

ANDHRA LEGAL DECISIONS

2003 (5)

JOURNAL

ALD

LAW ON STAMP DUTY AND REGISTRATION — AN ANALYTICAL STUDY

By

—B. SHIVA SANKAR RAO,
Additional Director,
A.P. Judicial Academy,
SECUNDERABAD

I. Introduction

1(a) **The Indian Stamp Act** is a fiscal legislation with an object to protect revenue and to collect revenue (tax) in the shape of stamps on transactions covered by the instruments. It is in fact to exclude proof of any transaction by an instrument not duly stamped till Stamp duty levied and paid held in 2001(7) SCC 573 in case of *Hameed v. Abdul*. See also AIR 1946 Mad. 437; AIR 1960 AP 155, 2003 (1) LS page 382, 2003(2) ALD 640 and 638. In the above apex Court judgment it was also held that strict construction of the provisions is required, however, it cannot over ride other statutes such as Limitation Act *etc.*, which operate completely in a different sphere.

1(b) **The Indian Registration Act** is one way a legislation having public policy to protect public and prevent fraud by conservation of evidence, assurance of title and publicity of document. It is thus meant to prevent people from being duped into entering transactions relating to property with persons having no right or title and publicity from documents registered about right and title over the property in order to prevent fraud and mischief. Virtually the registration of an instrument is a notice by way of definite recorded information to the world at large to enable the public to verify the records and enquire there from the right, title and obligations if any on

any immovable property. See 1970 Orissa. 22.

1(c) **The main difference between the provisions of Stamp Act** and Registration Act from effect of not duly stamped and not registered are while considering the effect of not duly stamping an instrument, the effect of non-registration mentioned in Section 49 Registration Act is not relevant. It is because there is no total bar for admitting unregistered document if duly stamped, since it can be used for collateral purpose or other purposes specified in Section 49, though under Section.49 an unregistered (when compulsory to register) document is inadmissible for main purpose to affect any rights in immovable property and the terms and conditions in the instrument. Where as an unstamped document is not at all admissible (even for collateral purpose) unless it is duly stamped since, there is a total bar to admit any part of the instrument in evidence. In 2003 (2) ALD 638 it was held by dealing with scope of Section 35 stamp Act and 49 Registration Act, by following 1972 AP 373 that for an unstamped document there is a total bar for its admission hence it cannot be admitted even for collateral purpose unless stamp duty is levied and paid whereas an unregistered document once duly stamped or stamp duty and penalty is paid, even not registered though under Section 17 it is compulsorily registerable, for collateral purpose or such

other specified purpose as per Section 49 read with 17 of the Registration Act it can be admitted and can be looked into. See also AIR 1962 AP 132.

The Stamp Act and Registration Act are not in *pari materia*. The principles which govern the interpretation of the Stamp Act can not be applied to the interpretation of the provisions of the Registration Act. However, these two acts may be read together and the definition in one Act may be applied to the other Act only when there is no such definition in the other Act held in 1970 Bom.109.

Execution of a document (instrument) means completion by the last act out of series of acts which complete the document *i.e.*, writing or scribing, signing, sealing if any, attestation if any, and delivery of document 1969 Mad. 1.

1(d) Once a document or instrument is filed in Court. (i) It is the duty of the Court, where the document is unregistered to consider as to whether it requires registration or not and, if required and even compulsory registerable document, whether it can be used for any purpose at least for collateral purpose or not without registration. In fact as per Section 23 of Registration Act from the date of completion of execution, such documents must be presented and be accepted for registration within four months. The exception to it is in the case of a will and cases taken under Section 25 on imposing ten times penalty to the original registration fees. Section 23A only deals with re-registration.

(ii) Further regarding Stamp duty it is the duty of the Court to consider whether it is properly stamped or not and liable for Stamp duty or not. Once it is found that it is liable for stamp duty, then to consider as to what is the stamp duty that is payable to impound and collect for a document not duly stamped *i.e.*, unstamped or insufficiently stamped. The penalty payable

in such case is ten times to the value of stamp duty payable in addition to the actual value as per Section 35 proviso (a). In 1985(1) LS 33 (SRC) it was held that to ascertain stamp duty the value of the property on which duty payable is market value as on the date of document. Order 13 Rule 8 CPC speaks about impounding of any document or instrument liable for stamp duty. In AIR 1958 All. 659 it was held that when a party filed a document in Court it can be impounded even not proved or not sought to be marked for evidence. See also observations in 1967(2) AWR 515 (FB) and 1953 Mad. 698. Order 13 Rules 5, 7, 9, 11, and 7(2) of A.P. Amendment, Order XI Rules 6 to 16, Order XII Rules 2, 2(a), 8 and Rules 117 to 133 of Civil Rules of Practice (Chapter X) deals with Documents, Search, Admission and Inspection *etc.*

(2) Scheme of the Indian Stamp Act (With A.P. Amendments)

2 (a) Sections:—The Indian Stamp Act contains eight chapters. Chapter 1 is sections 1 and 2 *i.e.* extent of applicability and definitions. Chapter 2 is Sections 3 to 30 regarding stamp duties, valuation, and who to pay. Chapter 3 *i.e.*, Section 31 and 32 is regarding adjudication as to proper stamp. Chapter 4 is Sections 33 to 48 relating to instruments not duly stamped, power of impounding by Court or Collector, use of the instruments, admissibility and objections relating to it in evidence. Chapters 5 and 6 (Sections 49 to 61) relate to allowances, reference and revision. Chapter 7 (Sections 62 to 72) relates to criminal offences, jurisdiction of a Magistrate and procedure. Chapter 8 is (Sections 73 to 78) relates to supplemental provisions.

2 (b) Rules:— Out of rules under Stamp Act (Central rules 1925 and state rules from time to time); the A.P. Stamp prevention of under valuation of instruments rules 1975 & rules for destruction of instruments impounded under Indian Stamp Act may be to some extent require perusal. For

several special exemptions from Stamp Duty on Instruments see Notifications of the A.P. State Government from time to time (Pages.312 to 354 on Stamp Act by Sri K.V. Ramana Rao) whenever special reference is required.

2(c) Definitions contained in Section 2 and Schedules contained in Schedules 1 and 1A, (which deal with nature and description of instruments and stamp duty payable) are to be read together.

(1) As per Section 2(14) instrument includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. In AIR 1971 SC 1070, 1946 Mad 298, 1962 SC 110; 1961 (1) An.WR 183 and 1973 A.P. 398 it was held that a copy of a document can not be called as an instrument under the Stamp Act. A document which records an earlier gift is not an instrument held in AIR.1958 Raj. 291, 2002 (5) ALT 624 = 2002 (4) ALD 808 = 2002 (2) LS 467. It was further held that when the original document not duly stamped and not produced in proof, a copy of the same since can not be an instrument no question of stamp duty payable thereon and further it is not at all admissible as secondary evidence, in view of bar under Section 35 of Stamp Act.

The words document and instrument are used in the Stamp Act not to mention in the Registration Act interchangeably. Since the word document is not defined in these Acts, one has to go to the definition in the general clauses Act. Section 3 (16) of the General clauses Act (10 of 1897) states that document shall include any matter written, expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, which is intended to be used, or which may be used, for the purpose of recording that matter."

(2) Schedule 1(49) and Section 2(22) promissory note - Section 2(22) defines

Pronote. As per Schedule 1(49) promissory note where payable on demand on which the highest revenue stamp to be affixed is (Rs.0-25Ps.). (on Pronote why revenue stamp alone be affixed see this notes at Para 3(B) under Section 37). However, Endorsement of transfer on Pronote does not require stamp since it falls under Schedule I (62) Exemption and Schedule I-A, (53) Exemption. See 1999 (6) ALD 229.

The difference between promissory note and bill of exchange is that, in case of pronote the executant with an unconditional undertaking promises himself to pay, thus there are 2 parties where as in case of bill of exchange he directs another to pay, thus there are 3 parties.

In case of letter of credit which is neither pronote nor bill of exchange nor bond, whether it is general or special or open or conditional or confirmed or revocable or otherwise there are 3 parties *i.e.*, one person requests some other to advance money (give credit) to another (3rd Party), with a promise to repay. See 1962 Cal. 325.

The difference between pronote and bond is that a mere promise to pay is not enough for pronote. If payable on demand to bearer or order it is not bond but pronote. For a bond money ultimately payable can even be uncertain. A bond requires compulsory attestation. A bond may even have other qualities of a pronote. See 1933.Mad. 306; 1976 M.P. 144 (FB); 1981 All. 58 and 386; 1966 A.P.-215; 1959 A.P. 653; 1958 (1) AWR 224; 1957 A.P. 779; 1955 Mad. 652 (FB), 1967 A.P. 123; 1964 (2) An.W.R. 472, 1997 (3) ALT 805; (5) ALT 628; 1996 (1) ALT 917 = (2) ALD 424 (FB); 1966 All. 392 (FB); 1983 (1) AWR 269 and 1967 S.C. 1118 at 1121.

In case of a pronote, even though it was marked and exhibited with no objection regarding Stamp Duty, since suit on pronote insufficiently stamped is not maintainable, the mere fact that pronote admitted in evidence or no objection to

the marking regarding stamp on pronote raised by the defendant, are of no significance See 1998 (4) A.L.D.375. For further information on the admissibility of a pronote even not duly stamped with no objection raised and its effect to know shall be read with Sections 35 and 36. For reference see this notes at para 3(B) under Section 36.

(3) Section 2(23) defines receipt. As per Schedule 1(53) a receipt for value above Rs.500/- the stamp required is Rs.1. As per Section 35(b) proviso for a receipt not duly stamped the stamp duty and penalty payable is maximum Rs.3/-

Receipt is acknowledgement between payee and payer about payment of money or delivery of goods or discharge or satisfaction of a debt to support a claim or contention.

(4) As per Schedule 1 A (a) on an acknowledgement the stamp required is twenty paise.

Acknowledgements do not by themselves create any obligation to pay though such obligation can be inferred by law.

A letter (save that is covered by Schedule 1(A) 32 and 33), unless it creates rights and legal obligations on immovable property does not require registration and Stamp.

For difference between letter, receipt and acknowledgement and when letter requires registration see 1988 (1) ALT 18 (NRC); 1979 (1) APLJ 195; 1978 AP 257, 1977 AP 123, 1973 A.P. 245; 1965 SC 59, 1934 All. 201, 1982 APLJ 375, 1957 AP 779 and 1975 Bom.79.

(5) Bond: Section 2(5) defines Bond: As per Schedule 1(A) 48 on Security Bond and Schedule 1(A) 30 on indemnity bond, the stamp is at 3% on the value of the security subject to a maximum of Rs.100/-. As per Schedule 1(A) 13 : on a Bond not

otherwise provided at Rs.3% up to Rs.1,000/- and above it Rs.15 per every 500/- or part thereof.

The essential requisites of bond defined in Section 2 (5) are the obligation to pay money or agricultural produce or the like. The whole document is to be read together to decide whether the obligation to pay is created by the document to construe as bond or it is a mere acknowledgement of a pre-existing liability. See 1980 (2) APLJ 375 and 1957 A.P. 779.

(6) As per Schedule 1A(3) adoption deed or instrument conferring authority to adopt Rs.35/-,

(7) As per Schedule 1A(4) affidavit (not for receiving pension or charitable allowance)Rs.10/-,

(8) As per Schedule 1(A)18 On Chit Agreement relating to Chits under A.P. Chit Funds Act, the stamp payable is Rs.2/-.

(9) As per Schedule 1A(16) certificate of sale granted to purchaser of property by Court on public auction sale, the same as conveyance.

(10) Schedule 1A(20) and Section 2(10) conveyance - As per Section 2(10) conveyance, (by virtue of A.P. Amendment in 1998), it includes a conveyance on sale, every instrument and decree or final order of a civil Court by which any property or interest therein transferred to or vested in or declared to be of any other person, intervivos which is not otherwise specifically provided by schedule 1 or 1A. It includes transfer of interest by one co-owner to another co-owner not covered by instrument of partition. It also includes transfer of share in property in partnership business by a partner to another partner with or without business assets on retirement or dissolution or by contribution of his interest by transfer of right, interest and title to capital of firm. The actual transfer of property is thus an essential feature. See 1961 A.P. 424. In 2002 (3)

ALD 33 *K.R.Laxmibhai v. R.D.O.* held that letter agreeing to give a girl in marriage and take him as illotham son-in-law by giving 1/3rd share in property is not a conveyance since no rights in immovable property actually conveyed and hence no stamp duty is required thereon to admit the letter.

As per schedule 1A(20) for conveyance including for exchange of property *i.e.*,

(11) Exchange of property chargeable for greater value as per Schedule 1A (27) not being a sale Rs.5/- per hundred up to Rs.1,000/- and above it for every five hundred or part thereof at Rs.25/-.

(12) Provided that, in case of sale agreements stamped as of a conveyance on sale, for later execution of sale deed the stamp to be adjusted and further stamp duty payable is Rs.5/- as per proviso to Schedule 1A(47A) Explanation 1.

This Explanation says that an agreement to sell followed by or evidencing delivery of possession of property agreed to be sold shall be chargeable as sale.

(13) Article 47A speaks of stamp duty for sale deed depending upon existence of property at different places,

(14) Schedule 1 (A) 6 Speaks of Stamp on Agreement. For Sale Agreement (other than possessory Sale Agreement covered by explanation to Schedule 1(A), 47(A)), as per Schedule 1(A) 6(A) the stamp payable is;

On value up to Rs. 5,000/- - Rs.10/-

Above to it up to Rs. 20,000/- - Rs.20/-

Above to it up to Rs. 50,000/- - Rs.50/-

On value above Rs. 50,000/- - Rs.100/-

As per Schedule 1(A) 6(B) if the agreement is relating to construction of a house or building including a multi unit house or building or unit of apartment/flat/portion of multi-storied building or

for development/sale of any other immovable property at Rs.5 % on market value or estimated cost mentioned in the agreement or on value arrived at in accordance with the schedule of rates prescribed by public works authorities which ever is higher.

As per Schedule 1(A) 6(C) in any other case Rs.100/-, in 2003 (2) ALD 640 it was held that agreement of sale originally without delivery of possession, when there is a subsequent recital by way of endorsement on the agreement or by a separate document acknowledging delivery of possession, this recital regarding delivery of possession comes under Article 47(A) of Schedule 1(A) hence liable for stamp duty as if sale. The contention that the endorsement is evidencing money and is only a receipt despite recital there in regarding delivery possession is untenable in view of Sections 5 and 6 Stamp Act. Refer 1999 (6) ALT 59 (DB) = (6) ALD 160, 1999 (1) ALT 596 = (1) ALD 159, 1995 (2) ALT 828, JT 1999 (1) SC 186. See also 2002 (3) ALD 321 = 2 ALT 703 = 1 LS 261 = AIR 2002 A.P. 218.

In 2002 (5) ALT 404= 3 LS 175 it was held that an unregistered sale deed (duly stamped) in an injunction suit is admissible regarding possession as collateral purpose.

In 2002 (6) ALT 144 = 2001 (3) ALD 317 = (1) LS 422 it was held that in a suit for a specific performance on sale agreement as per decree sale deed to be executed, the stamp duty payable is as per market value on the date of sale deed and not the market value on the sale agreement. This decision overruled the previous decision of the Court in 1998 (3) ALD 46 wherein it was held that without recourse to sale agreement consideration, registrar cannot insist to pay on basic value register valuation at the date of execution of sale deed.

In AIR 1996 SC 1170(c) it was held that though basic valuation of Sub-Registrar is

only for purpose of collecting stamp duty, even then it cannot be a sole basis or foundation to determine market value. However the values mentioned in the basic value register have to be taken into consideration along with other material in assessing the market value as per Rule 3(3) of A.P. Prevention of under valuation of instrument Rules, 1975 followed 1994 (4) SCC 595. See also 2002 (4) ALD 371 = 6 ALT 180 = 2 LS 229.

(15) As per Schedule 1(A) 31 - On Lease Rs.3 per hundred up to Rs.1,000/- and above it Rs.15/- for every five hundred or part thereof, on the amount of annual rent for lease up to five years and above it five rupees per hundred up to Rs.1000/- and above it for every five hundred or part thereof at Rs.25/-. For surrender of lease Rs.30/- as per Schedule 1(A) 52(6). For transfer of lease same as conveyance as per Schedule 1(A) 54. Lease is different from licence. Licence is not transfer of property. See 1976 S.C. 1813, 1978 S.C. 1587, 1986 A.P. 256; 1972 (2) AWR 302; 1969 A.P. 399 and 1925 Mad. 434 (FB). For further discussion, see this notes on Registration Act under definition of 'Lease' at Para 4(c)(3).

(16) As per Schedule 1A(35) Mortgage deed (other than an agreement relating to deposit of title deeds, pawn, pledge, bottomry bond, security bond, Mortgage of crop) when possession given or agreed to be given five rupees per hundred up to Rs.1,000/- and above it for every five hundred or part thereof at Rs.25/-, when possession not given at Rs.3/- per hundred up to one thousand and above it Rs.15 for every five hundred or part thereof. For stamp on mortgage of a crop see Schedule 1(A) 36. For stamp on agreement relating to deposit of title deeds, pledge and Pawn see Schedule 1(A) 7. For re-conveyance of mortgage property see Schedule 1(A) 45. As per Section 2(17) Mortgage deed includes instrument where by to secure money advanced or to be advanced, by way of loan or an existing or future debt or

performance of an engagement, one transfers or creates to or in favour of another, a right over or in respect of specified property. See 1959 A.P. 650 = (2) AWR 102, 1967(2) AWR 515 (FB); 1953 Mad.764 at 767 (FB) and 1969 Mad.-1.

A recital regarding deposit of title deeds already made and equitable mortgage created is not a mortgage deed. See AIR 1966 Raj. 219; AIR 1976 SC 1813, AIR 1968 AP 142 & AIR 1985 AP 391. In 2002(5) ALD 135(DB) = ALT 650 = 3 LS 36 Durga emporium vs. Munaga Bros. it was held that letter evidencing the factum of deposit of title deed already made and equitable mortgage created, doesn't require registration. See also AIR 1965 SC 1591 Union Bank Vs LR Sonaram and 1923 PC 50. In 2002 (5) ALD 750 distinction between lease and mortgage and requirement of registration discussed.

(17) As per Schedule 1A (29) gift, not being a settlement or will or transfer the same duty as a conveyance on market value of the property covered by the gift,

(18) As per Schedule 1A 49 Settlement (which is not a deed of dower at Muslim marriage) at Rs.3/- per hundred up to one thousand and above it Rs.15/- for every five hundred or part thereof. For revocation of settlement at Rs.3/- per hundred up to one thousand and above it Rs.15 for every five hundred or part thereof. Section 2(24) defines settlement: Settlement is like a gift, a non-testamentary - disposition in writing by a compulsory attestable document. It is not the nomenclature but the contents that are decisive to decide whether it is a settlement or gift or will or partition or family arrangement or relinquishment or the like. The distinction between settlement and will is whether the document is intended to have immediate operation or after death of executant/transferor and whether the instrument is irrevocable or revocable See 1980(2) APLJ 375, 1958 ALT 570, and

1970 (2) AWR 181. In 1951 S.C.103; 1961 S.C. 1302; 1963 S.C. 1703; 1972 Mad.309; 1972 Mys. 222; 1927 Mad.197; 1933 Mad.492 and 1982 Mad.281; it was held further that the general principles governing construction of will are equally applicable to construction settlement. The distinction between settlement and gift is whether it is given with a view to make a provision for a dependant or out of love and affection and the postponement of possession while conferring vested right see AIR 1977 AP 348. The distinction between settlement and trust See AIR 1979 Madras 5.

For distinction between settlement or partition or family arrangement See AIR 1977 Mad.88, 1986 Bom.370, 1967 Bom.369, 1966 Mad.315 and 1970 M.P. 33.

For family arrangement all persons getting property need not have interest muchless equal or uniform interest even to get property equally or all persons having equal interest may not be getting equal extent or share in properties arranged and settled in the family by the family arrangement.

For partition depending upon good and bad qualities in proportion to the extent and right of share the persons having joint interest as co. owners or co. sharers divide and separate their share in the properties whereby there will be mutual release of joint rights in the property divided and fallen to the shares of several parties to the partition. That is why partition is not a transfer of property except separation of existing joint and undivided interest in properties.

Whereas, in case of settlement the settlee is but for family relationship to settler, not having any interest in the property, the settlee may not have even any pre-existing right to claim maintenance *etc.* For example a father can settle his self acquired property to his daughters or sons or their children or even to his mother or wife or brothers and sisters or the like.

(19) As per Schedule 1A (40) Partition instrument at Rs.3/- per hundred up to one thousand and above it Rs.15 for every five hundred or part thereof, the largest share remaining after partition exempt from stamp duty, As per Section 2(15) instruments of partition include an award by arbitrator directing partition and Since August, 1986 even a memorandum regarding past partition- See 1990 (1) ALT 264. In 1956 AIR Madras 207 (FB), held that a final decree of Court allotting specific property to each sharer and vested is a final order effecting partition. The final order need not necessarily be passed in a partition suit. Unless parties furnished requisite stamp for final decree for partition, Court can not draw up the decree. A decree for partition comes under instrument of partition as such it cannot be admitted in evidence and cannot be acted upon unless duly stamped and engrossed on stamp papers unless decree drawn up on proper stamp papers it cannot be executed. It is the duty of the Court when passing a final decree for partition to call upon the parties to furnish requisite stamp papers for engrossing the decree thereon. See 1960 AIR AP 54, 1975 AIR AP 91; 1958 AIR AP 457, 1973 AIR AP 300 and 1997 (3) ALD 261. A partition list which doesn't effect any division is not an instrument of partition held in 1966 AIR AP 184 = 1965(2) AWR 276, 1982(2) ALT 384 & AIR 1962 AP 132. See also AIR 1957 AP 237 (FB) and 1957 (1) AWR 288.

In 1997 (3) ALD 261 it was held that to decide stamp duty payable, the market value to be taken for consideration is not the value on the date of suit but the value when final decree being passed in the partition suit.

In 2002 (2) ALD 261 it was held partition deed executed where by each sharer put in possession of his share - a subsequent partition list in accordance with earlier partition deed not liable for stamp duty as wont fall under instrument of

partition. In 2002(6) ALD27 it was held that when two brothers held jointly, divided their property and prepared two separate lists of it, it is not a partition list hence liable for stamp duty and registration. In 1975 A.P. 9; 1974 (1) APLJ 304; 35 Mad.26 & 1933 Oudh.562 (FB) it was held that decree of Court whereby allotment of specific properties to several persons made with a direction for delivery of the properties it tantamounts to actual partition by final order of the Court thus instrument of partition liable for duty. Thus the parties must furnish N.J. Stamp Papers for drawing up of final decree, till then there is no decree at all to execute. See also 1938 Mad.307 and 1946 Mad.534.

For distinction between partition list and deed and to say that no stamp duty payable for a partition list when it is a mere acknowledgement of past oral transaction. See 1990 (1) ALT 264, 1982 (2) ALT 384, 1974 Mad. 239, 1969 (1) APLJ, 1929 PC 269, 1962 AP 132, 1986 AP 1 and 14, 1987 Delhi 1101, 1978 (1) MLJ 248, 1991 Delhi 178, 1991 (2) APLJ (DNC)-45 (ALL), 1999 (6) ALD 642, 1989 Mad. 268(FB) and 257 and 1937 Mad. 308.

Family arrangement different to partition instrument. A family arrangement may be oral or written or partly oral or partly written. If it is in writing and thereby creates right in immovable property it requires registration. Even not registered can be received for collateral purpose. The themes behind family arrangements are to give finality to family disputes and differences. The family arrangements governed by principles which are not applicable to dealings between strangers. As per *Halsbury's laws* a family arrangement is a transaction between members of same family for the benefit of the family generally and to preserve the family property, peace and security in the family, saving of the honour of the family and to avoid family disputes and litigations by amicable arrangement. Such family

arrangement even can be arrived at orally. Its terms can be even recorded in writing of what has been settled such a memorandum is for the purpose of being used as document in future.

If the family arrangement is only memorandum of past oral family arrangement reduced to writing it doesn't require stamp duty and registration. If it a document by which rights are for the first time created or declared title for the first time by the terms of the document it requires Registration. See 1966 SC 292, 237 and 1836. 1955 SC 486 (481), 1979 (1) AWR 416, 1976 S.C. 807 at 813 and 1971 S.C. 1337.

(20) As per Schedule 1A(46) release that is one renounces a claim upon another or against a property at Rs.3/- per hundred up to one thousand and above it Rs.15 for every five hundred or part thereof. A release is nothing but relinquishment of joint rights in any property by virtue of it all the other persons who are co. owners can get benefit even if release is in the name of only one or few. Since relinquishment or admission doesn't confer title, release doesn't confer title to a stranger or only to one among several joint owners. See AIR 1966 S.C. 605 at 612, 1967 S.C. 1395, 1968 Mad.159 (FB), AIR 1988 S.C. - 1955 Mad. 641, 1987 (1) L.S. 2 (S.N.); 1935 Mad. 113; 1983 (2) APLJ (SN.) 72; 1956 Cal. 668; 1973 A.P. 275 (FB) and 1966 A.P. 184.

The distinction between partition and release is that a deed of release is a one sided document and binds the executant alone, whereas a partition is an arrangement or agreement between two or more persons dividing their property, though mutual release is an incident in the division. See 1958 A.P. -457 and 1971(1) M.L.J. 177(FB).

(21) As per Schedule 1A(41) Partner ship deed Rs.300/- and deed of dissolution Rs.150/-.

In AIR 1966 S.C. 1300 affirming 1959 A.P. 380 (FB) it was held that what ever may be the character of the property whether movable or immovable, brought in by partners for formation of partnership and whatever the property acquired in the course of partnership business all form part of property of firm and when the firm seizes its legal existence the properties vest in all partners thereby every partner has an interest in the partnership property though no partner can deal as his own any part of it during subsistence of the partnership firm. Though the partnership assets include immovable property fallen to any partner on dissolution, it is only a movable property and it can be by book entries allotting to any one or more among the partners. It doesn't require registration and stamp, even the document evidencing any relinquishment of that interest by other partners, no registration is necessary.

In 1989 (3) ALT 414 it was held that deed of dissolution of partnership where properties of firm distributed among partners, not chargeable as partition but only chargeable as partnership dissolution.

In 2000 (3) ALT 787 it was held under Section 27 of Stamp Act by following 1972 S.C. 899 that entries in the account book doesn't require stamp duty for admission in evidence, though the recitals in the document showing that disputes between them amicably settled regarding the properties which is only in the nature of family settlement. It was held that the lower Court committed an error in construing it as partition deed.

In 2003 (3) SCC 229 it was held that from dissolution of partnership firm and distribution of assets of the firm between partners as per arbitration award there is no transfer of assets or assignment of ownership in the assets of the dissolved firm thereby the document doesn't require registration.

(22) As per Section 2(21) power of attorney includes any instrument empowering a

specified person to act for and in the name of the person executing it. The Power of Attorney is a delegation of authority in writing by which one or more persons are empowered to do an act or acts in the name of another. See 15-Mad.-386 (FB).

As per Schedule 1A(42) power of attorney when executed for sole purpose of getting registration of documents or for authorizing one person or more to deal with single transaction Rs.25/-, for authorizing not more than five persons or more than one transactions Rs.50/-, for authorizing more than five and up to ten persons or more than one transaction Rs.75/-, when given for consideration authorizing the attorney to sell any immovable property Rs.5/- per hundred up to Rs.1,000/- and above it for every five hundred or part thereof at Rs.25/-, in any other case Rs.25 per each person authorized. For construction on development of or sale or transfer of any immovable property Rs.5/- per hundred up to Rs.1,000/- and above it for every five hundred or part thereof at Rs.25/-.

See *Malaysia Air Lines* case AIR 2001 S.C. 358 for stamp on power of attorney and penalty (a case of power of attorney executed in a Foreign Country relied in India).

(23) As per 1A(55) trust declaration or revocation concerning any property five rupees per hundred up to Rs.1,000/- and above it for every five hundred or part thereof at Rs.25/-. However, the maximum stamp duty payable for declaration of a trust is Rs.200/- and for revocation of a trust Rs.100/-.

(3) The aspects to be considered for levy of stamp duty and penalty

3(a) In Chapter 2 (Sections 3 to 30) of Stamp Act; Section 29 speaks of duty by whom payable. As per Sections 3 to 6 read with 17 to 19, the aspects to be considered are the facts affecting stamp

duty must set forth in the document as per Section 27 including the facts about consideration, market value as on date of document executed to know whether any stamp duty payable, if so, whether properly paid or not. See 1960 A.P. 155 and 2000 (3) ALT 787. Further it is not from the mere nomenclature but from substance *i.e.*, contents and recitals in the document as a whole to decide by the Court from the nature of the transaction covered by the document to impound and collect stamp duty. AIR 1961 AP 424 and AIR 1961 Mad. 504(FB). For stamp duty to levy and to impound it is the date of execution of the document and the value of the property by then that is the criteria. The Court to impound a document if not duly stamped, the crucial date is the date of execution since the stamp duty payable is as per the law that was prevailing on the date of execution and not the date of production for consideration before Court or Collector. See 1992 AP 183 and 1968 A.P.213 (FB). See also AIR 1962 Raj. 68 and 1954 HP.51.

The Stamp duty payable is on the instrument and not on transaction not covered by instrument. It is the real nature of the transaction covered by the instrument from its contents and not from nomenclature that be decisive to charge or to impound and to determine what is the stamp duty payable and what is the penalty to be impound. The nature of document to be determined to decide stamp duty is from the language employed therein from its' contents and also the purpose that intend to serve. Thus the substance of the transaction from whole contents of the documents will be determined even to gather intention of the parties. See 1961 Mad. 304, 1951 Mad.209, 1954 HP 51, 1972 Mys.263, 5 Mad.394 and 1955 AP. 257.

For charging stamp duty it has to be considered as to whether the instrument covered a single transaction or part or more than one transaction. See AIR 1956

S.C. 35; 1986 S.C. 403; 1977 S.C. 500, 1956 A.P. 252, 1962 A.P.145; 1976 A.P.417; 1952 Mad. 515 and 1970 Mad. 2, 5 and 10; See also 1967 (2) AWR 515 (FB) .

An unstamped or defectively stamped document is not void and it is effective from the date of its execution once it is properly stamped with, or stamp duty or penalty levied and paid. It is only till then; it is being incapable of being made use of as evidence held in AIR-1956 Mad 454 and AIR 1968 AP 213(FB). Considerations whether the document validly executed under T.P. Act or Registration Act *etc.*, are immaterial for the Court to impound once the document is filed in Court. For an unstamped document unless stamp duty paid the document has no validity in law. See 1967 (2) An.W.R. 515 (FB) and AIR-1968-AP-213. The decision also speaks about the duty of the Court to see whether the transaction covered by the document is a mere acknowledgement of a past transaction or it is the transaction entered and dealt by the document and rights and interest are for the first time created and conferred by the document. Infact, it is the instrument where by the transaction that is effected to be considered. For example in case of sale or conveyance or transfer if carried orally and not by any instrument there is no question of imposing or to impound any stamp duty. There can be no legal impediment to a party to select and adopt a particular form of transaction to minimise the expenses of stamp duty.

If any person claims benefit for exemption from payment of stamp duty it is for him to establish the applicability of such exemption See AIR 1955 AP 257.

A stamp paper purchased by or for the use of a person can be used by that person or his authorized agent or legal representatives only. It impliedly means others can not make use of the stamp paper purchased for the use of a person as per Rule 6(2) of 1925 Stamp Rules and

G.O. Ms. No.340 (Revenue), dated 16.4.1967 held in 2002(5) ALD 362 = 2002 ALT (3) 754.

A document executed in one state if relied in another state, if there is higher rate of stamp to charge in the 2nd state on the document, the difference stamp duty is payable. See AIR 1963 SC 1307. If a document executed in a foreign country relied in India the document is liable for stamp duty as per Indian law See AIR 2001 SC 358 = 2001 (1) ALD SC 57. See also AIR 1962 Punjab 167. See also Section 18 of stamp Act which says within 3 months after the documents reached India, to be stamped other than for promissory note & bill of exchange.

3(b) Chapter III & IV, (Sections 31 to 48) are important which deal with procedure for examination and impounding of instruments not duly stamped by whom, when and how and duty of Court to impound and at request of parties to refer to collector and then duty of the collector to adjudicate, decide and collect stamp duty once referred by Court or brought to collector by a party.

Sections 31 and 32 speak about the administrative duty of the collector to decide the stamp duty on document produced before him for his opinion and order of the Collector in relation thereto and further that such duty once paid and certified by collector that is final. See 1946 Mad. 437, 1942 Mad 381 and 1961 S.C. 787.

As per Section 35 Stamp Act there is a total and absolute bar to the admissibility of an unstamped instrument in evidence whatever may be the nature or the purpose or how ever foreign and independent the purpose may be for which it is sought to be used, unless there is a compliance with the requirements of provisos to Section 35 or unless it is duly impounded as per Section 33 by following the procedure laid down in Section 37 to 42. See AIR 1962

A.P. 132; AIR 1972 AP 373 and 2003 (2) ALD 638. See further 2002(3) LS 159.

Section 36 of the stamp Act says once a document is admitted in evidence either by mistake or other wise, it is not open to reject the same either in the same proceedings or in the further stages of litigation in appeal or revision see 1956 SC 12, 1961 SC1655, 1969 (1) SCC 597; 1957 A.P. 1022; 1962 AP 398; 1963 AP 442, 1977 AP 247 and 348, 1982 AP 240; 1968 (1) AWR 221; 2000 (1) ALD 504 and also 2002 (5) ALD 660 = 3 LS 149. In 1964 (2) ALT 374 it was held that even defendant raised objection on stamp duty for marking, when Court marked the document it doesn't mean that Court rejected the objection unless there is an order of the Court to that effect. See also 1969 A.P. 417 and 1978 S.C. 1393.

Thus as per Section 33 it is the duty of the Trial Court to necessarily apply mind to admissibility of the document and requirement of the stamp duty before receiving or admitting in evidence. It is also the duty of the other party to be alert to see the admissibility of the document presented by one party. Virtually the Court has an independent duty before admitting any document, on the question of stamp duty, even no objection taken by the parties. In 1933 Mad 117 it was held that in spite of waiver objection on stamp duty or admission regarding proof under Section 58 Evidence Act, the instrument not duly stamped cannot be allowed to be admitted by Court since, it is a fiscal legislation to collect revenue.

In 1982 (1) ALT 55 (NRC) it was held that for unstamped document to impound by Court where no value mentioned in the document, the Court has to ascertain the market value as on date of document and for that, the Court can appoint a Commissioner to ascertain the said market value.

In 1976 (1) AWR 22 (NRC) it was held that under Section 29 where plaintiff or defendant paid stamp duty and penalty on any document when impounded by Court, he or they can not ask the Court as of right to include the amount in the costs of the suit in decree, as it is for the Court to decide as to who is responsible to pay or whose document it is *etc.*, facts.

As per Sections 33 and 35 except a police officer, every other person having authority to receive evidence, before whom, when an instrument not duly stamped is produced or got produced, can examine the same, ascertain value and impound the instrument as per law in force in India at the time the document was executed. A document chargeable with duty shall not be admitted in evidence unless duty stamped for any purpose (to mean even for collateral purpose).

However, a Criminal Court (except in the criminal proceedings under chapter XII - information to police and their powers of investigation and Chapter XXXVI - limitation to take cognizance) not bound to impound such unstamped instrument. If the Court thinks fit not to impound in any case; nothing prevents the criminal Court See AIR1953 MAD 698.

As per Section 35(e) the documents (though not duly stamped) when executed by or on behalf of Government or when the documents bear certificate of Collector, those documents are admissible in evidence.

As per Section 36 once the Court applied its mind and admitted a document it cannot be open to raise any objection regarding stamp duty and it cannot be prevented from being acted upon once admitted, the only exception to it is pronote, besides Section 61, the power of Appellate Court *etc.* either *suo motu* or on collector's application to determine and collect proper stamp duty to protect revenue, see 1960 AP 155. In 1977 AP 348

it was held that admission of insufficiently stamped document can be called in question under Section 61 for payment of deficit stamp duty. See 1937 Mad 763 and 1974 AP 83.

In the case of a promissory note even though it was marked and exhibited with no objection regarding stamp duty, since suit on pro-note insufficiently stamped is not maintainable the mere fact that pronote admitted in evidence or no objection to the marking regarding stamp on pronote raised by defendant are of no significance, see 1998 (4) ALD 375. Thus the view expressed in 1982 AP 240 is not applicable to pro-note suits. For further guidance see also 1998 (5) ALD 166, 1997 (3) ALD 436, 1997 (1) ALD 246, 1961 SC 1655, 1969 SC1238, 1970 (2) ALT 234; 1973 AP 342, 1938 Mad 785 (FB), 1986 AP120 and 1985 -AP26. In 1963 A.P. 457 it was held that in case of promotees not duly stamped as per Section 35 proviso (a) the Collector also has no right to collect deficit stamp or to impound and certify. Even if so done, such certificate or order has no legal sanctity and won't bind civil Court and such pronote is not at all admissible in evidence and such suit on pronote won't lie. See also 1967 (2) AWR 268.

Section 37 deals with instruments stamped with improper description though it bears a stamp of sufficient amount. It says that in that regard the State Government may make Rules to collect proper stamp chargeable on such instruments and certify to deem it as if duly stamped on the date of execution of instrument. In AIR 1963 A.P. 457 it was held that Section 37 can not be made use of in respect of instruments exempted under proviso (a) to Section 35 and therefore the pronote which is engrossed on a non-adhesive stamp can not be validated under Section 37 by Collector in view of Section 40(1). In this context see the Indian Stamp Rules, 1925 with A.P. amended

Rules therein. Chapter III, of 1925 Rules, speaks about instruments on which adhesive stamps be used. As per Rule 13(f) it is clear that adhesive stamps be used for instruments chargeable with stamp duty under Schedule 1 of Stamp Act. Article 37 (letter of credit), Article 49 (a) (ii) and (iii) *i.e.*, pronote defined in Section 2(22) when payable on demand for value up to Rs.1,000/- stamp Rs.0-15 paise and in any other case stamp Rs.0-25 paise; and Article 52 (proxy), for the above Section 47 does't apply. In fact Section 47 speaks of only promotes covered by Article 49(a)(i) for stamp up to Rs.0-10 paise only for a pronote amount upto Rs.250/- See Rule 16 of Stamp Rules 1925 and A.P. Rule therein by G.O. Ms. No.1060 (Rev.), dated 2.6.1959 with effect from 1.4.1959 which says that the adhesive stamp denote inland revenue of 0.25 N.p. *etc.* Thus every pronote must be duly stamped by affixing required revenue (adhesive stamp) and not any other non-judicial stamp as per the above A.P. decision.

Regarding impounding of instruments and power of Collector, as per Sections 38 and 39 on document impounded with stamp duty as per Section 33 or 37 and with penalty as provided in Section 35 if the party paid the same, the Court or officer impounded shall send the amount and copy of the instrument to Collector with certificate about stamp duty and penalty levied and the Collector may refund entire or any portion of penalty to the party; if he feels there is no fraudulent intention except *bona fide* mistake or ignorance of the party. See 1964 A.P. 107. Where the party requests the Court before impounding by Court to refer to Collector or where the party did not pay the stamp duty and ten times penalty *i.e.*, impounded by Court or other officer under Section 33 and requests to send to Collector, as per Section 38(2) the Court shall send to the collector the original document.

In the case of AIR 1981 A.P. 274 - *Y.P. Venkaiah v. R.D.O., Guntur*; it was held that when the original document sent to Collector under Section 38(2) by Court, the trial of the case need not be stayed till the document is received back by the Court. What the Court has to do was discussed in this decision See also Section 46(2) in this regard. As per Section 40(1) the Collector has to decide and certify as to whether the document is duly stamped or not chargeable, to that effect or where chargeable and not duly stamped, require payment of proper stamp duty or its amount together with penalty of Rs.5/- or more however, not exceeding ten times of stamp duty value to that effect, or where remitted to the party the penalty to that effect and such certificate of the Collector as per Section 40(2) is conclusive and as per Section 40(3) in such a case the Collector shall return back the impounded instrument duly certified as per Section 42. Thus the collector's duty under Section 40 is a quasi-judicial one by application of mind following principles of natural justice. Section 41 speaks of production of instruments unduly stamped by accident, within one year of execution, other than pronotes *etc.*, the Collector instead of proceeding under Sections 31 to 33, or 40, can receive the actual stamp due and payable, see 1955 Mad. 652.

The above procedure to be followed under Sections 31 to 42 has been clearly laid down by the Apex Court in AIR 2001 S.C. 1321 in *Chilukuti Gangulappa v. R.D.O. Madanapalli* holding that, when a document is found insufficiently stamped, when the instrument is presented before civil Court, the party can ask the Court to forward the same to Collector, then the Court has to forward the same. Otherwise, under Section 33 read with Section 38(1), the Court has the power to admit such document in evidence if the party producing the same pays the stamp duty together with 10 times of that stamp duty

amount as penalty, when the Court chooses to admit the document on compliance with such condition under Section 38(1), the Court has to forward only a copy of the document to the Collector, together with the amount collected from the party for taking adjudicatory steps. But, if the party refuses to pay the amount impounded by the Court on the document and asks the Court to forward the same to collector, the Court has no option except to forward. On receipt of the document through either of the said avenues the Collector has to adjudicate. He can not refuge to adjudicate or to say that if civil Court impounded, since impounded he won't interfere.

Section 40 (1) says when collector impounds document under Section 33 or receives any instruments sent to him under Section 38(2), the collector under Section 40(1) read with 33 and 38(2) shall adopt the procedure laid down under Section 40(1) on the question of deficiency of stamp duty.

On facts it was held that the proceedings got misdirected from stage of trial Court. The Trial Court should have asked the party that the instrument since insufficiently stamped, as to whether he would remit the deficit portion of stamp duty together with ten times of it as penalty to admit on collection by impounding and to proceed with trial and to forward a copy of it to Collector or if he is unwilling to pay the stamp duty and ten times penalty, whether to forward the original document itself to Collector to adjudicate. Since ten times penalty is the upper limit, it is for the Collector to take into account all factors to decide what should be the proper amount of penalty to be impounded. The decision of the collector regarding the stamp duty and penalty impounded, shall not be open for challenge again before Civil Court nor even Civil Court can say that the amount collected on impounding by Collector is not correct, since the certificate

given by the collector on the stamp is conclusive. However, regarding nomenclature of the document or decision of the Collector about nature of the document won't bind civil Court. The above Apex Court decision is followed in 2003 (1) L.S. 417, 2002(1) AWR 393 = 2002 Suppl. (1) ALD 610, 2002 (5) ALD 330 = 6 ALT 239 = 3 (LS) 115 and 2002 (2) ALT 15. See also 1999 (2) ALD 314, 1997(1) ALT 725, 1981 A.P. 274, 1979(1) ALT 155; 1975 A.P. 96 and 1974 (2) AWR 240.

(4) Scheme of the Indian Registration Act (with A.P. Amendments)

4(a) The Indian Registration Act contains 15 parts in 91 Sections and 220 Rules in 31 chapters for the State of A.P. framed in pursuance of the Sections in 1959 with amendments from time to time. In 1999 the A.P. Prohibition of certain documents opposed to public policy Rules framed. There are also uniform Rates of Registration fees prescribed.

4(b) In the Act the part-I consists of Sections 1 and 2 regarding extent of applicability and commencement of the Act besides several definitions under the Act. Part-II consists of Sections 3-16 about registration establishment. Part-III consists of Sections 17-20 about registration of documents where compulsory and where optional, description of properties covered by the documents *etc.* Part-IV consists of Sections 23-27 about time for presentation of documents for registration of those executed in India and out of India. Part-V consists of Section 28-31 regarding place of registration for immoveable properties *etc.* Part-VI consists of Sections 32-35 about persons competent to present documents for registration, admission of execution and enquiry by Registrar in this regard *etc.*; Part-VII consists of Sections 36-39 regarding appearance of executants, witnesses, exemption from appearance and procedure for summoning *etc.* Parts-VIII and IX

consist of Sections 40-46 about persons entitled to present wills and authorities to adopt, regarding registration of the same, deposit of the wills *etc.* Part-X consists of Sections 47-50 about effect of registration and non-registration of documents relating to the properties, preference of registered over un-registered documents *etc.* Parts XI, XIA, XII & XIII consist of Sections 51-80A regarding duties and powers of registering Officers, procedure to be followed, registration of electronic documents, and registration when can be refused, re-course on refusal, fees payable for registration and its recovery *etc.* Part-XIV consists of Sections 81-84 regarding penalties and prosecutions. Part-XV consists of Sections 85-91 which are miscellaneous provisions regarding destruction of unclaimed documents, *bona fide* mistakes of officers, exemption from the Act to documents of the Government and inspection of the documents by the public *etc.*

4(c) Definitions: (1) As per Section 2(6) immovable property includes land, buildings, hereditary allowances, right of ways, lights, ferries, fisheries or any other benefit to arise out of land and things attached to earth or permanently fastened to any thing attached to earth, but not standing timber, growing crops and grass. (Standing timber to mean if cut it can be used as timber See 1958 SC 532). (2) As per Section 2(9) moveable property includes standing timber, growing crops and grass, fruits upon and juice in trees and property of every description, except immovable property. See also Section 3(26) General Clauses Act definition. In 1956 SC 17 and 1977 SC 2149 it was held that an exclusive right of fishery (in waters covering land) is interest in immovable property thus, on grant of lease of fisheries in a tank, registration is required. Easementary right to ways, light *etc.*, are immovable property and to create any rights therein for consideration of above Rs.100/-, thus it requires registration held in 1943 Madras

522. In 1944 Madras 492 and 1965 (1) AWR 183 it was held that moveable property like machinery *etc.* once attached to earth or permanently fastened to any thing attached to earth, is immovable property and requires registration. In 1998 (6) ALT 520 at 530 it was held that right to tonsure in T.T.D. is not a hereditary office and cannot be regarded as immovable property. Right to receive future rents on land or building is held as immovable property. In 1936 PC 230 and 1959 AP 380 (FB) confirmed in 1966 SC 1300 (FB) it was held that since partnership assets whether moveable or immovable are book assets these are there by movables and any partner relinquishes any rights therein since not immovable property no registration is required. In 1927 PC 172 it was held that benefit to arise out of land and things attached to earth or permanently fastened to any thing attached to earth must mean for permanent benefit of enjoyment of the land or building See also 1944 Madras 492.

(3) Section 2(7) says lease includes a counter part, kabuliyat, an undertaking to cultivate or occupy and an agreement of lease. The ingredients of lease as per TP Act are transfer of a right to enjoy immovable property, for certain time or in perpetuity and the lease consideration is either premium or rent or both and acceptance of the (lease) transfer by the transferee. Thus, lease is a transfer of interest in immovable property.

(a) The difference between lease and agreement to lease is that whether the agreement itself would confer a legal right or whether the execution of another instrument which would give a legal right was in the contemplation of the parties should be construed to be a lease if the present demise is to be inferred from the language employed. Since the dominant intention of the parties that should be the *criteria* in deciding whether a particular

instrument is an agreement to lease or merely an agreement to grant lease in future creating right in a party to obtain a document under certain contingencies or circumstances. See 1959 SC 620, 1960 AP 83, 1960 ALL 420, 1976 Delhi 15, 1998 (5) ALD 330, 502 and 1998 (6) ALT 224.

(b) The difference between lease and licence is that (i) in a lease one enjoys the property but has no right to take the property away since, interest created in property is to enjoy it whereas in a profit-a-pendree one has a license to enter the property, not for enjoying the property but for removing something from it like plucking of leaves, nuts, fruits or part of produce of soil, to collect toll tax *etc.* (ii) For the difference the document must be preferred to the forum, (iii) the real test is the intention of the parties as to whether they intend to create a lease or a licence (iv) if the document creates interests in immoveable property it can be a lease but, if it only permits another to make use of the property on which the legal possession continues with the owner, it is a license and (v) where contents of documents use exclusive possession of property, it can be inferred as lease unless the circumstances show that intention of parties is not to create lease. However, exclusive possession by itself is not decisive generally without re-course to the intention of the parties See. 1953 SC 108, 1958 SC 532, 1958 SC 1262, 1965SC 610, 1968 SC 175 and 919, 1974 SC 396, 1976 SC 1813, 1988 SC 184 and 1845 and 1971 (1) SCC 276.

5. Out of Parts-III to XV (Sections 17-91), the important Sections for regular reference are Sections 17 & 18 which shall be read with Section 49, Sections 23-27, Sections 32-40, Section 50, Section 57, Sections 58-60 read with 87, Sections 71 to 77 and Section 90.

5(a) Section 90 deals with exemption of certain documents executed by or in favour

of Government. Section 50 says that the document falls under Section 17 or 18 once duly registered take affect as regard the property comprised therein, against every unregistered documents relating to the same property and not being a decree or order, whether such un registered document be of the same nature as the registered document or not unless leases exempted under Section 17 or any registered document which has no priority under law in force. Section 48 speaks about registered non-testamentary instruments relating to property when to take effect over oral agreements. In 1923 Oudh 114 it was held that Section 50 doesn't apply where the competition is between a registered document and unregistered document falling under Section 90 and in such case the unregistered document must also deemed to be registered. Section 57 speaks that subject to payment of fees the books 1 and 2 and index of book No.1, on application for inspection is open for inspection to any person and such person is entitled to copies if applied for. In Book No.3 copies of entries can be given on payment of fees, after duly signed and sealed by the Registering Officer to the persons executing the documents or their agents and to any persons after death of executants. Entries in book No.4 can be given on payment of fees, to the persons executing the documents or persons claiming that the entries in document refers to them or their agents or representatives. Sections 58 to 60 read with 87 speak that whether a document falls under Section 17 or 18, once registered there is presumption of due execution. However it is a rebutable presumption. See 1962 AP 29 and 178, 1961 AP 361, 1978 Madras 244, 1973 Madras 421, 1962 Madras 111, 1977 Ker.41, 1969 Mysore 103, 1961 SC 1747, 1969 SC 244, 1147 and 1979 SC 553. However, there is no presumption about passing of consideration from contents or endorsement of Registering Officer See 1924 Mad. 1969 Ker. 265 (8), 1969 Gujarat 270;

1985(1) APLJ 99 = (2) ALT 492 and 1969 Mysore 360 See *contra* 1999 (2) MLJ 267 at 273 and 1977 Orissa 178. In this context one has to keep in mind the basic principle that a presumption is not in itself evidence but, only makes a *prima facie* case for a party in whose favour it exists. Thus, it is a rule concerning evidence. It depends upon conclusiveness or rebuttability of presumption and the burden of proof shifts accordingly. Presumption is thereby distinct from legal fiction.

5 (b) Section 58 says that a document admitted for registration, the particulars as per Section 58 regarding signatures and admission of execution by a person or agent or representative and every person examined in reference to such document and signature of him and regarding of payment of money delivery of goods in presence of Registering Officer in reference to execution and admission of receipt of consideration, the Registrar must get endorse. If person admitting execution refuses to endorse it, the Registrar must note such refusal and shall not register. Section 59 speaks of endorsements made under Sections 58 and 52 must be signed and dated by the Registering Officer. Section 52 speaks about the duty of Registering Officer when document presented for registration to endorse the hour and place of presentation and signature of person presenting it and receipt of the document by Registering Officer to endorse. Section 60 speaks about certificate of registration by the Registrar duly signed and sealed and to enter in a book meant for it after compliance with Sections 34, 35, 58 and 59. Sections 32 to 40 speak about presentation of document for registration by person executing it or his agent, power of attorney or other representative or assignee and the procedure for recognizing the power of attorney and its execution in India and outside India and enquiry before registration by the Registering Officer, procedure to be

followed on admission or denial of execution, power and procedure to enforce appearance of executants and witnesses and exemption of certain persons for personal appearance. The scope of Sections 40-46 is mentioned in this notes at para-4 above. Section 47 says that a registered document shall operate once registered, from the time of execution or from the time from which it would operate if no registration is required. The scope of Sections 23, 23A and 25 is mentioned in this notes in para 1(d)(ii). Section 70(A to C) deals with Registration of Documents by electronic media. Regarding refusal of registration covered by Sections 71 to 77, Section 71 says that if the property not situate in the sub-district, registration can be refused by endorsing the fact on the document and this can be challenged in appeal within 30 days as per Section 72. As per Section 73 where Sub-Registrar refused to register on ground that there is a denial of execution of the document presented for registration, it can be with in 30 days presented before superior authority showing the right to ask for registration and Section 74 and 75 speak the procedure in this regard. As per Section 77 where the Registrar refused to register document under Section 72 or under Section 76 within 30 days a civil suit can be instituted to direct the document to be registered within 30 days after passing of such decree. The scope of Section 77 is dealt with by the Apex Court in a specific performance suit in 2001 (5) ALD 47 (SC). *Chandeshwar Yadav v. Radha Devi* - holding that in case when vendor having received the entire sale consideration and executed the sale deed refused to appear before Sub-Registrar for registration and Registrar if refused to register, since Section 77 given option to a purchaser either to file suit under Section 77 of the Act or to bring a suit within limitation period for specific performance of an agreement for sale of the property. If the said suit claim is in time for specific performance, there is no need to file the suit as per Section 77

within one month from date of refusal by vendor to register

6 Now coming to the scope of Sections 17, 18 and 49 Registration Act - it is the settled law that to decide whether and when unregistered document is admissible in evidence, all the three sections must be read together more particularly Sections 17 read with 49. Unless a document clearly comes within the purview of Section 17, its non-registration is no bar to its admissibility see observations in 1970 SC 833 that it is for the Court to find out from facts and circumstances of each case and also by construction of terms of a document as to whether it comes under Section 17 or not and then reference to Section 49. See also 2001 (1) ALT 115, 2000 (6) ALT 739 at 745 and 1992(1) AWR 684 at 688.

6 (a) As per Section 17(1)(a) registration is compulsory in case of Instruments of gift of immoveable property, (irrespective of the value).

N.B.: A reading of Section 17 read with 18 and 49 clearly indicates the above.

The T.P. Act Sections 122, 123 and 129 mainly deals with gift as per which acceptance of gift by donee is mandatory besides transfer of property by a registered instrument by donor voluntary and without consideration to the donee. It is a compulsory attestable document. In 1917 Madras 859 it was held that a mere memorandum of an already completed oral gift, since no way declaring rights of the parties as per Section 17 Registration Act, it doesn't require registration. In 1924 Madras 800 (a) it was held that an unregistered gift deed though invalid for want of registration, may be considered for the collateral purpose of ascertaining the nature and character of possession. However, in the latest decision of 2003(1) ALT 228 and also in 2002 (6) ALT 752 = 2002 (2) AWR 787 it was held that an

unregistered gift deed cannot be used for any purposes. See also 1969 (1) APLJ 1 (FB); 1958 S.C. 199; 1987 Del.1101; 1978(1) M.L.J.248; See also 1991 (2) APLJ Dnc.45 and 1991 Delhi 178; In 1996 (3) SCJ 495 it was held that since gift of immoveable should be made only for transferring the right, title and interest by a donor to donee by registered instrument signed by or on behalf of donor and must be attested by two witnesses since the pre existing right and interest of donor stand divest by donee by registration after the gift deed duly registered and thereafter only the donee would loose title to the property.

Section 129 deals with exception in case of gifts under Mohammedan Law. In 1972 Kerala 27 it was held that under Muslim Law the three essential requisites for a valid gift are (i) declaration of gift by donor, (ii) acceptance of the gift by donee, (iii) delivery of position subject of the gift. A Muslim gift can be valid without any registration since registration not compulsory to its legal force and in fact no written document is even necessary under Muslim personal Law See also 1927 Calcutta 197 and 1929 Oudh 435. However in 1962 A.P. 199 (FB) = 1962 (1) ALT 108 (FB) it was held that where a gift deed has been executed by a Mohammedan to serve as evidence of the gift but not as a memorandum of past transaction such a document requires registration under Section.17.

The recognized custom under South Indian Mitakshara Law permits gift in immoveable property to a girl at the time of her marriage by parents or brothers without registration and even orally as Pasupukumkuma. For that mutation in Revenue records her name as owner is best evidence besides other circumstances if the transaction is oral See 1998 (4) ALD 107, ILR 40 Mad. 204 (FB), 1999 AP 189, 1981 AP 30, 1964 SC 510; 2000 Karnataka 318

and in 1927 PC 42 it was further held that while registration is a necessary solemnity for enforcement of gift of immoveable property, it doesn't suspend the gift until the registration actually takes place.

However in the latest Full Bench judgment of our High Court reported in 2001(5) ALT 130 = 2001(5) ALD 402 it was held by referring to Sections 123 and 123 T.P. Act and Sections 17 and 49 Registration Act that a Pasupukumkuma gift of immovable property to a daughter at the time of marriage is like any other gift a compulsory registerable document referred and over ruled 1999 (2) ALT 192 and 1980 A.P. 139.

In this context it is relevant to mention here that the correctness of the above decision is under challenge in CRP 3482/2000 in *Veeramreddy Chandra Rao v. LRAT*, Kakinada reported in 2002 (2) AWR 69 and it was referred to decide by an appropriate larger bench on the following questions:

1. Whether the decision reported in 2001(5) ALD 402 can be said to be a binding decision in the light of in the decision of the apex Court reported in AIR 1964 SC 510, especially in the light of Article 141 of Constitution?

2. Whether the customary mode of giving property by way of pasupukumkuma is not saved under Hindu Law (in view of Section 3 (b) read with Section 4 of Hindu Adoptions and Maintenance Act, 1956)?

As per Section 17(1)(b) registration is compulsory in case of other non-testamentary instruments (other than for gift) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent, of the value of Rs.100/-and upwards, to or in immoveable property. As per 1924 Madras 605a non-testamentary instrument

is one which intends to operate immediately and to be irrevocable See also 1931 PC 196 and 1969 AP-131.

N.B. As per Section 18(a) if the values is below Rs.100/- registration is optional in the case of instruments other than gift and Will.

As per Section 17(1)(c) registration is compulsory in case of non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest.

N.B. As per Section 18(b) registration is optional in case of other instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction, of any such right, title or interest.

N.B. As per amendment in 2001 by Parliament which came in to force with effect from 24-9-2001 in Section 17 after Section 17(1)(a) inserted as Section 17(1A) "which says that the documents containing contracts to transfer for consideration, any immoveable property for the purpose of Section 53A T.P. Act shall be registered after commencement of this Act, if not they shall have no effect for purposes of Section 53A T.P. Act. Similar amendment made to Section 53A T.P. Act by omitting there from the words "the contract though required to be registered has not been registered or".

Section 17(2) nothing in the clauses (b) and (c) of Section 17(1) applies to

(i) any composition deed or (ii) any instrument relating to shares in joint stock company, notwithstanding that the assets of such company even consists any immoveable property or (iii) any debentures issued by any such company and not creating, declaring, assigning, limiting or extinguishing a right, title or interest of Rs.100/- and upwards to or in immoveable

property, except in so far as it entitles the holder of a security by registered instrument whereby the company has mortgaged, conveyed or otherwise transferred the whole or part of its immoveable property or any interest therein to trustees upon trust for the benefit of the holders of such debentures or (iv) any endorsement upon or transfer of any debentures issued by any such company or (v) any agreement except any agreement of sale as mentioned Section 17(1)(g) (and document containing transfer for consideration of immoveable property under Section 53A T.P. Act as per 2001 Central amendment) not in itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of Rs.100/- and upwards to or in immoveable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish, any such right, title or interest, or (vi) any decree or order of a Court not being a decree or order or award falling under Section 17(1)(f), except decree or order expressed to made on a compromise and comprising immoveable property other than that which is the subject matter of the suit or proceeding or (vii) any grant of immoveable property by the Government, (viii) any instrument of partition made by a Revenue Officer or (ix & x) any order granting a loan or instrument of collateral security granted under land improvement Act or land improvement loans Act or Agriculturist Loans Act or instrument for securing repayment of a loan under the Act or any order made under Charitable Endowments Act vesting or divesting any property in its Treasurer or (xi) any endorsement on a mortgaged deed acknowledging payment of any mortgage money, and any receipt for payment of money due under the mortgage when such receipt doesn't extinguish the mortgage or (xii) any certificate of sale to the purchase of the property sold by public action granted by the Civil or Revenue Officer.

As per Section 17(1)(d) Registration is compulsory in case of lease of immoveable property, irrespective of the value as per A.P. amendment with effect from 1.4.1999. As per Section 17(1) Proviso, the State Government may, by order published by the Gazette, exempt from the operation of this sub-section any leases executed any district, or part of a district, the terms granted by which do not exceed 5 years and the annual rents reserved by which do not exceed Rs.50/-.

As per Section 17(1)(e) Registration is compulsory in case of Non-testamentary instrument transferring or assigning any decree or order of a Court or any award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs.100/- and upwards to or in immoveable property,

N.B. As per Section 18 (cc) registration is optional in the above if the value is less than Rs.100/-.

As per Section 17(1)(f) Registration is compulsory in case of any decree or order or award or copy thereof passed by a Civil Court on consent of the defendants or on circumstantial evidence but not on the basis of any instrument which is admissible in evidence under Section 35 Stamp Act, such as registered title deed produced by the plaintiff where such decree or order or award purports or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs.100/- and upwards to or in immoveable property with effect from 1.4.1999 as per A.P. amendment.

N.B. As per Section 18(d) registration is optional in the case of instruments (other than Wills) which purport or operate to create, declare, assign, limit or extinguish any right, title or interest, to or in moveable

property. As per Section 18(e) registration is optional in case of Wills. Further as per Section 18(f) registration is optional in all other documents not required registration as per Section 17.

As per Section 17(3) authorities to adopt a son, executed after 1.1.72 not confirmed by a Will, shall also be registered.

As per Section 17(1)(g) Registration is compulsory in case of agreement of sale of immoveable property of the value of Rs.100/- and upwards, as per A.P. amendment with effect from 1.4.1999.

N.B. As per proviso to Section 49 in the case of suit for specific performance of contract such unregistered sale agreement can be received as evidence. Further such an unregistered sale agreement in any other suit (i.e. other than in a suit for Specific Performance of Contract based on unregistered sale agreement) can be received as evidence of any collateral transaction not effected by registered instrument. In this context it is also necessary to take notice of the amendment to the Registration Act adding Section 17(1A) to the effect that documents containing contracts to transfer for consideration any immoveable property for purpose of Section 53A T.P. Act shall be registered if not shall not have effect for purpose of Section 53A and in Section 49 Registration Act in the proviso by omission of the words “or as evidence of part performance of a contract for the purposes of Section 53A T.P. Act” and in Section 53A T.P. Act by omission of words “the contract though required to be registered has not been registered or”, by the Central Government in 2001 which came into force from 24-9-2001.

Thus in a suit for Specific Performance of a contract under Specific Relief Act even the sale agreement (whether non-possessory or possessory) executed on or after 1.4.1999 for immoveable property not registered can be admitted in evidence by a

Court, though agreement executed after 24.9.2001 not registered shall not have effect under Section 53-A T.P. Act, are admissible under Specific Relief Act under Section 49 Registration Act. See 1926 Mad. 1117; 1961 A.P. 534; 1988 Ker. 255; 1960 Mad. 33; 1968 All. 168.

As per Section 49 a document required to be registered under Section 17 or as per T.P. Act, unless registered, shall not effect any immoveable property comprised therein nor shall be received as evidence of any transaction effecting such property, further, it shall not confer any power to adopt nor shall be received as evidence of any transaction conferring such a power.

The proviso to Section 49 however says that an unregistered document affecting immoveable property and required to be registered under Section 17 or as per T.P. Act, may be received in evidence of a contract in a suit for specific performance under chapter 2 of specific relief Act or as evidence of any collateral transaction required to be effected by the registered instrument. In AIR 2003 (NOC) 41, 1975(2) APLJ 298 and 1976 A.P. 74 it was held as per Section 49 an unregistered document may be received for the purposes mentioned therein.

6(b) The concepts “main purpose” and “collateral purpose” play pivotal role for admitting or not admitting in evidence an un-registered document compulsorily registerable. The main purpose means the purpose mentioned in Section 17 i.e., for the purpose of creating, declaring, assigning, limiting or extinguishing a right to immoveable property, such a document when compulsory registerable not admissible in evidence for the said main purposes. The effect of non-registration of such an instrument compulsory registerable is that the instrument doesn't affect any immoveable property comprised therein nor can it be received as evidence of any transaction affecting such property. It does

not follow, however, that the document is wholly irrelevant. Though the instrument is not admissible for the purpose of proving a concluded transaction transferring an interest, yet it can be received in evidence for collateral purposes. Collateral purpose is any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immoveable property.

The proviso to Section 49 permits the use of an un-registered document even compulsorily be registered, as evidence of a collateral transaction within the meaning of Section 49 proviso. Collateral transaction means a transaction other than the transaction affecting the immoveable property but which is in some ways connected with it. See 1999(3) MLJ 423 & 1942 Bom. 268.

6(c) The expression “collateral transaction” is not used in the sense of an ancillary transaction to a principal transaction or subsidiary transaction to a main transaction. The root meaning of the word “collateral” is running together or running on parallel lines. The transaction as recorded would be a particular or specific transaction. But it would be possible to read in that transaction what may be called the purpose of the transaction and what may be called a collateral purpose. The fulfillment of that collateral purpose would bring into existence a collateral transaction, which may be said to be a part and parcel of the transaction but nonetheless, a transaction which runs together with or on parallel lines with the same. Thus a collateral purpose is a purpose which must be unrelated to the terms and conditions of the main purpose of the transaction covered by the document. It must be independent of, or divisible from the transaction which requires registration, and it must be a transaction not by itself required to be effected by a registered document.

The term collateral purpose is a very vague one and therefore it is the Courts that must decide in each case depending upon facts and circumstances and from contents, as to whether the parties who seek a compulsory but unregistered document when not admissible to main purpose, for a purpose which is really a collateral purpose to mean other than for any of the main purposes mentioned. It is because a party cannot use such un-registered document by the simple device of calling it as collateral purpose. In legal proceedings what one cannot directly bring about, cannot indirectly bring about See 2001(1) MLJ 1-15

In 1932 PC 55 and 1952 SC 153 it was clearly held that to decide whether registration required or not the words creating, declaring, assigning, limiting or extinguishing a right to immoveable property are *eiusdem generis* and imply a definite change of legal rights in the property that is main purpose. Where the document doesn't reflect any definite change of legal rights in the property and merely recites what the existing rights therein are *i.e.*, mere acknowledgment of a fact took place, likewise merely recites with whom the possession of the property lies, it cannot be construed from the contents as of creating, declaring, assigning, limiting or extinguishing any rights in immoveable property. See also 1999 (1) ALT 136 = 1 ALD 191, 1999 SC 2054 = 5 SCC 108 and 1953 Bom. 50. In 1969 (1) SCWR it was held that evidence as to character of possession is being considered as collateral purpose. See also 1977 AP 371. In 1959 SC. 199 it was held that character of possession prior to date of document can not be regarded as collateral purpose. The test would be whether the party relying on the registered document seeks to rely on its terms for “affecting such property or conferring such power”. If the genuineness of a document is questioned, the execution of the document itself will have to be

proved and that cannot be a collateral purpose. For instance, an unregistered lease deed cannot be relied upon to enforce the terms of the agreement such as the period of tenancy, quantum of rent, mutual obligations under the agreement, where the lessee has the right to sub-lease or to carry out the repairs to the building *etc.* In other words, what is prohibited is the attempt to enforce the terms of the unregistered document, but not to establish the purpose for which the property was given possession *i.e.*, nature of possession which is a collateral purpose. See 1975 MP 230; 1977 A.P. 371; 1975(2) APLJ 298; 1973 Mad. 262; 1986 MP 215, 1975(2) AWR 226 = (1) APLJ 372; 2002 (3) ALD 186 all the above cases are relating to unregistered lease deed or lease agreements. In I.L.R. 13 Mad. 308 it was held that, where the transaction evidenced by particular instrument is single and indivisible or whether it really evidencing two transactions which can be severed from each other, the one as creating an independent personal obligation and the other as merely strengthening it by adding a right to proceed against immovable property.

In 2002 (5) ALT 404 = (3) LS 175 it was held that an unregistered sale deed in an injunction suit is admissible regarding possession as collateral purpose. See also 2003(1) ALT 336 where it was held that unregistered sale deeds for apartments can be received in evidence only for collateral purpose as to nature and proof of possession.

In 2003 (1) ALD 251, it was held that a partition may be effected orally and an unregistered partition can be admissible for the collectoral purpose of showing division in status and possession. Further, if it is a mere acknowledgment of oral partition already affected, no registration is required. See also 2003 (1) ALT 336; 2000 (6) ALT 772; 1999 (6) ALD 642; 1982 (2) ALT 384; 1969 (1) APLJ 1 (FB); 1969 AP 242; 1962 A.P. 132; 1986 A.P. 14 and 1; 1929 PC

269; 1974 Mad. 239; 1988 Delhi 13. Further the decisions 1970 SC 833 1972 SC 1121; 1961 SC 1077 and 2003(3) SCC 229 are for partition or distribution of assets among partners based on Arbitration award and discussed when registration is not required for the same. Further in 2002 (1) ALT 49 = 6 ALD 213 by following 1966 (2) ALT 300 (F.B.) it was held that award passed by Arbitrator relating to immoveable properties worth above Rs.100/- requires registration to give rights. In 1924 Mad. 542 it was also held that a partition already effected if covered by a list indicating the properties which fell to the share of each party, though signed by all and attested by mediators when the document not contained words that can be construed as creating a partition of the status of the parties by the document, it doesn't require registration. In 1987 (2) ALT 842 it was held that a family arrangement entered into in a compromise decree under which no right conferred for the first time to the parties therein then such a family arrangement covered by the compromise decree doesn't require registration. See also 1965 A.P. 367 and 1976 S.C. 807. For more details about difference between partition list and deed on the aspect of stamp duty and registration see discussion under the Stamp Act in this notes at page 12 para 2(c)(19).

In 2001 (2) ALT 417 = (2) ALD 525 *Abdul Majeed v. Yadram Suresh*, it was held that a document in question touches upon certain creation, declaration, assignment or limiting or extinguishing rights - it is not an agreement, thus such a document requires registration and proper stamp.

A memorandum merely recorded the fact of mortgage created already doesn't require registration see 1967 A.P. 51.

A letter when requires registration see the discussion under Stamp Act in this notes Para 2(c)(4).

In AIR 1996 SC 196 *Bhoop Singh's* Case it was held under Section 17(2) (vi) that where the compromise decree is *bona fide* in the sense that the compromise is not a device to obviate payment of stamp duty and frustrate the law relating to registration would not require registration, in a converse situation, it would require registration. If the compromise decree were to create for the first time right, title or interest in immoveable property of the value of Rs.,100/- or upwards in favour of any party to the suit, the decree or order would require registration. If the decree were not to attract any of the clauses of sub-section (1) of Section 17, it is apparent that the decree would not require registration. If the decree were not to embody the terms of compromise, benefit from the terms of compromise cannot be derived, even if a suit were to be disposed

of because of the compromise in question. If the property dealt with by the decree be not the "subject matter of the suit or proceeding", Clause (vi) of sub-section (2) would not operate. It was held that where the compromise decree confined to subject matter of suit it doesn't require registration to confer title. If the compromise covers outside the subject matter of the suit that portion requires registration to confer title to that property since decree creates new rights for first time to the subject matter not covered by the suit. In 2001 (3) ALD 522 = 2001 (4) ALT 490 - *G. Sanjeeva Reddy v. Indukuri Lakshamma* - It was also held that if subject matter not in respect of property other than subject matter of suit, such a compromise decree is exempt from registration and is admissible in evidence without registration.

CRIMINAL JUSTICE IN INDIA - A COMBINATION OF ADVERSARIAL AND INQUISITORIAL SYSTEM

By

—DR. MOHAMMED ZAHEERUDDIN,
Assistant Professor,
Post-graduate College of Law,
Osmania University, Hyderabad

In administration of justice there are two different systems functioning in the field of criminal justice, one is 'adversarial' and another is 'inquisitorial'. Some countries have the combination of these two systems.

In adversarial system accused is presumed to be innocent throughout the trial. The guilt of the accused beyond reasonable doubt will rest on the prosecution. It means the accused need not to rebut the case made out against him until prosecution does sufficiently well to establish his guilt beyond the shadow of doubt. It is sufficient if he is able to create some sort of reasonable doubt in the mind of the Court as to his guilt. In other words it

is the duty of the prosecution to establish all the ingredients of the offence with which the accused is charged and trial must be conducted before impartial and competent Court. Right of silence is fundamental to adversarial system which stipulates that 'it is the duty of the prosecution to prove the prisoners' guilt beyond reasonable doubt'.

Opposite to 'adversarial' is the 'inquisitorial system'. In this system a person is presumed to be guilty until he proves his innocence. At the time of trial Judge must take side of the Court. When the accused brought before Court he is presumed to be guilty person. Burden of proof is on him to prove that he is innocent.