Supreme Court of India
Jupudi Kesava Rao vs Pulavarthi Venkata Subbarao And ... on 29 January, 1971
Equivalent citations: 1971 AIR 1070, 1971 SCR (3) 590
Author: G Mitter
Bench: Mitter, G.K.

PETITIONER:
JUPUDI KESAVA RAO

Vs.

RESPONDENT:
PULAVARTHI VENKATA SUBBARAO AND OTHERS.

DATE OF JUDGMENT29/01/1971

BENCH:
MITTER, G.K.
BENCH:
MITTER, G.K.
RAY, A.N.

CITATION:
1971 AIR 1070 1971 SCR (3) 590
1971 SCC (1) 545

ACT:
Stamp Act (2 of 1899)-Section 35, 36-Evidence-Reception of secondary evidence of document insufficiently stamped-"Instrument" in ss. 35 and 36, if includes copy of document.

HEADNOTE:
On the question whether reception of secondary evidence of a written agreement to grant a lease, insufficiently stamped, is barred by the provisions of sections 35 and 36 of the Stamp Act,
HELD :The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second liml of the section 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 have the effect of the document being "acted upon" by the person having by law or authority to receive evidence. Proviso (a) is applicable only 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. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act. [596 D]
If Section 35 only deals with original instruments and not copies, section 36 cannot he so interpreted so 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 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. [596 H]
State of Bihar v. Karam Chand Thapar & Bros. Ltd. [1962] 1 S.C.R. 827 Raja of Bohbili v. Inuganti China Sitaramaswami Garu, 23 Madras 49., Thai] i Beehi v. Tirumalappa Pillai, 30 Madras 336 at 337 and Chidambaram v. Mayyappan, A.I.R. 1946 Madras 298, referred to.
Observations in Maung Po Htoo and three v. Ma Ma Gyi and one, I.L.R. 4 Rangoon 363 and Satyavati v. Pallayya, A.I.R. 1937 Madras 431 at 432, disapproved.
Ponnuswami v. Kailasam, A.T.R. 1947 Madras 422, and Alimana Sahiba v. Subbarayudu, A.T.R. 1932 Madras 693, explained.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 2537 of 1966.

Appeals by special leave from the judgment and decree dated September 22, 1966 of the Andhra Pradesh High Court in Second Appeals Nos. 875 of 1961, 488 and 516 of 1962. A. K. Sen, A. V. Rangam and T. Raman, for the appellant (in all the appeals):

B. V. Subramanyam and B. Parthasarathy, for respondents 1 and 2 (in all the appeals).

The Judgment of the Court was delivered by Mitter, J. The main question in these three appeals is, whe- ther reception of secondary evidence of a written agreement to rant a lease is barred by the provisions of ss. 35 and 36 of the Indian Stamp Act.

The relevant facts are as follows. There is a rice mill in Bhimiavaram, West Godavari District, which was formerly owned by the appellant along with respondents 3, 4 and 5. The mill was built on a site with an area of Ac. 1-75 by one K. N. Raju who had obtained a lease thereof from the guardian of respondents 1 and 2. It was executed on 21st December 1941 and was to expire on 17th July 1956. The appellant and respondents 3, 4 and 5 were successors-in- interest of the said leasehold rights. Respondents I and 2 served notice of ejectment on the lessees to quit the site and deliver possession on the expiry of the said lease. According to the lessees there were negotiations for a new lease.

Respondents I and 2 demanded enhanced rent and an agreement was ultimately arrived at on January 6, 1957 between the appellant and respondent No. 5 for themselves and on behalf of respondents 3 and 4 on the one hand and respondents I and 2 on the other for grant of a new lease for a period of thirty years commencing on January 1, 1957. The rent was fixed at Rs. 5401- per annum payable every two months. There was an option given to the lessors to purchase the rice mill It a price to be fixed by the President of the Rice Mills' Association but in case the said option was not exercised, the lessees were entitled to remove the structures of the mill. The lessees were to continue in possession and a deed of lease was to be executed and registered within a short time. The agreement was written on two stamp papers of Rs. 0-12-0 each and signed by the appellant and the 5th respondent on the one hand and respondent No. I on his own behalf and on behalf of respondent No. 2. The document was delivered to the respondent No. I after execution.

The appellant's further case is that thereafter he effected considerable improvements to the mill costing about Rs. 30,000,/-

and purchased the shares of respondents 3 and 4 in the said mill but respondent No. 5 who had originally joined the appellant in the suit for specific performance of the said agreement sold his share in or about September 1965 to respondent No. 6 herein.

On March 12, 1957 respondents I and 2 instituted a suit O.S. No. 81 of 1957 in the court of the District Munsif of Bhima- varam against the appellant and respondents 3, 4 and 5 besides certain other persons who were in occupation of the site, for recovery of possession after removing the rice mill and structures standing thereon on the basis that on the expiry of the old lease they had become entitled to possession. Respondents I and 2 instituted another suit O.S. No. 100 of 1957 on 4th April, 1957 in the same court claiming damages from the appellant and respondent No. 5 for failure to deliver the site from 1st January, 1957 till date of delivery of possession. In paragraph 6 of the plaint in this suit they expressly stated that they would file a separate suit to recover the future mesne profits. The total claim in this suit was computed at Rs. 4,700/- being the amount due for 94 days from 1st January, 1957 to 4th April, 1957 at the rate of Rs. 501per day. On April 5, 1958 the, appellant and respondent No. 5 instituted O.S. No. 92 of 1958 against respondents 1 to 4 praying for specific performance of the agreement to lease mentioned above with a direction that the respondents 1 and 2 should execute the lease deed. By their written statement filed in O.S. No. 92 of 1958 respondents I and 2 denied the execution of the agreement to, lease while in the two suits for recovery of possession and damages for illegal occupation the appellant and respondent No. 5 pleaded the aforesaid agreement for lease in defence and submitted that they were entitled to remain in possession without any liability as to damages. The three suits were tried together. As respondents I and 2 did not produce the original agreement which according to the appellant had remained with them, oral evidence was called by the appellant to prove the execution of the said document. In his judgment the learned Munsif held: "The plaintiffs have no right to lead any oral evidence in respect of the suit agreement to lease dated 6-1-1057. However, in order to appreciate the case put forward by the plaintiffs in the absence of the agreement to lease oral evidence has been recorded to determine whether the plaintiffs are entitled to specific performance as the full facts must be before the court."

Examining the evidence the learned Munsif recorded his finding that :

"The plaintiffs on whom the burden lies have not proved by evidence of P.Ws., I to 5 and 7 which is interested and developed that the agreement to lease dated 6-1-1957 is true and valid."

O.S. No. 92 of 1958 was therefore dismissed. O.S. No. 81 of 1957 was decreed against the appellant and others and they were directed to deliver vacant and peaceful possession after removing the constructions and the mill thereon on or before 9th July 1960. Suit No. 100 of 1957 was decreed against the appellant and respondent No. 5 for Rs. 117-2-10. The Subordinate Judge, Narsapur who heard the appeals from the judgment and decrees of the learned Munsif set them aside. The suit for specific performance of the contract of agreement to lease was decreed and defendants 1 and 2 in that suit were directed to execute and register a lease deed from 1st January, 1957. Ile accepted the oral evidence tendered on behalf of the plaintiffs in that suit and recorded that the objection regarding the admissibility of the oral evidence was raised only at the time of the argu- ments on the ground that the agreement was written On a stamp paper of Rs. 1-8-0 when it should have been written on a paper with a stamp of Rs. 60/-. According to the learned Subordinate Judge the defendants had suppressed the agreement to lease whereby the plaintiffs were deprived of the opportunity of making good the deficiency of the stamp. The learned appellate Judge held further that the conditions mentioned in s. 27-A of the Specific Relief Act had been fulfilled. He also found that the parties were contemplating the execution of a deed of lease subsequent to the agreement and the mere fact that plaintiffs continued their possession after the expiry of the period of the previous lease did not take the case out of the purview of s. 27-A of the Specific Relief Act.

The High Court in Second Appeal went elaborately into the question of the admissibility of the oral evidence regarding the agreement to lease and held that.

"although the objection was raised by defendants I and. 2 in the trial court at the time of the final arguments and not before the oral evidence was received in regard to the admissibility of oral evidence, even then since section 36 is not attracted to such an objection, the oral evidence cannot be acted upon. It is inadmissible in evidence and it cannot be received for any purpose." The appellant before us challenges this finding of the High Court.

Learned counsel for the appellant Mr. Sen argued that the admissibility of secondary evidence, be it oral or in writing, must be primarily decided in terms of the Indian Evidence Act. Inasmuch as the original document which was insufficiently stamped was suppressed by the defendants in the suit for specific performance, secondary evidence of the contents of the document could be led in terms of s. 65(a) of the Evidence Act. The Evidence Act imposed no bar to the reception of oral evidence by way of secondary evidence to prove the terms of the agreement to lease which was in writing and duly executed. According to counsel the Stamp Act did not create a bar with respect to the reception of secondary evidence to prove a document which was unstamped or insufficiently stamped in any case where the party seeking to rely upon the execution of the document and the terms thereof offered to pay the penalty in terms of S. 35 of the Stamp Act. According to Mr. Sen s. 35 raised a bar only in cases which were expressly excluded by proviso, (a) to s. 35 and in others where the party seeking to rely on the document was not agreeable to pay the deficiency in the stamp together with

the penalty in terms of the said proviso. Mr. Sen further argued that the whole object of s. 35 of the Stamp Act was that the Government revenue due by way of stamp should be protected. But even then s. 36 carved out an exception thereto and allowed the reception of an insufficiently stamped instrument in evidence when it had been admitted without objection at the initial stage. It was not reasonable, according to counsel to limit the operation of s. 36 only to cases where the original instrument was admitted in evidence without objection and logically oral evidence to prove the contents of a document which was insufficiently stamped should be subject to the same but no further infirmity and once such oral evidence was recorded without objection of the party against whom it was tendered, particularly where such party was responsible for the suppression or non-production of the document, it should be acted upon by courts of law if the party tendering oral evidence was agreeable to make up- the deficiency in the stamp and pay the penalty in terms of S. 3 5. We find ourselves unable to accept the submissions made on behalf of the appellant. The Indian Evidence Act which was enacted in 1872 consolidates, defines and amends the law of evidence. By various Chapters it deals with matters as to how facts are to be proved and which facts need not be proved. S. 59 of the Act lays down that, all facts except the contents of documents may be proved by oral evidence. Documentary evidence is dealt with in Chapter V and S. 61 provides that the contents of the document may be proved either by primary evidence or secondary evidence. Under s.62 primary evidence means the document itself produced for inspection of the court. S. 63 shows the different kinds of secondary evidence admissible with regard to documents. It includes several kinds of copies as specified in sub-cls.

(1)to (3) of the section, counterparts of documents as against the parties who did not execute them in terms of cl. (4) and oral accounts of the contents of a document given by some person who has himself seen it in terms of cl. (5). Under s. 64 documents must be proved by primary evidence except in cases mentioned thereafter. Section 65 allows secondary evidence to be given of the existence, condition or contents of a document in circumstances specified in cls.

(a) to (g) thereof. Under s. 91 when the relevant portion of a contract or of a grant or of any other disposition of property has been reduced to the form of a document, no evidence shall be given in proof of the terms except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

As the first court of appeal recorded the finding that it was the defendants who were responsible for suppression of the original agreement to lease, a finding which was accepted by the High Court, it must be held that no objection to the reception of secondary evidence by way of oral evidence can be raised under the provisions of the Indian Evidence Act.

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. The Stamp Act which is now in force is an Act of 1899 but it had a fore-runner in a statute of 1 879. Chapter IV of the Stamp Act deals with instruments not duly stamped. Section 33(1) of this Act provides that : "Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except and 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."

The relevant portion of s. 35 is as below:-- "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 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. Section 36 lays down that:

"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 around that the instrument has not been duly stamped."

The first limb of s. 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 s. 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. S. 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 s. 35. 'Instrument' is defined in s. 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. If s. 35 only deals with original instruments and not copies S. 36 cannot be- so interpreted as to allow secondary evidence of an instrument to have its benefit. The words "an instrument" in s. 36 must have the same meaning as that in S. 35. The legislature only relented from the strict provisions of S. 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 s. 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped. The above is our view on the, question of admissibility of secondary evidence of a document which is unstamped or

insufficiently stamped, as if the matter were res Integra. It may be noted however that the course of decisions in India in the Indian High Courts, barring one or two exceptions, have consistently taken the same view. One of the earliest decisions is the judgment of the Judicial Committee of the Privy Council in Raja of Bobbili v. Imuganti China Sitaramaswami Garu(1). In this case, a suit was brought by the Raja of Bobbili to obtain the proprietary possession of an estate once belonging to the family. The original defendant was the widow of a son of the sister of the plaintiff's paternal grandfather, a former Raja of Bobbili, by whom the estate, the subject of dispute was granted by a deed of April 5, 1848 to a cousin who had then married the then Raja's sister. The donee died in 1872, and his widow thereupon restored the estate to the Raja on the footing that the grant had been only for her husband's life. The Raja then granted the estate to another cousin who died in the same year. This was the husband of the original defendant. It was necessary for the Raja to show that the grant of 1848 was absolute and unconditional. The deed of grant was however not forthcoming having been lost. The question was whether the draft or a copy, of the instrument tendered as secondary evidence of its contents when the original instrument was shown to have been insufficiently stamped, could be, subjected to the penalty prescribed by section 34 of the Indian Stamp Act, 1879 as a preliminary to its being admissible in evidence. The respondent denied that such a deed was ever executed and averred that the gift consisted in transferring the estate to the donee's name in the register, upon the footing that the estate was to revert to the donor, in the event of the donee leaving no heir male of his body. At the trial the plaintiff offered in evidence what purported to be an unauthenticated copy and the defendant objected to the admission of the (1) 23 Madras 49.

same on the ground that it was the copy of a document which was insufficiently stamped. The District Judge refused to receive the document or allow it to be proved and dismissed the suit. The appeal to the High Court of Madras was also unsuccessful, the learned Judges of the High Court holding that:

"The copy should not be admitted on payment of a penalty, for the provision of the Stamp Act regarding penalty (section 39 of Act I of 1879) prescribes that such payment shall be endorsed on the document and presupposes that the document is forthcoming."

Before the Judicial Committee counsel for the appellant admitted that he was not in a position to dispute that the original deed of gift dated 1848 had not been sufficiently stamped in terms of the Madras Regulation XIII of 1816 and that he would be unable to maintain his claim for the estate unless he was permitted to prove the copy of the deed and use it as secondary evidence either on due payment of a penalty in court, or upon its endorsement by the Collector. He based his right to that remedy on the provisions of the Stamp Act of 1879. The Judicial Committee held on the construction of the said Act that the judgment appealed from was correct observing :

"These clauses throughout deal with, and exclusively refer to, the admission as evidence of original documents which, at the time of their execution, were not stamped at all, or were insufficiently stamped. It is only upon production of the original writ, that the Collector has the power given him or the duty imposed upon him, of assessing and charging tie penalty, a duty which he must, in that case, perform by writing an indorsement upon the writ submitted to him, which then, and not till then, becomes probative in law." Reference was made to, s. 33 of the Act of 1879 which is in pari

materia with S. 33 of the Act of 1899. S. 34 of the Act of 1879 was on the same lines as the present S. 35. The Board further held that the effect of granting the remedy which the appellant maintained he was entitled to would be to add to the Act of 1879, a provision which it did not contain, and which the Legislature ,of India, if the matter had been brought under their notice, might ,possibly have declined to enact.

More than sixty years after the above decision this Court observed that the law laid down there was well-settled and that a copy of an instrument could not be validated : The State of Bihar v. Karam Chand Thapar & Bros Ltd. (1). It is not necessary to (1) [1962] 1 S.C.R. 827.

examine the facts of that case except to note that the contention put forward was whether an instrument i.e. an award received in court which had been prepared in triplicate, the other two having been sent to the parties, was an original instrument which could be used by the payment of stamp duty under s. 35 of the Stamp Act and validated. This Court held that although the document sent to the court was marked as a certified copy, it was in reality an original instrument for the purpose of the Stamp Act.

The above judgment shows that if the document tendered in court was not an original instrument but a copy the decision would have been otherwise. However we may point out that the passage which occurs at page 835 of the report (reproduced hereinafter in part) as being quoted from the decision of the Judicial Committee is not to be found in their Lordships' judgment. The latter portion of the passage occurs in the judgment of the Madras High Court in Thaji Beebi v. Tirumalappa Pillai(1), but this does not in any way detract from the weight of the opinion expressed by a Bench of five Judges of this Court.

In Thaji Beebi's case (supra) the plaintiff sued upon a "cadjan" mortgage which was said to be, in possession of the first defendant whose ancestors were alleged to have created the mortgage in favour of the plaintiffs' ancestors. The first defendant denied tile existence of any such deed. The plaintiff examined two witnesses to prove the mortgage one of whom stated that he had attested the document which was unstamped. Plaintiffs led oral evidence to prove the mortgage and also put in a petition by the first defendant's ancestor in which the mortga-e was admitted. No objection was taken by the defendants to the reception of the secondary evidence. The trial court found the mortgage proved but dismissed the suit on the defendants' plea that the plaintiffs' ancestors had sold away the lands. On appeal the District Judge upheld the decision on the ground that the trial court ought not to have received secondary evidence of the mortgage. The High Court dismissed the Second Appeal on the same ground. The question as to whether it was open to. the plaintiff to rely on the oral evidence of the alleged execution of the instrument and the alleged passing of possession of the property under that instrument in order to show that that possession operated to create by prescription only the title of a mortgage in the defendants, was answered in the negative by observing : "To hold otherwise would be to give some effect to the unstamped instrument inasmuch as it would necessary connect the possession with the contents of the document relating thereto; and that would be contrary to the express provisions of section 35 of the Stamp Act which (1) 30 Madras 336 at 337.

lays down that an instrument chargeable with duty shall not only not be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, but also that it shall not be "acted upon" by any such person unless duly stamped."

The decisions of different High Courts make it quite clear that the cause of the non-production of the original instrument is immaterial i.e. whether it was lost or whether it was destroyed or even if it was the allegation of the party seeking to prove its contents by alleging that the document was suppressed by his opponent.

In Chidambaram v. Meyyappan(1) the plaintiffs produced an unstamped document as the basis of their claim. Before the trial commenced a mob invaded the court and set fire to it with the result that records of many cases including the record of the above case were destroyed. When the trial commenced the plaintiff sought to put in a copy of the document and it was objected to on the ground that the copy could not be stamped even on payment of penalty. The Subordinate Judge without admitting the document but leaving the question, of its admissibility open until he had heard the arguments of counsel, marked it as an exhibit. In rejecting the plaintiffs appeal the learned Judges of the Madras High Court referred to the decision of the Privy Council in Raja of Bobbili's case (2) and observed that the destruction by the mob's action put the plaintiffs-in no better position.

Numerous decisions on the point had been referred to by the learned Judge hearing the Second Appeal in the High Court but we do not think it necessary to take note of them in any detail. Mr. Sen relied strongly on certain observations in a judgment of the Rangoon High Court in Maung Po Htoo and three v. Ma Ma Gyi and one(3) . This arose out of a suit for administration of the estate of one Daw Thet San and for a declaration that a deed of gift executed by him was void. The District Court found that the deed of gift was void as being a testamentary disposition and (,ranted a declaration to that effect. In appeal to the High Court the decision that the deed of gift was void was not contested and the only question for decision was whether the adoptions mentioned therein were proved. The appellants wished to use a certain part of the deed as evidence to prove that the plaintiff and one Tun Sein were not adopted while the respondents claimed that it could not be admitted in evidence for any purpose. The deed itself was not produced which admittedly had been in possession of Po Htoo who put in a certified copy alleging that he had lost the original. On a consideration of the entire evidence the District Judge found (1) A.I.R. 1946 Madras 298 (2) 23 Madras 49. (3) I.L.R. 4 Rangoon 363.

that the original deed of gift was insufficiently stamped. This decision was not questioned before the High Court but the appellant claimed that it could not be admissible in evidence and was riot to 'be considered for any purpose. Referring to the decision of the Judicial Committee and the passage which we have quoted already the Judges of the Rangoon High Court remarked that their Lordships observation (quoted by us earlier) that "Those clauses throughout deal with, and exclusively refer to, the admission as evidence of original documents, which , at the time of their execution, were not stamped at all, or were insufficiently stamped."

did not intend to go as far as their words suggested. According to the Rangoon Judges:

> ". . . section 35 of the present Act, read with the provisions of the Evidence Act, excludes both the original instrument itself and secondary evidence of its contents. Similarly, under section 36, when either the original instrument itself or secondary evidence of its contents has in fact been admitted, that admission may not be called in question in the same suit, on the ground that the instrument was not duly stamped.

In this view, they held that the terms of the deed of gift could be considered.

With all respect to the learned Judges it appears to us that both the premises of the last sentence of the above quotation and the conclusion based on the same are incorrect. Neither under the decision of the Judicial Committee nor the express words of s. 34 of the Stamp Act of 1879 mentioned in that judgment (present section 36) allow the leading of secondary evidence of the contents of an insufficiently stamped document.

As we have expressed our view already s. 35 imposed a bar on the reception of any but the original instrument and forbade the reception of secondary evidence. Section 36 only,lifted that bar in the case of an original unstamped or insufficiently stamped document to which no exception as to admissibility was taken at the first stage. It did not create any exemption in the case of secondary evidence which a copy would undoubtedly be. In the case before the Judicial Committee the copy was one other than ,the final draft of the original document which had been lost through no fault on the part of the person intending to prove it and yet it was held that the Stamp Act ruled out its admissibility in evidence.

For the same reason we must hold that the dictum in Satyavati v. Pallayya(1) that (1) A.I.R. 1937 Madras 431 at 432.

> "S. 35 will also apply when secondary evidence of an instrument not duly stamped had been wrongly admitted."

is not good. law.

Learned counsel for the appellant also relied on the decision in Ponnuswami v. Kailasam(1). In this case a suit as filed for recovery of the loans which were evidenced as two documents described as hand letters which were admittedly unstamped. Before the trial stamp duty and penalty was levied by the court on the tooting that they were bonds. The defendant admitted the execution of the two documents but pleaded that in substitution of his liability under them he had executed a promissory note and had made payments towards the same, leaving a balance of Rs. 40/only payable on the loan. Neither party let in any evidence. The defendant-raised the only contention that the suit was not sustainable on the two documents because they are inadmissible in evidence for any purpose. The learned Judge in revision took the view that it was not necessary for him to decide as to the exact nature of the two documents to determine whether they were admissible in evidence but he went on to add :

> "Assuming that these two documents should not have legally admitted in evidence, nevertheless it is contended for the petitioner..... that as the defendant had admitted the execution of the documents and had only pleaded a substitution of liability by the execution of another promissory note and a partial discharge towards it there was no necessity for the plaintiff to adduce proof of his claim by seeking to get the two documents admitted in evidence. In other words the plaintiff will be entitled to a decree on the failure of the defendant to make out the Plea set-up by him in defence."

We do. not think this judgment helps the appellant. If a suit is based on a document which is admittedly unstamped the insufficiency of the stamp is cured by the payment of penalty. The learned Judge never mean to lay down, as is contended for by Mr. Sen, that the defect of insufficiency of stamp is cured by the admission of execution of the document. The learned Judge of the Madras High Court relied on an earlier decision of that court in Alimana Sahiba v. Subbarayudu (2)wherein a suit had been filed on a promissory note which bore a stamp paper but the same was not cancelled. The defendant admitted the execution of the promissory note sued on but pleaded discharge. Subsequently at the stage of the argument the defendant raised a legal objection (1) A.T.R. 1947 Madras 422.

(2) A.I.R. 1932 Madras 693.

to the maintainability of the suit on the ground that the stamp affixed to the promissory note had not been cancelled as required by s. 12 of the Stamp Act and contended that the promissory note should accordingly be. treated as unstamped for any purpose. In Alimana Sahiba's case (supra) the learned Judge stated in clear terms that "Under the provisions of s. 12 (of the Stamp Act) therefore it must be taken that this promissory note was not duly stamped and accordingly if any question arose as to its admissibility in evidence the same may have to be held to be inadmissible."

The learned Judge however took the view that as facts admitted need not be proved the circumstance that the promissory note was not admissible in evidence is immaterial for the purpose of this case. No doubt the learned Judge added (see at p. 696) "Now when once this document has been admitted in evidence and marked as an exhibit' then having regard to the provisions of s. 36, Stamp Act, its admissibility could not be re- opened on the ground of the document not having been duly stamped. That position being clear under the provisions of s. 36, Stamp Act, the whole discussion would thus seem to be entirely unnecessary and for no purpose, so far as the facts of this case are concerned." It was wholly unnecessary, as was pointed out by the learned Judge himself, to consider the question of admissibility under s. 36 of the Act. His decision really rested on the conclusion that a fact which is admitted did not require proof.

The case is not an authority for the proposition that secondary evidence of a document is to be treated on the same footing as an unstamped or insufficiently stamped original document.

In the result the appeal is dismissed with costs. The respondents moved an application C.M.P. No. 87 of 1971 under Order 47 Rule 3of the Rules of this Court for a direction that a relief for future

mesne profits from the date of the suit be added to the decree. On the fact of this case we cannot allow the application. The respondents in their own plaint had stated that they would file a suit for future mesne profits and it was because of this that the courts below did not grant any such relief.

R.K.P.S. Appeal dismissed.
918 Sup. C.I./71