

(2012) 12 KAR CK 0015

In the Karnataka High Court

Case No : Writ Appeal No's. 885 and 2062-2106 of 2008

Digambar Warty and Others

APPELLANT

Vs

District Registrar and Chief Controller of Revenue and
Commissioner of Stamps

RESPONDENT

Date of Decision : 07-12-2012

Acts Referred:

Karnataka Stamp Act, 1957 — Section 20(2), 46, 46A, 67, 67-B

Citation : (2013) 3 AKR 597 : (2013) ILR (Kar) 2099 : (2013) 4 KarLJ 247

Hon'ble Judges : N. Kumar, J;B.V. Pinto, J

Bench : Division Bench

Advocate : S.K.V. Chalapathy in Writ Appeal No. 870/2008 and Writ Appeal Nos. 2479-2538/2011, for the Appellant; Sajjan Poovaiah, AGA for R1, for the Respondent

Judgement

N. Kumar, J.—In both these batch of writ appeals as common questions of law are involved, they are taken up for consideration together and disposed of by this common Judgment. For the purpose of convenience, the parties are referred to as they are referred to in the writ petition.

2. In W.P. No. 14231/2005 and other connected matters, the petitioners are all members of Sri Chitrapur Co-operative Housing Society Limited [for short hereinafter referred to as "Society"]. The Society was registered in the year 1980 under the provisions of the Karnataka Co-operative Societies Act, 1959. The Society is a tenant Co-partnership society. The Society took on long lease for 99 years, the land belonging to Chitrapur Mutt. After taking the lease, they built 96 flats. The lease-hold rights and the ownership of the building vests in the Society. Each tenant member is allotted apartment on the basis of holding distinctive shares and loan stock subscribed by the member. The members jointly hold the property through the Society during the lease period. The land together with the buildings will revert back to the lessor on expiry of the lease period. The Society has not executed any conveyance, instrument of transfer or lease deed in

favour of its members. It has issued share certificates, loan stock certificates and possession certificates. Possession Certificates were issued to facilitate the members in the matter of filing IT return and other such benefits.

3. The revenue authorities i.e., the Chief Controlling Revenue Authority and the Commissioner of Stamps initiated proceedings against the petitioners under Sections 67 & 67-B of the Karnataka Stamp Act, 1957 ["Stamp Act" for short]. Show cause notice was issued alleging that possession certificates issued to the members enable them to enjoy possession of lands amounted to conveyance and as such attracted stamp duty u/s 20(2) of the Stamp Act. They were directed to show cause as to why the stamp duty should not be collected from them. The petitioners sent a reply to the show cause notices. Overruling their objections, the second respondent passed identical orders on different dates holding that possession certificates issued by the Society to its members attracted stamp duty u/s 20(2) of the Stamp Act and directed recovery of stamp duty as well as penalty from the petitioners. Further, a direction was issued to impound the xerox copies of the possession certificate produced by the members. Writ petitioners challenged the said orders in this Court.

4. The petitioners in Writ Petition No. 11678 of 2005, and other connected writ petition are the tenant members of M/s. Dattaprasad Housing Co-operative Society, Malleshwaram, Bangalore. It is a Society registered under the Co-operative Societies Act, 1959. It was registered in the year 1970. It is in the nature of tenant co-partnership co-operative society. The Society purchased the land in its own name and constructed 96 apartments. The bye-law of the Society provides that the member holding specified number of shares with distinctive shares and who paid compulsory tenement deposit are eligible for allotment of an apartment. It is consequential right of the shareholders. The apartments were constructed in the year 1977 and tenant members occupied the same. The land and the apartments continued to be held by the Society and the title vests in the Society. On 4.9.2004, a notice was issued to the members under Sections 67, 67-B, 33(1) and 39 of the Stamp Act for non-payment of stamp duty and registration fees in the transfer/conveyance of immovable property. In the notice, it was stated that the Society has been allotting and transferring apartments under the guise of transfer of shares linked to immovable property to avoid stamp duty and registration fee. Attention was drawn to Section 20(2) of the Stamp Act. It was pointed out that stamp duty is payable on all such transfer of shares pertaining to premises being a conveyance. Ten days time was given to show cause why steps should not be taken to recover the stamp duty as well as registration charges. Replies were sent and it was contended that the transfer of shares and possession certificates in the case of all the petitioners are prior to amendment of Section 38 of the Karnataka Co-operative Societies Act. Therefore, the amendment is not applicable to the allotment of shares and consequential possession of flats was much earlier to the amendment. Therefore, they are not liable to pay stamp duty as well as registration charges. In substance, they contended the possession certificates do not partake the

character of deed of conveyance and therefore no duty is payable. Challenging the said order writ petitions were filed.

5. A learned Single Judge heard all the writ petitions together and held that the possession certificates issued to the petitioners by the Society amounts to conveyance as defined under the Stamp Act and as such attracts the stamp duty as provided u/s 20(2) of the Stamp Act. However, he set aside the order to the extent of determining the market value, stamp duty and penalty u/s 39(1)(b) and remanded the matters back to the first respondent to consider the same to that extent and to re-determine the stamp duty and penalty payable. Aggrieved by the said orders, these appeals have been filed.

6. Sri S.K.V. Chalapathy, learned Senior Counsel appearing for the appellants in WA No. 870/2008 firstly contended that the land on which the flats have been constructed belongs to Chitrapur mutt. The said land is leased to the Society under a Lease Deed for a period of 99 years. Therefore, the Society is not the owner of the land. Society is only a lessee. The Society has constructed 96 apartments on the land leased. The building constructed also vests with the Society. The writ petitioners are all members of the society. They hold shares in the Society as evidenced by the Share Certificates. They have invested money for construction which is evidenced by the loan stock certificates. After constructions, they were put in possession of the apartments under the possession certificates. None of these documents effect transfer of immovable property and therefore it does not fall within the definition of the word "Conveyance" used in the Stamp Act. The condition precedent for application of Section 20 is that there should be a conveyance of movable or immovable property. In other words, there should be transfer of an immovable property. Mere transfer of possession of immovable property would not constitute conveyance of immovable property. Therefore the proceedings initiated and the adjudication made and the demands raised are all illegal, without the authority of law and is liable to be struck down.

7. Secondly, he contended that Section 46(A) of the Stamp Act prescribed a time limit within which the actions have to be taken. In the absence of fraud, collusion, the period prescribed is 12 years. Admittedly, the proceedings were not initiated within 5 years from the date of possession certificate. Therefore, the authorities have no right to recover the stamp duty as determined by them.

8. Thirdly, he contended that the adjudication of stamp duty payable should be on the basis of prevailing market rate on the day the possession certificate was issued. In fact, accepting their contentions, the learned Single Judge has set aside the determination and remanded the matter back to the authorities for re-determination. But as the transaction in question do not constitute a conveyance and the very proceedings are initiated beyond the period of limitation prescribed u/s 46-A of the Stamp Act, the entire proceedings are one without jurisdiction and requires to be set aside.

9. Sri Sreevatsa, learned Senior Counsel appearing for the appellants in the connected appeals adopted the aforesaid arguments.

10. Per contra, Sri Sajjan Poovaiah, learned Additional Advocate General appearing for the State contended that the definition of immovable property, used in Section 20(2) includes within its hold, the land and building and also the benefit arising out of the land. Admittedly, in the instant case, though the title of the land and the building vests with the Society after construction of the apartments, the benefit of enjoyment of apartments are transferred to the members through the possession certificates. In fact majority of the allottees in turn have executed a Deed of Conveyance, conveying such interest, which they got from the Society and all those documents are duly stamped and registered. But the very original documents are not subjected to duty and registration and therefore the learned Single Judge was justified in holding that the transaction in these cases fall within the definition of "Conveyance". Insofar as the question of limitation is concerned, he submitted, it applies only to the proceedings to which Section 46-A is attracted. This is a proceeding initiated u/s 67 of the Act, which expressly makes it clear that once the document which is not duly stamped comes into possession of the authority, he shall impound the document u/s 33 of the Stamp Act. The documents impounded u/s 33 are taken up for consideration u/s 39 for the purpose of deciding what is the duty payable. There is no limitation prescribed for holding such an enquiry. Once the adjudication is complete, Section 46 comes into picture and the duty and penalty is recoverable as if it is land revenue. The bar of limitation as contemplated u/s 46-A is not attracted. However, he submitted that insofar as the quantum of duty and penalty payable is concerned, the learned Single Judge has remitted the matter to the authorities for re-determination.

11. In the light of the aforesaid facts and rival contentions, the points that arise for our consideration are:-

(1) Whether the transactions in the nature of handing over possession in pursuance of a "Possession Certificate" would constitute "Conveyance" as defined u/s 20(2) of the Stamp Act, and as such it attracts stamp duty and registration?

(2) Whether the bar of limitation prescribed u/s 46-A is attracted to the facts of the case?

POINT NO. 1-CONVEYANCE

12. In order to answer this question, it is necessary to set out the nature of transaction. Sri. Chitrapur Math is the owner of the schedule property. It leased the said land under a registered lease deed to Chitrapur Co-operative Housing Society Limited, Bangalore for a period of 99 years. The Society has constructed 96 flats on the leased property. The bye-laws of the Society defines who is a "tenant member", and "interests of member" as under:

Tenant Member" (also ordinarily referred to as member) is one who has been

allotted a tenement/flat under these bye-laws and wherever the context admits it, his nominee, heir or legal representative who may be admitted as member as per the bye-laws."

Interests of member" means and includes the membership, share certificate, loan stock for flat and parking space and possession certificate for flat assigned to the tenant member.

13. One of the objects of the Society was to undertake construction of houses/flats/apartments on the lands acquired/purchased by the Society for the benefit of members subject to approval by the Competent Authority. Clause 10 of the bye-laws deals with Rights of members. It reads as under:

10. Rights of Members

All members shall be eligible to avail the benefits as per the objectives under bye-laws. Each member is eligible for allotment of a flat in the building constructed by the society. The society shall function as Tenant co-partnership society" in which the ownership of building and flats constructed on land acquired by the society on lease from Shri Chitrapur math will vest with the society and the members who are allotted the flats will have right of possession, transfer and letting out of the flats allotted to them as per the terms and conditions indicated in the possession certificate tenancy Agreement and Bye-laws of the society.

14. Clause 13 deals with the Procedure for Transfer of Shares and Interest. The relevant clauses are 13(a) & (g), which read as under:

(a) A member may apply to the Secretary in the prescribed forms for transfer of his shares and other interests stating therein the reason for such transfer, such application shall be submitted with the consent of the transferee along with share certificates, loan stock certificate or bond, land lease certificate, possession certificate, tenancy Agreement and parking place certificate (if allotted);

(b).....

(c).....

(d).....

(e).....

(f).....

(g) No member shall transfer, mortgage, lease, sublet or hire his interests and/or possessions of his flat and/or parking space allotted to him by society nor take possession and/or occupy nor give possession of any flat or parking space without obtaining the written permission of the Society with due procedure. Any violation or infringement of this is liable to be dealt with under the provisions of the Bye-laws of the Society.

15. All the writ petitioners have been issued "shares" in the Society. They are

also issued a "loan stock certificate" showing the amount invested by each member in the said project. Thereafter "Possession Certificates" were also issued, wherein it is recited that the Society has constructed an apartment building complex on the said land for co-operative living and the Society has issued shares and loan stock certificates equivalent to the value of the contributions made by each member as a form of acknowledgement of debt. Then there is a reference to the number of shares held by such a member, the amount which is invested by such a member and the apartment number, which is allotted to him with the parking space. Finally, it is stated that the Society hands over the possession of the apartment and parking space to such members, their successors, legal heirs, etc., who are free to enjoy peaceful undisturbed occupancy of the apartment subject however, to the terms and conditions mentioned therein. The first condition is that the member continues to hold in his name the shares and loan stocks mentioned therein; abides by the Rules and Regulations as laid out in the bye-laws of the Society in force from time to time; and abides by the terms and conditions of the agreement entered into between the member and the Society. The Possession Certificate shall be surrendered to the Society at the time of transfer of loan-stocks and the shares mentioned therein.

16. As is clear from the bye-laws, the right of a member under the aforesaid documents conferred is, the right of possession, right to transfer and right to let-out the flats allotted to him. As per the terms and conditions indicated in the Possession Certificate, tenancy agreement and bye-laws of the Society, confer a right to transfer, mortgage, lease, sub-let or hire his interest and or possession and his flat and or parking space allotted to him by the Society. He could also give possession of any flat or parking space to others. The only condition is that, before exercising the said right, he shall obtain a written permission of the Society with due procedure.

17. A combined reading of these documents makes it clear that the ownership of the land vests with Sri. Chitrapur math. The Society has constructed the apartments and the ownership of the apartment vests with the Society. But, by virtue of the aforesaid documents, the members have a right to be in possession of the apartment. They have a right to lease the apartment to a person of their choice. They can also transfer possession to another person. Therefore, the member is conferred the power to have the benefit of the land and the building uninterruptedly and exclusively to the extent mentioned in the Possession Certificate and he could alienate the said property. It is in this background, we have to find out, whether it amounts to conveyance.

18. The Karnataka Stamp Act, 1957 (for short hereinafter referred to as "the Act") is a consolidating Act. It defines "conveyance" at Section 2(d) which reads as under:

(d) "conveyance" includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is

not otherwise specifically provided for by the Schedule."

Section 2(j) defines what an "instrument" means:

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

19. The said definition underwent a change by way of an amendment by Act 6/1999 which came into effect from 01.04.1999. The amended provision reads as under:

Conveyance" includes.-

(i) a conveyance on sale;

(ii) every instrument;

(iii) every decree or final order of any Civil Court;

(iv) every order made by the High Court u/s 394 of the Companies Act, 1956 in respect of amalgamation of Companies Act, 1956 in respect of amalgamation of companies, by which property, whether movable or immovable or any estate is transferred to, or vested in, any other person, and which is not otherwise specifically provided for by the schedule.

20. For the first time, the word immovable property used in the said definition clause was defined by way of the aforesaid amendment by introducing Section 2(gg) as under:

2(99) "Immovable property" includes lands, buildings, rights to ways, air rights, development rights, whether transferable or not, benefits to arise out of the land, and things attached to the earth, or permanently fastened to anything attached to the earth.

21. However, in the absence of the said definition of immovable property, the definition of immovable property as found in the General Clauses Act, 1897 was attracted. General Clauses Act, 1897 defines Immovable property" at Section 3(26) as under:

3(26) "Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

22. Therefore, till the word "immovable property" is defined in 1999, it is the definition of "immovable property" as contained in the General Clauses Act, which was applicable. The definition of immovable property now inserted by way of amendment to the Karnataka Stamp Act includes all the words used in the definition of immovable property under the General Clauses Act and in addition, it includes buildings, rights to ways, air rights, development rights, whether transferable or not. The Legislature has the power to define a word given artistically. So the definition of a word in the definition Section may either be

restricting of its ordinary meaning or it may be extensive of the same. When a word is defined to mean such and such, a definition is prima facie restricted and exhausted, where as when a word defined includes such and such, the definition is prima facie extensive. The word includes is often used in interpretation clause notwithstanding the meaning of the words or phrases occurring in the body of the statute. When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and purpose, but also those things, which the interpretation clause declares, they shall include. When a word is defined to bar a number of inclusive meanings, the sense in which the word is used in a particular provision must be ascertained from the context of the scheme of the Act, the language of the provision and the meaning intended to be served thereby.

23. Chapter II of the Act deals with the Liability of instruments to duty. Section 3 of the Act is the charging Section, which states that, subject to the provisions of this Act and the exemptions contained in the Schedule, the instruments mentioned in the said Section shall be chargeable with duty of the amount indicated in that schedule as the proper duty therefor. It is in this context the definition of "conveyance", which is inclusive one includes the "conveyance of sale". It does not include those instruments, which are otherwise specifically provided for by the schedule. But every other instrument, which does not fall within the aforesaid two categories by which the property whether movable or immovable is transferred to any other person which constitutes a "conveyance" and then Section 3 of the Act is attracted and such instruments shall be chargeable with duty of the amount indicated in that schedule. The word "transfer" has not been defined under the Act. Therefore, we have to fall back upon the definition of "transfer" as contained in Section 5 of the Transfer of Property Act. It defines "transfer of property" as under:

5. "Transfer of property" defined.-In the following sections "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act.

[In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.]

24. Similarly, Section 6 of the Transfer of Property Act also sets out what may be transferred, which reads as under:

6. What may be transferred.-Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force,-

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred;

(b) A mere right of re-entry for breach of a condition subsequent cannot be transferred to any one except the owner of the property affected thereby;

(c) An easement cannot be transferred apart from the dominant heritage;

(d) All interest in property restricted in its enjoyment to the owner personally cannot be transferred by him;

[(dd) A right to future maintenance, in whatsoever manner arising, secured or determined, cannot be transferred;]

(e) A mere right to sue cannot be transferred;

(f) A public office cannot be transferred, nor can the salary of a public officer, whether before or after it has become payable;

Stipends allowed to military naval, air-force and civil pensioners of the Government and political pensions cannot be transferred;

(h) No transfer can be made (1) insofar as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee;

(i) Nothing in this section shall be deemed to authorize a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate, under the management of a Court of Wards, to assign his interest as such tenant, farmer or lessee.

25. A combined reading of these provisions makes it clear, that every instrument by which whether movable or immovable property is transferred which does not amount to "conveyance of sale" and which is not otherwise specifically provided for by the schedule, constitutes a "conveyance". In view of the definition of immovable property prior to amendment included land, benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth, which necessarily means immovable property, cannot be narrowly construed as a land or a building. Even the benefits arising out of land falls within the definition of immovable property, which is inclusive in nature. All those words find a place now in the definition of "immovable property" under the Act and in addition to the same, "immovable property" includes buildings, right to ways, air rights, development rights whether transferable or not. Therefore, the definition of "immovable property" is also exhaustive. The definition of immovable property was inserted by Act 24/1999. The object of the said amendment was, for more effective implementation of the provisions of the Act and therefore, they have defined "immovable property" and it is by way of insertion. Therefore, from the scheme of the Act and the object behind this amendment, it is clear that the said amendment is clarificatory in nature. All the rights which are now expressly defined under the word "immovable property"

always was included in the word "immovable property" as mentioned in the definition clause. Therefore, in order to ascertain whether a particular transaction is either before this amendment or subsequent to amendment, the tests prescribed under the law is the same. It makes no difference. In the wider sense, property includes all personal legal rights of whatever description. A man's property is all that is his in law. The law of property is the law of proprietary rights and in rem, such as freehold and lease hold estate in land. In the narrowest use of the term, it includes nothing more than a corporeal property i.e., to say, the right of ownership in material object or that object itself. The owner of a material object is, he who owns a right to the aggregate of its uses. Ownership is the right of general use, not that of absolute or limited use. He is the owner of a thing, who is entitled to all those uses of it, which are not specially excepted and cut-off by the law. No such right as that of absolute and unlimited use is known to the law. The limits that are imposed upon an owner's right of use are of two kinds. The first are the various limits imposed upon ownership by the general law. The second class of restrictions upon a owner's right of use consists of those which flow from the existence of encumbrances vested in other persons. Therefore, in the context of Stamp Act and chargeability of an instrument under the Act, what is to be seen is, whether it is an instrument under which a person claims a right and whether that right can be construed as an immovable property. Having regard to the definition of the immovable property in the general Clauses Act and after amendment under the Stamp Act and in particular the said definition being an inclusive one, it not only includes the land and buildings, but includes the benefits that arise out of land and things attached to the earth. Therefore, though a person may not be the owner of a land or a building and the said land or building may not vest with him, if a person is entitled to have the benefit of that property like possession, right to transfer possession, right to lease, then that right constitutes "immovable property". It falls within the definition of "conveyance" and it is chargeable to duty u/s 3 of the Act. Therefore, the contention that a mere right to possession and right to transfer or let-out such possession do not constitute "immovable property", has no substance, in view of the said definition contained, both in the General Clauses Act as well as under the Stamp Act 1999.

26. In the instant case, as is clear from the aforesaid documents and the byelaws of the Society, the members are entitled to possession of the apartment which they can enjoy. Clauses 10 of the byelaws confers to such members not only the right of possession, they are also conferred right to transfer and let out the flats allotted to them. In the instant case in exercise of that right, number of members executed sale deeds transferring the apartments in favour of third persons and all those sale deeds are duly stamped and registered. It is settled law that a person cannot confer better title than what he has. If the members had no right to "immovable property" and if they are conveying that right to third parties and if the said transaction does not constitute "conveyance", there was no need to pay stamp duty and get it registered. It is only because the right,

which they were conveying is the right arising out of an immovable property and the benefits arising out of the land and the building, which constitutes "immovable property" and at best, transfer of such right constitutes "conveyance" and the stamp duty and registration fees was payable.

27. All these three documents are executed contemporaneously. What is conveyed is the enjoyment of an immovable property as the Society itself did not have ownership right and therefore could not have transferred the ownership rights in the land. However, constructions are put up with the money of the members. In terms of the bye-laws, the building vests with the Society. In turn it vests with the members. When we look at these documents, the nature of transaction, the payments made, the nature of property, the way the property is enjoyed and the way the property is dealt with, there leaves no room for doubt that it constitutes a conveyance as defined u/s 2(d) of the Stamp Act. This is an ingenious method adopted by the members to avoid payment of stamp duty and registration fees.

28. In the light of the aforesaid discussion, we are satisfied, that the learned Single Judge, on proper appreciation of the entire material on record, rightly held that the transaction in question falls within the definition of "conveyance" and therefore the instrument evidencing such conveyance is chargeable to duty in terms of Section 3 of the Act read with the appropriate schedule under the Act.

POINT NO. 2-LIMITATION

29. In the alternative, it was contended that assuming the transaction in question falls within the definition of "conveyance" as defined u/s 2(d) of the Act and the authorities have the power to impound the said document, their right to recover stamp duty and penalty is clearly barred by the law of limitation as prescribed u/s 46A of the Act.

30. Per contra, it was contended on behalf of the Revenue that only, if the case falls u/s 46A of the Act, the limitation prescribed therein is attracted. It has no application to a case where an instrument is impounded and liability of tax is adjudicated and recovery is made in terms of Section 46 of the Act. It is in this context, necessary to find out from the scheme of the Act what is the meaning of the word "impounding" and how that duty and penalty is levied on a document, which is not stamped or on a document, which is short levied and the mode of recovery and the limitation, if any.

31. Chapter III of the Act deals with Adjudication as to stamps. Any person, who is not clear about the chargeability of the tax or a duty on an instrument or what is the duty chargeable on such instrument, may approach the Deputy Commissioner u/s 31 of the Act, who shall in turn adjudicate and decide, whether an instrument is chargeable to duty or not and if any duty is paid, is it fully paid and if there is a deficiency, what is the deficiency, which is payable. On payment of such duty u/s 32 of the Act, the Deputy Commissioner shall certify by endorsement on such instrument that the full duty (stating the amount) with which it is chargeable has been paid. If in his opinion, such an instrument is not

chargeable with duty, the Deputy Commissioner shall certify that such instrument is not so chargeable. After such an endorsement is made, the said instrument shall be deemed to be duly stamped or not chargeable with duty, as the case may be and shall be receivable in evidence or otherwise and may be acted upon and registered as if it had been originally stamped. Chapter IV deals with Instrument not duly Stamped".

IMPOUNDING

32. Section 33 of the Act provides for Examination and impounding of instruments. It reads as under:

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

(2) For that purpose every such person shall examine every instrument so chargeable and so produced or coming before him, in order to ascertain whether it is stamped with a stamp of the value and description required by the law in force in the State of Karnataka when such instrument was executed or first executed:

Provided that-

(a) nothing herein contained shall be deemed to require any Magistrate or Judge of a Criminal Court to examine or impound, if he does not think fit so to do, any instrument coming before him in the course of any proceedings other than a proceedings under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(b) in the case of a Judge of the High Court, the duty of examining and impounding any instrument under this section may be delegated to such officer as the Court appoints in this behalf.

(3) For the purposes of this section, in cases of doubt, the Government may determine-

(a) what offices shall be deemed to be public offices; and

(b) who shall be deemed to be persons-in-charge of public offices.

33. Section 34 of the Act declares that Instruments not duly stamped are inadmissible in evidence, etc." It reads as under:-

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

officer, unless such instrument is duly stamped:

Provided that:-

(a) any such instrument not being an instrument chargeable with a duty not exceeding fifteen paise only, or a mortgage of crop Article [35](a) of the Schedule chargeable under clauses (a) and (b) of section 3 with a duty of twenty-five paise shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

(b) where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(c) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898;

(d) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government, or where it bears the certificate of the Deputy Commissioner as provided by section 32 or any other provision of this Act and such certificate has not been revised in exercise of the powers conferred by the provisions of Chapter VI

34. This provision mandates that 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. Further it mandates that such an instrument shall not be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped. Proviso to the said Section provides for admission of such instrument, provided that it can 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.

35. This provision refers to the power of the Civil Court which admits the documents in evidence. The main Section is couched in the negative. Unless the instrument is duly stamped, it is inadmissible in evidence. As an exception, the proviso provides for payment of duty and penalty. In the matter of collection of duty and penalty no discretion is vested with the authority admitting such an instrument in evidence. The duty payable on the instrument is prescribed by statute. Therefore, there is no question of any discretion being vested with the

authority impounding the document in the matter of collecting the duty. Once the duty payable is ascertained from the statute, no discretion is vested with the authority admitting the document in evidence, in the matter of imposition of duty and penalty. The word used in the said proviso is "shall". It is mandatory. However, Section 35 makes it clear, that where an instrument has been admitted in evidence without there being objection at the time of admitting the said instrument in evidence, then such admission shall not, except as provided in Section 58, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Section 58 deals with the power of the Appellate Court to review the finding recorded by the original Court u/s 34 of the Act, either suo motu or on the application of the Deputy Commissioner. Section 36 of the Act deals with admission of improperly stamped instrument. The State Government may make rules providing that, where an instrument bears a stamp of sufficient amount but of improper description, it may, on payment of the duty with which the same is chargeable, be certified to be duly stamped, and any instrument so certified shall then be deemed to have been duly stamped as from the date of its execution.

36. Section 37 of the Act deals with the procedure to be followed by the authority after impounding the document u/s 33 and after passing of the orders u/s 34 or Section 36. When the person impounding an instrument u/s 33 has by law or consent of parties authority to receive evidence and admits such an instrument in evidence upon payment of a penalty as provided by Section 34 or of duty as provided by Section 36, under Sub-Section (1) of Section 37, he shall send to the Deputy Commissioner an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty, levied in respect thereof, and shall send such amount to the Deputy Commissioner or to such person as he may appoint in this behalf. Sub-section (2) of Section 37 provides that in every other case, the person so impounding an instrument shall send it in original to the Deputy Commissioner.

37. The reason is obvious. Generally, it is the Civil Court which receives the instrument in evidence. Admission of instrument in evidence is not proof of the said instrument. If the execution of the instrument is denied by the executant or the opposite party, burden is cast on the person producing the said instrument to prove that the instrument was executed in accordance with law. He may have to examine the attesting witnesses if there is any, or he may request the Court to compare the signature found on the said instrument with the admitted signatures in the case or he may request for sending the said instrument containing the signature for the opinion of the handwriting expert. Therefore the original document, after it being impounded and the party paying the duty and penalty cannot be sent to the Deputy Commissioner, the law provides for a authenticated copy of such an instrument being sent to the Deputy Commissioner. However, in all other cases, it is the original of the document impounded which is to be sent to the Deputy Commissioner. The object being, the said provision should not come in the way of speedy disposal of cases before the Court.

38. Section 38 of the Act deals with the power of the Deputy Commissioner to refund the penalty paid under Sub-section (1) of Section 37. When a copy of an instrument is sent to the Deputy Commissioner under Sub-section (1) of Section 37, he may, if he thinks fit, refund any portion of the penalty in excess of five rupees which has been paid in respect of such instrument. The reason being, when a person receiving the evidence impounds the document and collects the duty u/s 34 of the Act, which in most of the cases, is the Civil Court, the time of the Court should not be wasted in deciding, whether it is a fit case where penalty of ten times the duty is to be levied or a case is made out for imposition of lesser penalty. Therefore, the Legislature consciously has used the word, "shall" taking away any discretion in the Civil Court in the matter of imposition of penalty equal to ten times the duty payable. However, the Civil Court after impounding the document, collecting the duty and penalty, is under a statutory obligation to send it to the Deputy Commissioner under Sub-section (1) of Section 37. Therefore, when such an instrument is so sent to the Deputy Commissioner, he has been conferred the power to reduce the penalty already paid before the Civil Court. One of the reasons why such a discretion is not vested with the Civil Court is, it is the revenue authorities who are more concerned with the collection of revenue, and that is not the job of the Civil Courts. However, if a document which is not stamped or insufficiently stamped is tendered in evidence in Civil Court and admitted in evidence, then the very purpose of the Stamp Act itself would be defeated. Therefore, a power is vested in Civil Court to impound the document. In fact, it is an obligation cast on the Civil Court by the statute. But, the legislature does not want to burden the Civil Court to go into the question, whether a case for payment of lesser penalty is made out or not. The Civil Courts cannot be expected to be wasting their precious judicial time in deciding matters which exclusively fall within the sphere of revenue authorities and under the scheme of the Act, which has to be decided by them. Therefore, it prescribes that after determining the duty payable on such instrument, to collect the duty with ten times penalty and then transmit the document to the Deputy Commissioner with duty and penalty so collected. Thereafter, a power is conferred on the Deputy Commissioner u/s 38 of the Act to hold an enquiry after giving an opportunity to the person who has paid duty and penalty to extend the benefit of reduction of penalty. Such a reduction in penalty is available to both the documents i.e., tendered before the Civil Court or produced directly before the Deputy Commissioner u/s 33. No discrimination in law is made between these two types of documents. However, there appears to be some conflicting opinion in this regard.

JUDICIAL DISCIPLINE

39. A learned Single Judge of this Court in W.P. No. 43172/04 in his order dated 08.12.2005 held that penalty amount will be maximum of ten times of the stamp duty payable and that the maximum amount of 10 times does not necessarily mean that the Courts have to impose the maximum penalty payable. Yet another learned Single Judge who could not agree with the aforesaid view, rightly

referred the matter to the Division Bench. On such reference, the Division Bench of this Court in the case of J.S. Paramesh Vs. Smt. Indramma Murthy, interpreting clause (a) of Section 34 of the Act, held as under:

3. The impugned order was passed by the Trial Court in exercise of the power under the proviso to Section 34 of the Karnataka Stamp Act, 1957. According to clause (a) of the said proviso, when the amount of the proper duty or deficient portion thereof exceeds five rupees, the penalty to be imposed is a sum equal to ten times such duty or portion. There is no discretion granted to the Court to impose a lesser penalty. Hence the observation contained in the order dated 8-12-2005 in Writ Petition No. 43172 of 2004 that the Courts have the power to impose as penalty a lesser amount than ten times the amount of proper duty or deficient portion is not correct. The observation is contrary to the clear provisions contained in the proviso to Section 34 of the Karnataka Stamp Act, 1957.

(emphasis supplied)

40. However, yet another learned Single Judge of this Court in the case of K. Govinde Gowda Vs. Akkayamma & Others, in Writ Petition No. 8892 of 2010 after referring to the aforesaid judgment held as under:

In J.S. PARAMESH'S CASE the Division Bench has given the plain interpretation of Sec. 34 that the Court has no discretion to levy lesser amount than the 10 times of the amount of proper duty. The discrimination and the discrepancy in the provisions of Sec. 34 vis-à-vis Sec. 39 is not considered and decided."

XXXXX

XXXXX

Both the provisions declare that the deficit of the stamp duty together with a penalty of Rs. 5/- or in the alternative 10 times the duty could be collected. Both the provisions does not declare that the highest of the penalty to be collected. In other words "whichever is higher" is not stated in the provision. Therefore, in the discretion of the Court and the Deputy Commissioner the penalty that could be collected may be Rs. 5/- or the 10 times of the duty imposed. It is not as a rule that the Court shall have to levy penalty of 10 times which is only an alternative provision. When the State collects the proper stamp duty u/s 34 there cannot be any grievance of loss of public revenue. Penalty is in the nature of a fine for violating Section 17 of the Act. The penalty should not be unduly harsh and arbitrary. The law itself provides to levy penalty of Rs. 5/- or in the alternative 10 times the duty. Therefore, the Court or the Deputy Commissioner should normally levy penalty of Rs. 5/- in extreme and exceptional cases a harsher step of levy of penalty should be invoked. Even while levying a harsher penalty, the Court or the Deputy Commissioner has to give special reasons and levy of alternative penalty should not normally be more than double the duty payable.

41. Thereafter, after considering the provisions of the Stamp Act, the learned Single Judge, held as under:

16. With regard to the discrimination of the powers vested with Deputy Commissioner and the power of the Court u/s 34 of the Act to levy penalty 10 times the duty, evidently disclose a case of hostile discrimination"

"Therefore, instead of holding the rigid provision regarding levying penalty 10 times the duty as being unconstitutional, by applying the Doctrine of Harmonious Construction and reading down the provision, it is to be held that the Courts u/s 34 of the Act shall also have similar power like Deputy Commissioner u/s 39(1) (b) of the Act to levy penalty not more than 10 times if the Court thinks fit and proper.

19. At the cost of repetition, it is to be said that provisions of Sections 34 and 39 gives a direction to the Court and the Authority to levy penalty of Rs. 5/- apart from collecting deficit stamp duty or in the alternative can levy penalty not more than 10 times in appropriate cases. The Court or the Deputy Commissioner shall have to take into consideration the literacy of the parties, the nature of transaction and their financial capacity while levying the penalty. However, while levying alternative penalty not more than 10 times, normally the Court or the Deputy Commissioner shall levy penalty double the duty and only in the exceptional circumstances for special reasons, the harsher and extreme step to levy penalty not more than 10 times to be invoked."

42. Now the question is, which of the two decisions, noticed supra is to be followed, in particular, by the Sub-ordinate Courts in the State. Dealing with this aspect, the Supreme Court in the case of Mahadeolal Kanodia Vs. The Administrator-general of West Bengal, held as under:

19....If one thing is more necessary in law than any other thing, it is the quality of certainty. That quality would totally disappear if Judges of coordinate jurisdiction in a High Court start overruling one another's decisions. If one Division Bench of a High Court is unable to distinguish a previous decision of another Division Bench, and holding the view that the earlier decision is wrong, itself gives effect to that view the result would be utter confusion. The position would be equally bad where a Judge sitting singly in the High Court is of opinion that the previous decision of another Single Judge on a question of law is wrong and gives effect to that view instead of referring the matter to a larger Bench. In such a case lawyers would not know how to advise their clients and all courts subordinate to the High Court would find themselves in an embarrassing position of having to choose between dissentient judgments of their own High Court.

43. In Shri Bhagwan and Another Vs. Ram Chand and Another, the Apex Court observed as under:

18....It is hardly necessary to emphasize that considerations of judicial propriety and decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a Single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to a Division

Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the question himself.

44. The Supreme Court in the case of Union of India (UOI) and Another Vs. Raghubir Singh (Dead) by Lrs. Etc., while recognizing the need for constant development of law and jurisprudence, emphasized the necessity of abiding by the earlier precedents in the following words:

9. The doctrine of binding precedent has the merit of promoting a certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequence of transactions forming part of his daily affairs. And, therefore, the need for a clear and consistent enunciation of legal principle in the decisions of a court."

45. In the case of Sundarjas Kanyalal Bhathija and others Vs. The Collector, Thane, Maharashtra and others, a two-Judge Bench of the Apex Court observed as under:

22.... In our system of judicial review which is a part of our constitutional scheme, we hold it to be the duty of judges of superior courts and tribunals to make the law more predictable. The question of law directly arising in the case should not be dealt with apologetic approaches. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the courts, profession and public. Otherwise, the lawyers would be in a predicament and would not know how to advise their clients. Subordinate courts would find themselves in an embarrassing position to choose between the conflicting opinion. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute.

46. In the case of Dr. Vijay Laxmi Sadho Vs. Jagdish, the Apex Court considered whether the learned Single Judge of Madhya Pradesh High Court could ignore the judgment of a coordinate Bench on the same issue and held as under:

33. As the learned Single Judge was not in agreement with the view expressed in Devilal case it would have been proper, to maintain judicial discipline, to refer the matter to a larger Bench rather than to take a different view. We note it with regret and distress that the said course was not followed. It is well-settled that if a Bench of coordinate jurisdiction disagrees with another Bench of coordinate jurisdiction whether on the basis of different arguments or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all costs.

47. In the case of Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others, the Constitution Bench of the Apex Court noted that the two learned Judges denuded the correctness of an earlier Constitution Bench judgment in Bharat Petroleum Corpn. Ltd., vs. Mumbai Shramik Sangha and reiterated the same despite the fact that the second Constitution Bench refused to reconsider the earlier verdict and observed as under:

3. We may point out, at the outset, that in Bharat Petroleum Corpn. Ltd., vs. Mumbai Shramik Sangha a Bench of five Judges considered a somewhat similar question. Two learned Judges in that case doubted the correctness of the scope attributed to a certain provision in an earlier Constitution Bench judgment and, accordingly, referred the matter before them directly to a Constitution Bench. The Constitution Bench that then heard the matter took the view that the decision of a Constitution Bench binds a Bench of two learned Judges and that judicial discipline obliges them to follow it, regardless of their doubts about its correctness. At the most, the Bench of two learned Judges could have ordered that the matter be heard by a Bench of three learned Judges.

5. The learned Attorney-General submitted that a Constitution Bench judgment of this Court was binding on smaller Benches and a judgment of three learned Judges was binding on Benches of two learned Judges—a proposition that learned counsel for the appellants did not dispute. The learned Attorney-General drew our attention to the judgment of a Constitution Bench in Sub-Committee of Judicial Accountability vs. Union of India where it has been said that "no coordinate Bench of this Court can even comment upon, let alone sit in judgment over, the discretion exercised or judgment rendered in a cause or matter before another coordinate Bench" The learned Attorney-General submitted that the appropriate course for the Bench of two learned Judges to have adopted, if it felt so strongly that the judgment in Nityananda Kar was incorrect, was to make a reference to a Bench of three learned Judges. That Bench of three learned Judges, if it also took the same view of Nityananda Kar, could have referred the case to a Bench of five learned Judges.

6. In the present case the Bench of two learned Judges has, in terms, doubted the correctness of a decision of a Bench of three learned Judges. They have, therefore, referred the matter directly to a Bench of five Judges. In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified.

48. In the case of State of Bihar Vs. Kalika Kuer @ Kalika Singh and Others, the

Apex Court elaborately considered the principle of per incuriam and held that the earlier judgment by a larger Bench cannot be ignored by invoking the principle of per incuriam and the only course open to the coordinate or smaller Bench is to make a request for reference to the larger Bench.

49. In the case of State of Punjab and Another Vs. Devans Modern Brewaries Ltd. and Another, the Apex Court reiterated that, if a coordinate Bench does not agree with the principles of law enunciated by another Bench, the matter has to be referred to a larger Bench.

50. In the case of Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, , the Constitution Bench of the Apex Court interpreted Article 141, referred to various earlier judgments including Bharat Petroleum Corpn. Ltd., vs. Mumbai Shramik Sangha, and Pradip Chandra Parija vs. Pramod Chandra Patnaik and others and has held as under:

the law laid down in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength and it would be inappropriate if a Division Bench of two Judges starts overruling the decisions of Division Benches of three Judges. The Court further held that such a practice would be detrimental not only to the rule of discipline and the doctrine of binding precedents but it will also lead to inconsistency in decisions on the point of law; consistency and certainty in the development of law and its contemporary status-both would be immediate casualty.

51. In the case of State of U.P. and Others Vs. Jeet S. Bisht and Another, when one of the Hon''ble Judges (Katju, J.) constituting the Bench criticized the orders passed by various Benches in the same case, the other Hon''ble Judge (Sinha, J.) expressed himself in the following words:

100. For the views been taken herein, I regret to express my inability to agree with Brother Katju, J. in regard to the criticisms of various orders passed in this case itself by other Benches. I am of the opinion that it is wholly inappropriate to do so. One Bench of this Court, it is trite, does not sit in appeal over the other Bench particularly when it is a coordinate Bench. It is equally inappropriate for us to express total disagreement in the same matter as also in similar matters with the directions and observations made by the larger Bench. Doctrine of judicial restraint, in my opinion, applies even in this realm. We should not forget other doctrines which are equally developed viz. Judicial Discipline and respect for the Brother Judges.

52. In the case of Uttar Pradesh Gram Panchayat Adhikari Sangh and Others Vs. Daya Ram Saroj and Others, the Apex Court noted that by ignoring the earlier decision of a coordinate Bench, a Division Bench of the High Court directed that part-time tube-well operators should be treated as permanent employees with same service conditions as far as possible and observed thus:

26. Judicial discipline is self-discipline. It is an inbuilt mechanism in the system

itself. Judicial discipline demands that when the decision of a coordinate Bench of the same High Court is brought to the notice of the Bench, it is to be respected and is binding, subject of course, to the right to take a different view or to doubt the correctness of the decision and the permissible course then open is to refer the question or the case to a larger Bench. This is the minimum discipline and decorum to be maintained by judicial fraternity.

53. It is interesting to note that the Apex Court in the case of Coir Board, Ernakulam, Cochin and Another Vs. Indira Devi P.S. and Others, a two-Judges Bench doubted the correctness of the seven-Judges Bench judgment in Bangalore Water Supply & Sewerage Board vs. A. Rajappa and directed the matter to be placed before Hon'ble the Chief Justice of India for constituting a larger Bench. However, a three-Judges Bench headed by Dr. A.S. Anand, C.J., refused to entertain the reference and observed that the two-Judge Bench is bound by the judgment of the larger Bench (Coir Board vs. Indira Devi P.S.).

54. Therefore, the law on the point is well settled. When a learned Single Judge is not in agreement with the view expressed either by a learned Single Judge or by a Division Bench, it would be proper for him in order to maintain judicial discipline, to refer the matter to a larger Bench, rather than to take a different view. When a Single Judge hearing a matter is inclined to take the view that the earlier decision of a Division Bench need to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer the matter to the Division Bench or place the relevant papers before the Chief Justice, to enable him to constitute an appropriate Bench to examine the question. That is the proper and traditional way to deal with such matters. It is founded on healthy principles of judicial decorum and propriety. When on reference by a learned Single Judge who did not agree with the view expressed by another learned Single Judge, the Division Bench pronounces its decision on that point, the said law laid down by the Division Bench cannot be ignored or over come by giving yet another reason, as has been done in this case. If a learned Single Judge holds the view that the Division Bench of the Court which has laid down the law, has not looked into the case from another angle and interprets the provision which is diametrically opposite to the view taken by the Division Bench, it results in utter confusion. It is well settled that, if a Bench of co-ordinate jurisdiction, disagrees with another Bench of co-ordinate jurisdiction, whether on the basis of different arguments or otherwise, on a question of law, it is appropriate that the matter be referred to a larger Bench for resolution of the issue, rather than to leave two conflicting judgments to operate, creating confusion. It is not proper to sacrifice certainty of law. Judicial decorum, no less than legal propriety forms the basis of judicial procedure and it must be respected at all cost. The law must be made more effective as a guide to behaviour. It must be determined with reasons which carry convictions within the Courts, profession and public. Otherwise, the Advocates would be in a predicament and would not know how to advise their clients. Subordinate Courts would find themselves in an embarrassing position to choose between the conflicting opinions and dissentient judgments of their own

High Court. The general public would be in dilemma to obey or not to obey such law and it ultimately falls into disrepute.

55. In the light of the aforesaid judgments of the Apex Court, the learned Single Judge in K. Govinde Gowda's case, if he was not agreeing with the view expressed by the Division Bench, he should not have given his own reasons in not agreeing with the same, even if he was viewing the provisions from the question of Constitutional validity. He was bound by the judgment rendered by the Division Bench on reference on the same question. Assuming, he doubted the correctness of the said judgment, he could not have differed from the said judgment of the Division Bench and expressed the view contrary to the same. At the most, he could have opined that the matter be heard by a Bench of more than two learned Judges. Judicial discipline is self-discipline. It is an in built mechanism in the system itself. Judicial discipline demands that when the decision of a coordinate Bench of the same High Court is brought to the notice of the Bench, it is to be respected and is binding, subject of course to right to take a different view or to doubt the correctness of the decision and the permissible course then open is to refer the question or the case to a larger Bench. This is the minimum discipline and decorum to be maintained by judicial fraternity.

56. Noticing such disturbing trends in our judicial system, the Apex Court in the case of Official Liquidator Vs. Dayanand and Others, has observed as under:

90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in the last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass roots will not be able to decide as to which of the judgments lay down the correct law and which one should be followed.

91. We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole.

Discipline is sine qua non for effective and efficient functioning of the judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judge Bench in UP Seb Vs. Pooran Chandra Pandey should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.

57. In view of the aforesaid judgment of the Apex Court, it is clarified that the observations made in the judgment in K. GOVINDE GOWDA's case should neither be treated as binding by the learned single Benches of High Court or Subordinate Courts and other judicial foras nor should that order be relied upon or made basis, for bypassing the principles laid down in the case of J.S. PARAMESH, by the Division Bench of this Court.

58. Section 39 of the Act deals with the power of the Deputy Commissioner to stamp the instruments. When he impounds the instrument u/s 33 or he receives any instrument sent to him under Sub-section (2) of Section 37, if he is of the opinion that the instrument chargeable with duty or is not duly stamped, he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of Rupees Five or if he thinks fit an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees. Here again, the discretion is conferred on the Deputy Commissioner to impose a penalty less than ten times the duty payable. Therefore Section 38 and Section 39 of the Act, confers power on the Deputy Commissioner to levy penalty on an insufficiently stamped instrument or an instrument which is not stamped at all, less than ten times the penalty payable thereon u/s 34 of the Act. However, the said discretion conferred on the Deputy Commissioner should be exercised in a judicious manner. He will be exercising a quasi judicial power. Therefore, he has to take into consideration the facts of the case, the circumstances under which the instrument is executed, the reason given either for not paying stamp duty or for payment of insufficient duty on such instrument and other attendant circumstances and then in his discretion can reduce the penalty payable. The said order reducing the penalty should not be arbitrary and whimsical, as otherwise it may give scope for abuse of such power and the very intention of the legislature enacting the provision for penalty would be defeated. Therefore, merely because the Deputy Commissioner has been conferred under the statute the power to levy duty less than 10 times, such a power cannot be exercised mechanically without application of mind and without assigning reasons for such reduction. That would serve the object with which this penalty provision is introduced in the Act, which in fact is in the nature of *terrorem*, so that the duty

payable on the instruments are properly paid and the attempt to avoid payment of requisite duty is discouraged. Section 67-A of the Act provides that when the Deputy Commissioner adjudicates the duty payable on such instrument, there is an obligation cast on him to give a reasonable opportunity to be heard, to such person who is liable to pay duty.

RECOVERY

59. After determination of duty and penalty as aforesaid, the next stage is, the stage of recovery. If a person does not voluntarily pay the duty and penalty so determined, Section 46 of the Act deals with recovery of duties and penalties. It reads as under:

46. Recovery of duties and penalties.-

[(1)] All duties, penalties and other sums required to be paid under this Chapter may be recovered along with simple interest at such rate as may be specified by the State Government by notification by the Deputy Commissioner by distress and sale of the moveable property of the person from whom the same are due, or by any other process for the time being in force for the recovery of arrears of land revenue.

[(2)] All duties, penalties and other sums required to be paid under this Chapter shall be a charge on the property which is the subject-matter of the instrument:

Provided that the provisions of sub-section (2) shall be deemed to apply to all cases of which are pending recovery and to proceedings under sub-section (1) which have already been initiated.

(3) Notwithstanding anything contained in the Registration Act, 1908 (Central Act XVI of 1908). A note of such charge and its extinguishment shall be made in the indices prescribed therein and shall be deemed to be a notice under the said Act.]

60. Section 46 of the Act provides for Recovery of duties and penalties by distress and sale of the moveable property of the person from whom the same are due or by any other process for the time being in force for the recovery of arrears of Land Revenue. All duties, penalties and other sums required to be paid under the chapter shall be charged on the property which is the subject matter of the instrument.

61. The Audit parties of the Accountant General's Office during the course of audit of several Sub-Registry Offices in the State, pointed out instances of non-levy/short levy/irregular remission of Stamp duty due to mis-classification of documents and mis-interpretation of the provisions of law regarding levy of stamp duty. In most of the cases, the observations of the audit were found to be valid and the Inspector General of Registration and Commissioner for Stamps had to initiate steps for recovery of the deficit stamp duty from the concerned parties. Therefore, new Section 46A providing for recovery of such deficit stamp duty from the concerned parties as arrears of land revenue and in certain type of

cases, with retrospective effect, namely from 1st of April 1972, was inserted. Thus, Section 46A came to be inserted by Act 15 of 1980 with effect from 01.04.1972. By amendment Act 24 of 1999, for more effective implementation of the provisions of the Act, Section 67 & 67B were substituted by way of amendment, which conferred power on the authorities to impound documents u/s 33 of the Act, which comes into their possession in a manner other than what is provided u/s 33 of the Act. The amended Section 67 reads as under:

67. Books, etc., to be open to inspection.-A Deputy Commissioner or an Assistant Commissioner or any officer not below the rank of a Sub-Registrar authorized by the Deputy Commissioner or Chief Controlling Revenue Authority in this behalf may for the purpose of this Act require every public officer or any person to produce or permit at all reasonable time, inspection of such registers, books, records, papers, documents, information in electronic storage and retrieval device or medium, applications, instrument or proceedings, the inspection whereof may tend to secure any duty or to prove or lead to the discovery of any fraud or omission in relation to any duty and take such notes and extracts as he may deem necessary without fee or charge and may if necessary seize them and impound them u/s 33.

Similarly, Section 67B of the Act reads as under:

67-B. Power to enter premises and inspect certain documents,-(1) Where the Deputy Commissioner or an Assistant Commissioner or any officer not below the rank of a Sub-Registrar authorized by the Deputy Commissioner or Chief Controlling Revenue Authority has reason to believe that any of the instruments specified in the schedule has not been charged at all or incorrectly charged with duty leviable under this Act or the Indian Stamp Act, 1899 insofar as it is applicable to the State of Karnataka, he shall have power to enter and search any premises where he has reason to believe that any register, book, record, paper, application, information in electronic storage and retrieval device or medium, instrument or proceedings are kept and to inspect them and to take such notes and extracts as he may deem necessary. Every person having in his custody or is maintaining such register, book, record, paper, application, instrument or proceedings, shall at all reasonable times produce, or permit the Deputy Commissioner, Assistant Commissioner or such officer to inspect them and to take notes and extracts as he may deem necessary and if necessary seize and impound them u/s 33.

Provided that no residential accommodation (not being a place of business-cum-residence) shall be so entered into and searched except on the authority of a search warrant issued by a Magistrate having jurisdiction over the area, and all searches under this section shall, so far as may be made in accordance with the provisions of the Code of Criminal Procedure, 1973 (Central Act 2 of 1974).

(2) If upon such inspection, the Deputy Commissioner, Assistant Commissioner or the officer so authorized is of opinion that any instrument chargeable with

duty and is not duly stamped then he shall require the person liable to pay the proper duty or the amount required to make up the same and also penalty, not exceeding five times the amount of the deficient duty thereof if any leviable, and in case of default the amount of duty and penalty shall be recovered in accordance with Section 46:

Provided that before taking any action under this sub-section, a reasonable opportunity of being heard shall be given to the person likely to be affected thereby.

62. Section 67 provides for impounding of the instruments u/s 33, whereas Section 67B empowers the authorities to enter upon the premises, inspect certain documents and seize and impound them u/s 33. If the document is impounded u/s 67-B, Sub-section (2) of Section 67-B provides that the authority shall require the person liable to pay the proper duty or the amount required to make up the same and also penalty not exceeding five times the amount of the deficient duty thereof if any leviable and in case of default the amount of duty and penalty shall be recovered in accordance with Section 46. The proviso makes it clear that before taking any action under this sub-section, a reasonable opportunity of being heard shall be given to the person likely to be affected thereby. Therefore, the law makes a distinction in so far as payment of penalty is concerned, between the documents which are sought to be tendered by way of evidence and documents which are seized by the authorities u/s 67-B of the Act. If a person wants the document to be admitted in evidence or tendered in evidence, the penalty payable is ten times, however, subject to reduction of the said penalty at the discretion of the Deputy Commissioner. When the party is not volunteering to produce the said document, but seized by the authorities, then the penalty to be imposed should not exceed five times the duty payable. Therefore, irrespective of the manner in which the instrument comes into possession of the Competent Authority under the Act, on examination of the said instrument, if the authority finds that the document is not stamped or insufficiently stamped, the power is conferred on the authority to seize the said instrument and then adjudicate the duty payable u/s 37 of the Act and then recover the same u/s 46 of the Act. No time limit is prescribed for impounding of the document and for adjudicating the duty payable on such instruments. The question of limitation arises only when the duty is recoverable, because neither the act of impounding the document nor adjudicating the duty payable would affect the person, who is claiming property under the instrument. It is only when the duty so determined is sought to be recovered u/s 46 of the Act by employing coercive measures, his right is said to be affected. Therefore, we have to find out whether any limitation is prescribed under the Act for such recovery.

63. It is in this context, it is necessary to take note of yet another provision under the Act, namely Section 45-A. The said provision deals with Instrument of conveyance, etc., undervalued, how to be dealt with. Whereas Section 46-A deals with Recovery of Stamp Duty not levied or short levied. In both these provisions,

we find a prescription of limitation prescribed for recovery of stamp duty not paid or insufficiently stamped. Section 45-A deals with documents which are presented for registration before the concerned Sub-Registrar. If the said instrument does not reflect the correct market value of the property, which is sought to be conveyed or it has not been truly supported, the Sub-Registrar is empowered to arrive at the estimated market value, communicate the same to the party for payment of the difference in the stamp duty. If the amount is not paid, he shall keep pending the process of registration and refer the matter along with copy of the instrument to the Deputy Commissioner for determination of market value on the property and the proper duty payable thereon. On receipt of such a reference, the Deputy Commissioner, after giving notice to the parties, shall hold an enquiry and adjudicate the market value of the property, which is the subject matter of the instrument and specifically the duty payable thereon. The Deputy Commissioner also has been vested with the suo moto power, to be exercised within two years from the date of registration of any instrument specifically under sub-Section (1) not already referred to him. Under sub-Section (1) he may call for and examine instruments for the purpose of satisfying himself on the correct market value of the property which is the subject matter of the instrument and thereafter determine the market value payable and recover the same.

64. In a case falling u/s 45-A, if the amount determined as duty payable is not paid, the instrument is not registered. Section 45-A does not apply to a case to which Section 46-A applies, which applies to a document which may be compulsorily registerable or not registerable. In view of Sections 67 and 67-B read with Section 33 of the Act, all documents which comes into possession of a competent authority is now required to be impounded and there should be a determination of the stamp duty payable. After such determination, steps have to be taken to recover the said duty payable.

65. It is in this context Section 46-A comes into force. It reads as under:

46-A. Recovery of stamp duty not levied or short levied.-(1) Where any instrument chargeable with duty has not been duly stamped, the Chief Controlling Revenue Authority or any other officer authorised by the State Government (here in after referred to as the authorised Officer) may, within five years from the date of commencement of the Karnataka Stamp (Amendment) Act, 1980 or the date on which the duty became payable whichever is later, serve notice on the person by whom the duty was payable requiring him to show cause why the proper duty or the amount required to make up the same should not be collected from him:

Provided that where the non-payment was by reason of fraud, collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the provisions of this sub-section shall have effect, as if for the words five years the words ten years were substituted:

Provided further that nothing in this sub-section shall apply to instruments executed prior to first day of April, 1972.

Explanation:- Where the service of a notice, under this sub-section is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of five years or ten years, as the case may be.

(2) The Chief Controlling Revenue Authority or the authorised officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of duty due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

(3) Any person aggrieved by an order under sub-section (2), may prefer an appeal before the Karnataka Appellate Tribunal within three months from the date of such order.

(4) All duties payable under this section shall be recovered in accordance with provisions of section 46.

66. Before amount of duty payable is sought to be recovered, an obligation is cast on the authority to serve notice on the person by whom the duty is payable requiring him to show cause why the proper duty or the amount required to make up the same should not be collected from him. It is here a period of five years is prescribed for initiation of proceedings for collection of duty. In cases where the non payment by reason of fraud, collusion or any willful mistake or suppression of facts or contravention for any other provisions of the Act or the Rules made there under, the period prescribed is 10 years. The proviso to Section makes it clear that this provision shall not apply to instrument executed prior to first day of April 1972. Therefore, Section 46-A comes into effect from the day the stamp duty was payable on an instrument. Whether the document is impounded u/s 33 or it comes into possession of the authority in any other manner, he is under an obligation to adjudicate the stamp duty payable. Before adjudicating, there is an obligation to hear the person, who is liable to pay the stamp duty. The bar of limitation is for initiation of proceedings for recovery of stamp duty payable on the instrument. It is five years from the date of execution of the document. In the case of fraud, collusion, misrepresentation, it is 10 years. Therefore, the contention of the revenue that no limitation is prescribed for documents which are impounded u/s 33 has no substance.

67. In the instant case, all the documents under which the immovable property was transferred in favour of the writ petitioners came to be executed in the year 1987. Five years is the period prescribed for recovery of the deficit stamp duty from the date of execution. The proceedings should have been initiated on or before 1992. Admittedly, the proceedings are initiated in the year 2004. Therefore the bar of limitation prescribed u/s 46-A is applicable. The proceedings u/s 46-A to recover the stamp duty is clearly barred by limitation.

68. However, under the Scheme of the Act, the said benefit could be extended only to such instruments, which are not compulsorily registrable. If an instrument which is not compulsorily registrable but on which the person relies on to prove his title, and it is to be tendered in evidence in a Court of law, unless the proper stamp duty and penalty payable thereon is paid, it is inadmissible. Therefore, the said document would be of no use to enforce a right of such a person. If the documents require registration i.e., compulsory registration, unless the document is registered, there is no transfer of interest in an immovable property. Even though the authorities are prevented from recovering the stamp duty payable on such instrument for non payment of stamp duty, for non registration of the said document, the said document in the eye of law, has no value. Therefore, the provisions contained in Sections 33 and 67 make it clear that even though the revenue is prevented from collecting the revenue, the person claiming right under the instrument is given an opportunity to pay duty, penalty and get the document registered.

69. In the instant case, even though the authorities cannot recover the duty payable, the aforesaid documents, in the absence of being duly stamped and registered, do not confer any title on the writ petitioners in respect of an immovable property. If they have already sold their interest in the property under the registered Sale Deed, the purchaser gets no title because the seller acquired no title. Therefore, as a duty is cast on the seller to make good the title of the purchaser, even in the absence of the authority enforcing the right to recover the stamp duty, if proper stamp duty and penalty is paid, along with registration fee, it could be registered. That is the object behind this legislation.

70. Insofar as the determination of market value, payment of duty is concerned, the learned Single Judge has set aside the impugned notice and orders and remanded the matter back to the concerned authority for fresh adjudication. Under the circumstances, we pass the following order:-

- (a) Writ Appeals are partly allowed;
- (b) The finding of the learned Single Judge and the authorities that the documents in question constitute "conveyance" as defined u/s 2(d) of the Act, is affirmed.
- (c) In view of the fact that the proceedings are initiated beyond the period of limitation though the said documents are not stamped, authorities cannot recover the stamp duty payable on the said instruments;
- (d) However it would not come in the way of the petitioners volunteering to pay the requisite stamp duty and get the documents registered; and
- (e) In view of the fact that the learned Single Judge has remanded the matter back to the authorities, the authorities shall determine the stamp duty payable with the penalty, but they shall not initiate steps to recover the same.
- (f) After the determination of market value, it is open to the appellants to pay

the requisite duty and if any penalty imposed and get the document registered within six months from the date of such adjudication by the authorities.

Parties to bear their own costs.

It is submitted that in the case of WA No. 870/2008, after remand, the stamp duty payable with penalty is already determined, if it is so, it is open to the appellants, if they chose to challenge the same or to pay the duty within six months. It is open to them either to approach the very same authority seeking review or to challenge it in the manner known to law or to pay the duty and penalty payable and get the documents registered within six months from the date of receipt of the copy of this order.