

CASE DETAILS

VIJAY

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 4910 of 2023)

NOVEMBER 29, 2023

[ABHAY S. OKA AND SANJAY KAROL, JJ.]

HEADNOTES

**Issue for consideration:** Whether the bar of admissibility created by s.35, Stamp Act 1899 applies to the agreement(s) to sell dtd. 04.02.1988 executed by the parties; can a copy of a document be adduced as secondary evidence when the original instrument is not in possession of the party; and whether, in the facts of the present case, would the decision of this Court in Jupadi Kesava Rao v. Pulavarthi Venkata Subha Rao be binding as held by both the Courts below?

**Stamp Act, 1899 – s.35 – Applicability – Article 23 of Schedule 1A of the Stamp Act – “conveyance” – Stamp (Madhya Pradesh Amendment) Act, 1989 – Stamp (Madhya Pradesh Second Amendment) Act, 1990 – Explanation added in Article 23 – Agreement to sell handing over possession prior to the amendment brought in the year 1989 or 1990, if a conveyance so as to be covered u/Article 23 as existing on the date of execution of the agreement(s) – Further, the Explanation added vide M.P. Act 22 of 1990, if can be read retrospectively so as to apply to an agreement to sell executed on 04.02.1988:**

**Held:** The causal amendment was brought in only in 1990, i.e., prior to the transaction in question – The amendments that create rights and obligations are generally prospective in nature – Clarification or Explanation must not have the effect of imposing an unanticipated duty or depriving a party of an anticipated benefit – The Explanation inserted in Article 23 of Schedule I-A contained in the Act creates a new obligation for the party and, therefore, cannot be given retrospective

application – Thus, it will not affect the agreement(s) executed prior to such amendments – Further, to impose the bar of admissibility provided u/s.35, the twin conditions required to be fulfilled are instrument must be chargeable with duty and it is not duly stamped – If the documents sought to be admitted are not chargeable with duty, s.35 has no application – Thus, in the present case, since the document was dtd.04.02.1988, the instrument was not chargeable with duty – Thus, when such document(s) are not required to be stamped, then no bar could be imposed due to it being not duly stamped – Further, in the present case, the exact status of the documents in question could not be ascertained as one party claimed that the other had the said documents and the other party allegedly stated that it was with her counsel – However, as per records, the said documents could not be recovered from the said counsel – In such a situation, therefore, the presentation of secondary evidence could be allowed, if other requirements are complied with – Plaintiff's prayer for leading the secondary evidence ought to be allowed in so far as the documents sought to be introduced as secondary evidence be taken by the concerned Court and exhibited, with its admissibility being decided independently, in accordance with law under the Evidence Act – Also, Jupadi Kesava Rao is distinguishable on facts – Impugned order of the High Court set aside – Order passed by the Additional District Judge allowing the application of the Plaintiff to file a copy of the agreement to sell, as secondary evidence, restored – Constitution of India – Entry 44 of List III – Entry 63 of List II – Evidence Act, 1872 – ss.61, 63, 65(a) – Interpretation of Statutes. [Paras 25, 26, 36, 40, 44]

**Stamp Act, 1899 – s.35 – Evidence Act, 1872 – ss.61, 63, 65 – Secondary evidence in proof of its contents forbidden – Plaintiff and Defendant entered into an agreement to sell – Defendant denied the existence of the agreement – Plaintiff filed suit for specific performance of contract, moved an application to file a copy of the agreement to sell, among other documents, as secondary evidence – Plaintiff claimed that after executing the document, Defendant kept the original copy, and a photocopy of the same was given to Plaintiff – However, as per the averments made in the application, the Defendant had stated in an affidavit that the documents were not with her but with her counsel – Trial Court and the High Court relied on Jupadi Kesava Rao to hold**

**that the Plaintiffs cannot lead secondary evidence as the document sought to be produced needed to be duly stamped:**

**Held:** s.35 of the Stamp Act forbids the letting of secondary evidence in proof of its contents – The section excludes both the original instrument and secondary evidence of its contents if it needs to be stamped or sufficiently stamped – This bar as to the admissibility of documents is absolute – Where a document cannot be received in evidence on the ground that it is not duly stamped, the secondary evidence thereof is equally inadmissible in evidence – Jupadi Kesava Rao is distinguishable on facts as the document which the Court was concerned with therein was one which was chargeable with duty, but in the present case, such is not the case as the document to be produced is not one which was chargeable with duty at the time of its execution i.e., 04.02.1988 – This being a material difference, the principle of law held in this case, correct as it may be, shall not apply to the instant case. [Paras 36, 40]

**Stamp Act, 1899 – ss.35, 2(6):**

**Held:** s.35 prohibits admission in evidence of instruments that are chargeable with duty unless they are “duly stamped – The word ‘chargeable,’ as defined u/s.2(6), means chargeable under the Act in force at the date of the execution of the instrument – The crucial date which determines the law in force is the date of execution of the instrument, and the stamp duty is to be charged with reference to the date of execution – For stamp duty, the relevant date is the date of execution and not the date of adjudication or the date of presentation and registration of the document. [Paras 9, 11]

**Interpretation of Statutes – Role of a clarification/explanation to a statute and how the same is identified and distinguished from a substantive amendment – Discussed.**

**Stamp/Stamp Duty – Question as to whether the document is liable to stamp duty and penalty, to be decided at the threshold:**

**Held:** It is a settled position of law that where the question is whether the document is liable to stamp duty and penalty, it has to be decided at the threshold even before marking a document – In the present case, the document in question was not liable to stamp duty – Deeds and Documents. [Para 41]

**Evidence Act, 1872 – ss.61, 63, 65 – Principles relevant for examining the admissibility of secondary evidence, deduced. [Para 33]**

**Words and Phrases – Primary and Secondary Evidence – Discussed – Evidence Act, 1872 – ss.61, 63, 65. [Para 31]**

#### **LIST OF CITATIONS AND OTHER REFERENCES**

*CIT v. Vatika Township (P) Ltd.* [2014] 12 SCR 1037 : (2015) 1 SCC 1; *Cement Corp. of India Ltd. v. Purya* (2004) 8 SCC 270 – followed.

*Jupadi Kesava Rao v. Pulavarthi Venkata Subha Rao* [1971] 3 SCR 590 : (1971) 1 SCC 545 – distinguished.

*Virtual Soft Systems Ltd. vs. Commissioner of Income Tax, Delhi*, [2007] 2 SCR 289 : (2007) 9 SCC 665; *Govind Das v. ITO* [1976] 3 SCR 44 : (1976) 1 SCC 906; *Neeraj Dutta v. State (NCT of Delhi)* (2023) 4 SCC 731; *Yashoda v. K. Shobha Rani* [2007] 5 SCR 367 : (2007) 5 SCC 730; *M. Chandra v. M. Thangamuthu* [2010] 11 SCR 38 : (2010) 9 SCC 712; *Surendra Krishna Roy v. Muhammad Syed Ali Matwali Mirza* 1935 SCC OnLine PC 56; *H. Siddiqui v. A. Ramalingam* [2011] 5 SCR 587 : (2011) 4 SCC 240 – relied on.

*Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana* [2011] 11 SCR 848 : (2012) 1 SCC 656; *G.T. Girish v. Y. Subba Raju* [2022] 12 SCC 321 : (2022) 12 SCC 321; *Ghanshyam Sarda v. J.K. Jute Mills Co. Ltd* (2017) 1 SCC 599; *Munishamappa v. M. Rama Reddy & Ors.*, Civil Appeal No. 10327 of 2011; *Hariom Agrawal v. Prakash Chand Malviya* [2007] 10 SCR 772 : (2007) 8 SCC 514 – referred to.

#### **OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES**

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4910 of 2023.

From the Judgment and Order dated 30.11.2009 of the High Court of M.P. Principal Seat at Jabalpur in WP No.741 of 2004.

#### **Appearances:**

Dr. Menaka Guruswamy, Sr. Adv., Gautam Awasthi, Utkarsh Pratap, Lavkesh Bhamhani, Harshwardhan Thakur, Advs. for the Appellant.

Akshay Amritanshu, Pranay Ranjan, Arkaj Kumar, Ms. Khushboo Kapur, Pratyush Srivastava, Arvind Kumar Sharma, Sunny Choudhary, Ms. Archana Sharma, Advs. for the Respondents.

**JUDGMENT / ORDER OF THE SUPREME COURT**

**JUDGMENT**

**SANJAY KAROL J.**

1. The issues that arise for consideration of this Court in the present appeal are:

- 1.1 Whether the bar of admissibility created by Section 35 of the Indian Stamp Act 1899<sup>1</sup> applies to the agreement(s) to sell dated 04.02.1988 executed by the parties?
- 1.2 Can a copy of a document be adduced as secondary evidence when the original instrument is not in possession of the party?
- 1.3 Whether, in the facts of the present case, would the decision of this Court in **Jupadi Kesava Rao v. Pulavarthi Venkata Subha Rao**<sup>2</sup> be binding as held by both the Courts below?

**FACTUAL MATRIX**

2. Plaintiff and Defendant entered into an agreement to sell on 04.02.1998, and pursuant to that, Plaintiff was allegedly put in possession by Defendant. When Defendant denied the existence of such an agreement, Plaintiff filed a suit for specific performance of contract. In the said suit, Plaintiff moved an application to file a copy of the agreement to sell, among other documents, as secondary evidence.

3. Initially, the said application was allowed by the 4<sup>th</sup> Additional District Judge vide order dated 17.07.2001. But when Defendant sought review of this order, the Court vide its order dated 16.12.2003 reviewed it and held that secondary evidence of an agreement to sell could not be allowed as it was not executed on a proper stamp, thus barred under section

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1 Hereinafter referred to as 'Stamp Act'

2 (1971) 1 SCC 545 (2-Judge Bench)

35 of the Stamp Act. While holding so, it relied on the decision of this Court in **Jupadi Kesava Rao (supra)**.

4. Subsequently, the Plaintiff filed a writ petition before the High Court of Madhya Pradesh challenging the review order and the constitutional validity of Section 35 of the Stamp Act. The High Court, vide the impugned order dated 30.11.2009 in W.P. No. 741/2004, upheld the validity of the said section and the order of the Review Court.

5. The present appeal is preferred against this order of the High Court.

6. Learned Senior Counsel Dr. Menaka Guruswamy, for the Appellant-Plaintiff, submits that the prohibition of Section 35 of the Stamp Act is not applicable as there was no requirement for either party to have paid stamp duty at the time of execution (before the 1989 Amendment) of the agreement to sell. Thus, the Plaintiff ought to have been permitted to lead a copy of the agreement to sell as secondary evidence under Section 65 of the Evidence Act.

7. Respondent no.2/Defendant, in its counter affidavit, has stated that a copy of an original document that is unstamped or deficiently stamped can neither be impounded nor validated or admitted as secondary evidence. Once the original document is inadmissible under the Stamp Act, the photocopy or any other copy cannot be allowed as secondary evidence.

### **ISSUE 1**

8. To adjudicate this issue, it is pertinent to reproduce Section 35 of the Stamp Act:

“Section 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 instruments are duly stamped: Provided that-

(a) any such instrument [shall] 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;

xxxx”

9. It is evident from a bare perusal of the section that it prohibits admission in evidence of instruments that are chargeable with duty unless they are “duly stamped.” Duly stamped as defined under Section 2(11) of the Stamp Act means that the instrument bears a stamp and that such stamp has been affixed or used in accordance with law for the time being in force in India.

10. Further, it is required to consider when the document becomes chargeable with duty—during its execution or when it is produced before the Court.

11. The word ‘chargeable,’ as defined under Section 2(6), means chargeable under the Act in force at the date of the execution of the instrument. The crucial date which determines the law in force is the date of execution of the instrument, and the stamp duty is to be charged with reference to the date of execution. For stamp duty, the relevant date is the date of execution and not the date of adjudication or the date of presentation and registration of the document.

12. Entry 44 of List III of the Constitution of India is Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty. Under Entry 44 of List III, the power to levy stamp duty on all documents is concurrent. But the power to prescribe “the rate” of such levy is with the Parliament and subjected to the same with the State Legislature. The State Legislature is competent to levy the stamp duty under Entry 44 of List III and prescribe rates of duty under Entry 63 of List II.

13. However, if the instrument falls under the categories mentioned in Entry 91 of List I, the power to prescribe the rate would be only with the Parliament, and for all other instruments or documents, such power would be with the State legislature under Entry 63 of List II.

14. Instruments chargeable with duty is defined under Section 3 of the Act, which denotes that every instrument mentioned in the Schedule, subject to exceptions or exemptions, shall be chargeable with duty of the amount

which is indicated in that Schedule as the proper duty thereof. From time to time, amendments have been carried out in the Stamp Act, and Schedule I-A, as applicable to the State of Madhya Pradesh, was inserted.<sup>3</sup> This Schedule specifies the stamp duty that must be paid on specific instruments. Importantly, instruments not mentioned in the Schedule are not subject to duty.

15. Article 23 of Schedule 1A of the Stamp Act deals with conveyances. The definition of “conveyance” is contained in Section 2(10) of the Stamp Act which reads as under:

“(10) ‘**Conveyance**.’—’Conveyance’ includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I;”

At the time of execution of an agreement to sell (1988), the conveyance was subjected to stamp duty and Article 23 stood as:

“23. Conveyance, not being a transfer charges or exempted under Article No.62: Where market of the property which is the subject matter of conveyance-

does not exceed Rs. 50	Four percent of such market value subject to a minimum of One Rupee
does not exceed Rs. 10,000	Seven percent of such market value
exceed Rs. 10,000	Seven and half percent of such market value.

Provided that if the total amount of the duty payable is not a multiple of fifty paisa it shall be rounded off to the nearest rupee half of a rupee or over being counted as one rupee and less than half a rupee being disregarded.”

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<sup>3</sup> The Central Provinces and Berar Indian Stamp (Amendment) Act, 1939

16. Article 23 was substituted vide M.P. Amendment Act No. 19 of 1989<sup>4</sup> and stood as:

Seven and half percent of such market value:

“Article 23. Conveyance, not being a transfer charged or exempted under No.62 irrespective of the market value of the property which is the subject matter of conveyance      Provided that if the total amount of the duty payable is not a multiple of fifty paise, nearest rupee half of a rupee or over being counted as one rupee and less than half of a rupee being disregarded.

#### Exemptions

xxx”

17. Further, an Explanation was inserted into this Article vide M.P. Amendment Act No. 22 of 1990<sup>5</sup>,

“Explanation.-For the purpose of this Article, where in the case of agreement to sell immovable property, the possession of any immovable property is transferred to the purchaser before execution or after execution of such agreement without executing the conveyance in respect thereof, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be levied accordingly:

xxx”

18. The sub-issue that the Court is confronting is whether an agreement to sell, handing over possession prior to the amendment brought in the year 1989 or 1990, is a conveyance so as to be covered under Article 23 as existing on the date of execution of the agreement(s). On this aspect we may only observe that the causal amendment was brought in only in 1990, i.e., prior to the transaction in question. And a three-judge Bench of this Court in **Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana**<sup>6</sup> in considering the scope of an agreement to sell observed thus:

<sup>4</sup> The Indian Stamp (Madhya Pradesh Amendment) Act, 1989

<sup>5</sup> The Indian Stamp (Madhya Pradesh Second Amendment) Act, 1990

<sup>6</sup> (2012) 1 SCC 656

**“18.** It is thus clear that a transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title, or interest in an immovable property can be transferred.

**19.** Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of the T.P. Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53-A of the T.P. Act). According to the T.P. Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the T.P. Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter.”

(Emphasis supplied)

19. The decision stand considered in **G.T. Girish v. Y. Subba Raju<sup>7</sup>**, and relied upon in **Ghanshyam Sarda v. J.K. Jute Mills Co. Ltd.<sup>8</sup>**, without any change. This principle was recently restated in **Munishamappa v M.Rama Reddy & Ors.<sup>9</sup>**

20. It be observed that now, in many states, amendments were brought in whereby agreements of sale acknowledging delivery of possession are charged with the same duty as leviable on conveyance.

21. Now the question arises if we can retrospectively read the Explanation added vide M.P. Act 22 of 1990 so as to apply to an agreement to sell executed on 04.02.1988.

22. A Two-Judge bench of this Court<sup>10</sup> while culling out the principles on the role of a clarification/explanation to a statute and how the same is identified and distinguished from a substantive amendment, observed that

7 (2022) 12 SCC 321

8 (2017) 1 SCC 599

9 Civil Appeal No. 10327 Of 2011

10 2023 SCC OnLine SC 640

only because a provision is described as a clarification or explanation, the Court is not bound by the said statement, but must analyze the nature of the amendment so as to conclude whether it is, indeed, a clarificatory or declaratory provision or whether it is a substantive amendment which is intended to change the law and which would apply prospectively.

23. The mere description of a provision as an “Explanation” or “clarification” does not determine its actual effect. On this aspect, this Court in **Virtual Soft Systems Ltd. vs. Commissioner of Income Tax, Delhi<sup>11</sup>** observed as follows:

“Even if the statute does contain a statement to the effect that the amendment is declaratory or clarificatory, that is not the end of the matter. The Court will not regard itself as being bound by the said statement in the statute itself, but will proceed to analyse the nature of the amendment and then conclude whether it is in reality a clarificatory or declaratory provision or whether it is an amendment which is intended to change the law and which applies to future periods.”

24. In **Govind Das v. ITO<sup>12</sup>**, this Court has observed that:

“11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule, as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts, is that

“all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective”

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11 (2007) 9 SCC 665

12 (1976) 1 SCC 906

and If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”

(Emphasis supplied)

25. A Constitution Bench of this Court in **CIT v. Vatika Township (P) Ltd.**<sup>13</sup> reiterated this principle that the amendments that create rights and obligations are generally prospective in nature. It is a well-established principle of law that clarification or Explanation must not have the effect of imposing an unanticipated duty or depriving a party of an anticipated benefit.

26. Hence, in our considered view, the Explanation inserted in Article 23 of Schedule I-A contained in the Act creates a new obligation for the party and, therefore, cannot be given retrospective application. Thus, it will not affect the agreement(s) executed prior to such amendments.

27. The object of the Stamp Act is to collect proper stamp duty on an instrument or conveyance on which such stamp duty is payable. Section 35 is a provision to cater for the instruments not being properly stamped and, as such, not being admissible in evidence. A document not duly stamped cannot be admitted for any purposes. To impose the bar of admissibility provided under this section, the following twin conditions are required to be fulfilled:

- (i) Instrument must be chargeable with duty;
- (ii) It is not duly stamped.

28. If the documents sought to be admitted are not chargeable with duty, Section 35 has no application. Thus, in the present case, since the document was dated 04.02.1988, the instrument was not chargeable with duty. It follows therefrom that when such document(s) are not required to be stamped, then no bar could be imposed due to it being not duly stamped.

### **ISSUE II& III**

29. Plaintiff claims in the application that after executing the document, Defendant kept the original copy, and a photocopy of the same was given

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13 (2015) 1 SCC 1

to Plaintiff. However, as per the averments made in the application, the Defendant had stated in an affidavit that the documents were not with her but with her counsel.

30. Before proceeding with the discussion, it is imperative to reproduce the relevant provisions of the Evidence Act and discuss the law relating to secondary evidence:

**"Section 61- Proof of contents of documents-** The contents of documents may be proved either by primary or by secondary evidence.

**Section 63-Secondary evidence.-**Secondary evidence means and includes-

- (1) certified copies given under the provisions hereinafter contained;
- (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them; (5) oral accounts of the contents of a document given by some person who has himself seen it.

**Section 65- Cases in which secondary evidence relating to documents may be given.-****Secondary evidence may be given of the existence, condition, or contents of a document in the following cases-**

**(a) When the original is shown or appears to be in the possession or power-**

**of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or**

**of any person legally bound to produce it,**

**and when, after the notice mentioned in Section 66, such a person does not produce it;**

- (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;
- (d) when the original is of such a nature as not to be easily movable;
- (e) when the original is a public document within the meaning of Section 74;
- (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in 91[India], to be given in evidence;92
- (g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

31. Primary and Secondary Evidence stands explained by a Constitutional Bench of this Court in **Cement Corp. of India Ltd. v. Purya**,<sup>14</sup> (5-Judge Bench) as the former being evidence that the law requires to be given first, the latter being evidence that may be given in the absence of that original evidence when a proper explanation of its absence has been

given. The terms “primary and secondary evidence” apply to the kinds of proof that may be given to the contents of a document, irrespective of the purpose for which such contents, when proved, may be received.

32. Section 63 of the Evidence Act gives an exhaustive definition declaring that secondary evidence “means and includes” the five kinds of evidence mentioned therein. Section 65 of the Evidence Act allows secondary evidence to be given of the existence, condition, or contents of documents under the circumstances therein mentioned. It provides for the circumstances in which secondary evidence can be used when the original document is unavailable or inaccessible. It is imperative to adhere to the principles outlined in these sections, including the proper documentation and authentication, to successfully produce secondary evidence in legal proceedings.

33. After perusing various judgments of this Court, we can deduce the following principles relevant for examining the admissibility of secondary evidence:

- 33.1 Law requires the best evidence to be given first, that is, primary evidence.<sup>15</sup>
- 33.2 Section 63 of the Evidence Act provides a list of the kinds of documents that can be produced as secondary evidence, which is admissible only in the absence of primary evidence.<sup>16</sup>
- 33.3 If the original document is available, it has to be produced and proved in the manner prescribed for primary evidence. So long as the best evidence is within the possession or can be produced or can be reached, no inferior proof could be given.<sup>17</sup>
- 33.4 A party must endeavor to adduce primary evidence of the contents, and only in exceptional cases will secondary evidence be admissible. The exceptions are designed to provide relief

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15 Neeraj Dutta v. State (NCT of Delhi) (5-Judge Bench) (2023) 4 SCC 731;Yashoda v. K. Shobha Rani (2-Judge Bench)(2007) 5 SCC 730

16 Yashoda (supra)

17 Yashoda (supra)

when a party is genuinely unable to produce the original through no fault of that party.<sup>18</sup>

- 33.5 When the non-availability of a document is sufficiently and properly explained, then the secondary evidence can be allowed.<sup>19</sup>
- 33.6 Secondary evidence could be given when the party cannot produce the original document for any reason not arising from his default or neglect.<sup>20</sup>
- 33.7 When the copies are produced in the absence of the original document, they become good secondary evidence. Still, there must be foundational evidence that the alleged copy is a true copy of the original.<sup>21</sup>
- 33.8 Before producing secondary evidence of the contents of a document, the non-production of the original must be accounted for in a manner that can bring it within one or other of the cases provided for in the section.<sup>22</sup>
- 33.9 Mere production and marking of a document as an exhibit by the Court cannot be held to be due proof of its contents.<sup>23</sup> It has to be proved in accordance with the law.<sup>24</sup>

34. A reading of Section 65(a) of the Evidence Act displays the following:

- a. Secondary evidence can be presented as a substitute when the original document/ primary evidence is in the possession of the opposing party or held by a third party;

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18 M. Chandra v. M. Thangamuthu (2-Judges Bench) (2010) 9 SCC 712

19 Neeraj Dutta (*supra*)

20 Surendra Krishna Roy v. Muhammad Syed Ali Matwali Mirza 1935 SCC OnLine PC  
56

21 H. Siddiqui v. A. Ramalingam, (2-Judge Bench) (2011) 4 SCC 240

22 H. Siddiqui v. A. Ramalingam (2-Judges Bench)(2011) 4 SCC 240

23 Neeraj Dutta (*supra*)

24 H. Siddiqui (*supra*)

- b. Such a person refuses to produce the document even after due notice,
- c. It must be ensured that the alleged copy is a true copy of the original.

35. Applying the constituents of Section 65 (a) of the Evidence Act to the present facts, in reference to the averments made, we find that the exact status of the documents in question could not be ascertained as one party claims that the other has the said documents and the other has allegedly stated that it was with her counsel. However, the said documents could not be recovered from the said counsel, as per records. In such a situation, therefore, the presentation of secondary evidence could be allowed, if other requirements are complied with.

36. We may now consider Section 35 of the Stamp Act which forbids the letting of secondary evidence in proof of its contents. The section excludes both the original instrument and secondary evidence of its contents if it needs to be stamped or sufficiently stamped. This bar as to the admissibility of documents is absolute. Where a document cannot be received in evidence on the ground that it is not duly stamped, the secondary evidence thereof is equally inadmissible in evidence.

37. In relation to secondary evidence of unstamped/insufficiently stamped documents, the position has been succinctly explained by this Court in **Jupudi Kesava Rao (supra)** wherein it dealt with an issue, i.e., whether reception of secondary evidence of a written agreement to grant a lease is barred by the provisions of Sections 35 and 36 of the Stamp Act and answered it in affirmative. It observed:

“12. The Indian Evidence Act, however, does not purport to deal with the admissibility of documents in evidence which require to be stamped under the provisions of the Indian Stamp Act.

.....

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 the inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.

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."

(Emphasis supplied)

38. This Court, in **Hariom Agrawal v. Prakash Chand Malviya<sup>25</sup>**, reiterated the principle laid down in **Judupi Kesava Rao** (supra) and observed that:

"**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

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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.”

39. Thus, if a document that is required to be stamped is not sufficiently stamped, then the position of law is well settled that a copy of such document as secondary evidence cannot be adduced. The present facts, however, differ.

40. The Trial Court and the High Court have relied on **Jupadi Kesava Rao** (supra) to hold that the Plaintiffs cannot lead secondary evidence as the document sought to be produced needed to be duly stamped. However, we find that **Jupadi Kesava Rao** (supra) is distinguishable on facts as the document which the Court was concerned with therein was one which was chargeable with duty, but in the case at hand, such is not the case, that is, the document to be produced is not one which was chargeable with duty at the time of its execution i.e., 04.02.1988. This being a material difference, the principle of law held in this case, correct as it may be, shall not apply to the instant case.

41. It is a settled position of law that where the question is whether the document is liable to stamp duty and penalty, it has to be decided at the threshold even before marking a document. In the present case, in view of the discussions above, the document in question was not liable to stamp duty.

42. Thus, keeping in view the above-stated principle as well as the above-discussed case law and facts of the case, we are of the opinion that in the instant case, the Plaintiff’s prayer for leading the secondary evidence ought to be allowed in so far as the documents sought to be introduced as secondary evidence be taken by the concerned Court and exhibited, with its admissibility being decided independently, in accordance with law under the Evidence Act.

43. The issues raised in this instant dispute are adjudicated in the following terms:

43.1 The first issue is answered negatively as the documents in question were not required to be stamped at the relevant period to attract the bar of Section 35 of the Stamp Act.

43.2 The second issue is answered in the affirmative. A copy of a document can be adduced as secondary evidence if other legal requirements are met.

43.3 As discussed above, the third issue is answered negatively.

44. The appeal is allowed accordingly. Consequently, the order dated 16.12.2003 passed by the 19<sup>th</sup> Additional District Judge in Civil Suit No. 46/A/03 titled as Shri Vijay v. Dr. Mrs. Mrinalini Devi Pour as affirmed by the High Court vide order dated 30.11.2009 in W.P. No. 741/2004 titled as Vijay Choudhary v. Union of India &Ors. are quashed and set aside. The order dated 17.07.2001 passed by 4th Additional District Judge is restored.

45. No order as to costs.

**Headnotes prepared by:**  
**Divya Pandey**

**Appeal allowed.**