act in *Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao and others* AIR 1971 SC 1070 and held that :-

\02313. 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 35 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\022 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 Sec.36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped.\024

8. 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 Indian 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 Indian Stamp Act, 1899.

9. The learned counsel for the appellant submitted that the High Court was guided by the decisions rendered by this Court while deciding the question involved in the case whether original document was unstamped or not properly stamped and not in regard to a document which was although stamped but was improperly stamped. As per the learned counsel, the case in hand shall be governed by Section 37 of the Act and not by Section 33 read with Section 35 of the Act. The learned counsel further urged that the High Court has committed an error in overlooking Section 48-B inserted by Indian Stamp (Madhya Pradesh Amendment) Act, 1990 (No. 24 of 1990], which received assent of the President and was published in the Madhya Pradesh Gazette (Extraordinary) dated 27.11.1990, applicable in the State of Madhya Pradesh whereby the Collector is authorized even to impound copy of the instrument.

10. Section 33 refers to the power of the authority to impound the instrument not duly stamped, and by virtue of Section 35 any document which is not duly stamped shall not be admitted in evidence.

11. Section 37 of the Act reads as under:

\02337. Admission of improperly stamped instruments.- The State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution. \023

Under this provision, the State Government is authorized to make rules providing therein to impound any instrument which bears a stamp of sufficient amount but of improper description and on payment of chargeable duty to certify it to be duly stamped and to treat such document as duly stamped as on the date of its execution.

12. In the State of Madhya Pradesh, Rule 19 of the Madhya Pradesh Stamp Rules, 1942 permits payment of duty

on the instrument which carries stamp of proper amount but of improper description. The said Rule reads as under:

\023When an instrument bears a stamp of proper amount but of improper description, the Collector may, on payment of the duty with which the instrument is chargeable, certify by endorsement that it is duly stamped:

Provided that if application is made within three months of the execution of the instrument, and Collector is satisfied that the improper description of stamp was used solely on account of the difficulty of inconvenience of procuring one of the proper description, he may remit the further payment of duty prescribed in this rule.\024

13. Section 37 of the Act would be attracted where although the instrument bears a stamp of sufficient amount but such stamp is of improper description, as in the present case where the proper stamp duty of Re.1/- under the Act has not been paid but a notarized stamp of Rs.4/- was affixed on the document. The sufficient amount of the stamp duty has been paid but the duty paid by means of affixture of notarized stamp is of improper description. By virtue of Rule 19 of the Madhya Pradesh Stamp Rules, 1942, the Collector of Stamp is authorized to receive the proper stamp duty on an instrument which bears a stamp of proper amount but of improper description, and on payment of the adequate duty chargeable under the Act he would certify by endorsement on the instrument that the instrument is duly stamped. Under the proviso to the Rule, the Collector may pardon the further payment of duty prescribed in this Rule provided the person holding the original instrument moves the Collector within three months of the execution of the instrument for certification by endorsement and the Collector is satisfied that the stamp of improper description was used solely on the account of the difficulty or inconvenience of the holder of the instrument to procure the adequate stamp duty required to be paid on the instrument. But the power under Section 37 and Rule 19, even after framing the rules by the State Government, could only be exercised for a document which is an instrument as described under Section 2(14). By various authorities of this Court, an instrument is held to be an original instrument and does not include a copy thereof. Therefore, Section 37 and Rule 19 would not be applicable where a copy of the document is sought to be produced for impounding or for admission as evidence in a case.

14. Section 48-B is a provision applicable in the State of Madhya Pradesh which was inserted by Indian Stamp (M.P. Amendment) Act, 1990 (No. 24 of 1990] in Chapter IV under heading \023Instrument not duly stamped\024 of the Act. This Section reads as under:

\02348-B. Original instrument to be produced before the Collector in case of deficiency. \026 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.\024

15. 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 authorized 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 authorized to receive the document in evidence to be impounded on inadequacy of stamp duty found. The Section uses the phraseology \023where the deficiency of stamp duty is noticed from a copy of any instrument\024. 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 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 \023the Collector may proceed in the manner provided in this Chapter\024 has 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\022s 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 authorizes 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 authorize the Collector to impound the copy of the instrument.

16. For the reasons stated above, the appeal fails and is dismissed.

17. There shall be no order as to costs.