
(2008) 08 AHC CK 0012
In the Allahabad High Court

Tata Teleservices Limited

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 26-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 21
Mines and Minerals (Development and Regulation) Act, 1957 — Section 3
Registration Act, 1908 — Section 17
Stamp Act, 1899 — Section 10, 11, 12, 13, 14
Telegraph Act, 1885 — Section 4
Transfer of Property Act, 1882 — Section 105

Citation : (2008) 08 AHC CK 0012

Hon'ble Judges : Janardan Sahai, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Janardan Sahai, J.—The petitioner was granted a license u/s 4(2) of the Indian Telegraph Act, 1885 to establish, maintain and operate fixed and mobile telephone services. In connection with this business the petitioner installs radio based station also known as cell sites and Telecom towers at suitable locations usually on empty roof top spaces of buildings. The petitioner has entered into various identical agreements each described as a licence in respect of a number of sites in Ghaziabad for installing cell site and other related equipments on the terrace or ground space of the property of the "licensor". The dispute in the present writ petition relates to 17 such license deeds each of which was executed on a stamp paper of Rs. 100 in accordance with Entry 5-C of Schedule 1-B of the Indian Stamp Act.

2. A circular letter dated 5.2.2003 was issued by the Commissioner (Stamps) to the various Assistant Commissioners and Collectors of Stamp in U.P. that telephone companies were executing agreements with private persons for taking on rent their roofs for installation of tower and these documents were neither being registered nor stamped and the Additional Collectors were directed to visit

the offices of the companies and to examine the agreements and ensure the recovery of proper stamp duty and registration of such agreement. In pursuance of the circular the District Magistrate Ghaziabad issued notice dated 9.11.2004 to the petitioner stating that the petitioner was not paying the requisite stamp duty under Article 35 of Schedule 1-B of the Stamp Act, which is applicable to a lease and was thereby violating the provisions of Section 17 of the Act. The petitioner was called upon to appear before the District Magistrate on 19.11.2004. The notice was followed by another notice dated 10.12.2004. The notice dated 9.11.2004, which according to the petitioner was served upon the petitioner on 20.12.2004 after the date of the meeting was accompanied by a format in which the petitioner was required to provide information regarding the rent per month payable and the period of the agreement. The petitioner gave reply dated 27.1.2005 and furnished the details of the aforesaid agreements disclosing the monthly charges being paid by the petitioner as compensation to the licensor/guarantor and the period of the license, namely 20 years. The copy of the letter dated 27.1.2005 of the petitioner has been filed by it as Annexure P-8.

3. The petitioner was given another notice dated 17.2.2005 to the effect that it had violated the provisions of the Indian Stamp Act. The petitioner's reply to the notice was that the agreement it had entered into was a license and not a lease. The respondent No. 2 Assistant Commissioner of Stamp, Ghaziabad passed a composite order dated 14.3.2005 holding that the 17 license deeds executed by the petitioner are in fact lease deeds for a period of more than one year and hence liable to stamp duty under Article 35 of Schedule (1-B) of the Indian Stamp Act and a deficiency of Rs. 13,13,300/- was assessed together with penalty of four times the alleged deficiency. The Commissioner by his order dated 25.4.2006 dismissed the appeal of the petitioner. The petitioner has challenged the order of the Commissioner dated 25.4.2006 as well as that of the Assistant Commissioner dated 14.3.2005 and the circular dated 5.2.2003 as well as the notices and letters dated 9.11.2004, 10.12.2004 and 17.2.2005.

4. It is not in dispute that the deficiency in stamp duty was noticed from a copy of the agreement furnished by the petitioner in the circumstances set out above and the original agreement was never produced. Under Sub-sections 4 and 5 of Section 33 of the Indian Stamp Act introduced by the U.P. Amendment, if deficiency of duty is noticed from a copy of the instrument the Collector can call for the original instrument for the purposes of satisfying himself about the adequacy of duty paid and if the original instrument is not produced the Collector can require payment of deficient stamp duty on the copy of the instrument. The petitioner has also prayed for a declaration that the provisions of Section 33(4) (5) and Section 56(1-A) inserted by U.P. Amendment are ultra vires the Constitution of India.

5. I have heard Sri Sunil Gupta, learned senior Advocate who appeared for the petitioner and the learned Advocate General who defended the validity of the U.P. Amendment. I have also heard the learned standing counsel. Written arguments

have been filed on behalf of the petitioner and also by the State. The petitioner's case is that in its very nature stamp duty is a duty levied on an original instrument and not upon the transaction nor upon a copy of the instrument. The duty it is submitted is leviable only upon the voluntary production of the instrument. It is in this sense that stamp duty has been used in the Stamp Act and accepted by courts. Entry 44 of List III of the VIIth Schedule of the Constitution of India is as follows;

Stamp duty other than duties and fees calculated by means of judicial stamps but not including the rates of stamp duty.

6. According to the petitioner the Constitution framers have "used stamp" duty in Entry 44 in the same sense in which it was always recognized in the Stamp Act and consistently in the judicial decisions at the time the Constitution was framed and so understood no stamp duty is leviable upon a copy of an instrument; but by Sub-sections 4 and 5 of Section 33 introduced by the U.P. Amendment a copy of the instrument is being charged. Sub-sections 4 and 5 are also repugnant to the other essential characteristic of stamp duty that it can be charged only upon a voluntary production of the instrument. Under Sub-sections 4 and 5 of Section 33 however the Collector can call upon a party to produce the original instrument and if he does not do so, the Collector can charge duty upon the copy. These provisions therefore empower the Collector to charge duty even though the instrument or its copy is not voluntarily produced. The levy therefore is not in the nature of stamp duty envisaged in Entry 44. These provisions are therefore beyond the competence of the legislature. The fact that the U.P. Amendment incorporating Sub-sections 4 and 5 has received the assent of the President would not confer any validity upon the amendment as the duty imposed by Sub-sections 4 and 5 is not stamp duty at all and levy of such duty is beyond the competence of the State legislature.

7. The contention of the petitioner is that the legal and constitutional meaning of an entry contained in any list in the 7th Schedule to the Constitution is determined by the legal meaning, legislative practice and judge made law prevailing at the time the Constitution makers framed the Constitution. In *The State of Madras Vs. Gannon Dunkerley and Co., (Madras) Ltd.*, it was held that the words "sale of goods" in Entry 48 in List II of Schedule 7 to the Government of India Act, 1935 would not cover a tax on the supply of material in a building contract and it is not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such contract treating it as a sale. Hence the provisions of the Madras General Sales Tax Act which impose a tax on such materials as if there is a sale of them were declared ultra vires. It was also held that the words "sale of goods" in Entry 48 cannot be construed in their popular sense but must be interpreted in their legal sense vide paragraphs 12 and 14 of the report. In *Diamond Sugar Mills Ltd. and Another Vs. The State of Uttar Pradesh and Another*, it was held that the words "local area" in Entry 52 of the State list in the VIIth Schedule would mean an area administered

by a local body such as a municipality or a district board but would not include the premises of a factory and therefore Section 3 of the U.P. Sugar Cane Act, 1956 empowering the Governor to impose a cess on the entry of sugar cane into the premises of a factory did not fall within Entry 52 of the State list and therefore the law was beyond the legislative competence of the State Legislature. In *Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others*, it was held that the word "luxuries" in Entry 62 of List II would mean activities of indulgence, enjoyment or pleasure in that which is costly or recognized as being beyond the necessary requirement of an average member of society and hence a tax on goods described as luxury goods imposed by the Andhra Pradesh Tax on Luxuries Act, 1987 and the West Bengal Tax on Luxuries Act, 1994 were held to be beyond legislative competence of the State legislature because these enactments taxed goods and not activity of indulgence enjoyment or pleasure. In *Prof. Yashpal and Another Vs. State of Chhattisgarh and Others*, it was held that the Chhattisgarh Niji Kshettra Vidhwavidyalaya (Sthapana Aur Viniyaman) Adhiniyam, 2002 was ultra vires the Constitution on the ground that for incorporation as a university it is necessary, that an institution should be a pre-established institution for higher education with all infrastructural facilities and qualities, which may justify its claim for being conferred with the status of a university. In paragraph 43 the apex court observed that the State Legislature is undoubtedly empowered to legislate and make an enactment for incorporation and establishment of universities in view of Entry 32 of List II and Entry 25 of List III but "University" as a topic of legislation has not been introduced for the first time in the Seventh Schedule of the Constitution as it was already there in the Government of India Act, where Entry 13 of List I related to Benares Hindu University and Aligarh Muslim University and Entry 17 of List II was education including universities other than those specified in Entry 13 of List I. The framers of the Constitution had the same concept of "university" in mind as in the Government of India Act when they made the relevant entries in the Seventh Schedule of the Constitution. Keeping in view the principles of legislative practice, the word "university" should be given the same meaning as it was generally understood to have at the relevant time having due regard to what is ordinarily treated as embraced within that topic or subject.

8. To appreciate the submission that a duty on the copy of an instrument or upon a document not voluntarily produced, which according to the petitioner is what Sub-sections (4) and (5) of Section 33 provide for, is repugnant to the concept of stamp duty envisaged in Entry 44 of List III. it is necessary to consider the essential nature of stamp duty and also the reach of Sub-sections (4) and (5) of Section 33.

9. In Black Law Dictionary 6th Edition 1990 the description of stamp duty has been given as follows.

In old English law, duties imposed upon and raised from stamps upon parchment and paper, and forming a branch of perpetual revenue of the kingdom.

10. In Halsbury's Laws of England Vol. 44 (1) England para 1010. The nature of the charge has been described in the following words.

1010. A Charge on instruments. Stamp duty is chargeable on instruments and not on transactions. The liability of an instrument to stamp duty arises at the moment at which it is executed and depends on the law in force and the circumstances which exist at that time.

11. Section 3 is the charging section of the Indian Stamp Act. Its heading is "Instruments chargeable with duty". Under this section instruments of the description given in the three schedules I, I-A, I-B of the Act shall be chargeable with duty in the circumstances set out in the section. It is clear from the charging section that only an instrument is chargeable with duty. Stamp duty is a duty on an instrument and not a duty upon a transaction. The definition of instrument is contained in Section 2(14) of the Indian Stamp Act. It has been held in decided cases that stamp duty is chargeable only upon an instrument and not upon a transaction vide *Commissioner Inland Revenue v. G. Angus* 1889 (23) QBD 579 , *Ministry of Stamps v. Annie Qualye* 1909 AC 633 , *In Re: In Re: Incorporation of Swadeshi Cotton Mills Company Ltd., W.M. Cory v. I.R.C.* (1865) 1 ALLER 917 , *SRF Limited Vs. State of Madhya Pradesh and Others*,

12. Decided cases have held that a copy of an instrument is not an instrument and cannot be charged with stamp duty. The leading case upon the point is that of *Raja of Bobbili v. Inuganti China* ILR (1900) Mad 49 (PC). In that case an original grant had been lost and a draft/copy of the instrument was tendered as secondary evidence of its contents. From the copy it appeared that the original instrument itself had been insufficiently stamped. The question was whether the person tendering the copy could on payment of the deficiency in stamp duty and penalty get the copy admitted in evidence. The Judicial Committee held that under the Indian Stamp Act 1879, which was then in force the Collector was empowered only to assess and charge the deficiency in duty and penalty on production of the original instrument and not upon its copy. The Judicial Committee observed that "the effect of granting the remedy, which the appellant maintains is entitled to, would be to add to the Act of 1879 a provision, which it does not contain and which the Legislature of India if the matter had been brought under their notice might possibly have declined to enact." The view taken in the case of *Raja of Bobbili* was approved by the Supreme Court vide *The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd.*, AIR 1971 1070 (SC) , *Biswajit Chakraborty v. Mira Sen Ray* 2002 (2) CLJ 449 .

13. In AIR 1971 1070 (SC) it was held that Sections 35 and 36 of the Indian Stamp Act are not concerned with the copy of a document. A party can only be allowed to rely on a document, which is an instrument for purposes of these sections. Section 36 does not apply to secondary evidence adduced in proof of the contents of a document unstamped or insufficiently stamped. The Apex Court relied upon the definition of instrument in Section 2(14) of the Indian Stamp Act as including every document by which any right or liability is or purports to be

created, transferred limited, extended, extinguished or recorded and held that there is no scope for inclusion of a copy of a document as an instrument for the purposes of the Stamp Act. The Apex Court relied upon the decision of the Privy Council in the case of Raja of Bobbili and also referred to the observations in The State of Bihar Vs. Karam Chand Thapar and Brothers Ltd., made more than sixty years after the decision in Raja of Bobbili that the law laid down in that case was well settled and that a copy of an instrument could not be validated. This statement of the law has recently been reaffirmed by the Apex Court in Hari Om Agarwal v. Prakash Chand Malviya AIR 2007 SC 6368. It is, thus, clear from an unbroken line of judicial decisions, first, that an instrument alone is chargeable to stamp duty and not a transaction and second, that it is the instrument itself and not a copy of an instrument that is chargeable to duty. These two propositions of law are firmly established, the first, since the decision in Commissioner of Inland Revenue v. G. Angus 1889 (23) QBD 579 and the second from the decision of the judicial committee in Raja of Bobbili more than a hundred years ago and not a single decision whether of Indian or Foreign Courts has been cited where a different view may have been taken. It therefore appears that the concept that stamp duty is a duty upon an instrument and not upon a copy of the instrument was a concept firmly established at the time the Constitution of India was framed and it is this concept of stamp duty in which Entry 44 has to be understood. It may now be examined whether the levy of stamp duty upon voluntary production of the instrument is also an essential characteristic of stamp duty conceptualized in Entry 44. For examining that question it is necessary to find out the source from which the concept has emerged.

14. Chapter IV of the Indian Stamp Act deals with instruments not duly stamped. This chapter provides the manner in which an instrument not duly stamped shall be dealt with if produced before a person authorized to take evidence or before a public officer in the performance of his functions. u/s 33 Sub-section 1 such an instrument shall be impounded by the person authorized to receive evidence or by the public officer before whom the document is produced in the performance of his functions. Section 35 of the Act contained in this chapter provides that an instrument not duly stamped shall be inadmissible in evidence. Section 33 Sub-section 1 reads as follows;

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.

15. Decided cases have interpreted the words "produced or come in the performance of his functions" as having been voluntarily produced vide Ujjal Singh v. A.Y. Khan AIR 1936 Lah 95, In Re: Narayandas Nathuram Marwadi AIR

1943 Nag 97, Uttam Chand v. Perman Nand AIR 1942 Lah 265, Raja Mohd. v. Deputy Commissioner 1956 ALJ 220 , Government of Uttar Pradesh and Others Vs. Raja Mohammad Amir Ahmad Khan, R.A. Remington v. Deputy Commissioner 1966 ALJ 514 , Varghese Vs. State of Kerala and Others, Som Dutt Builders Limited Vs. State of Uttar Pradesh and Kanpur Development Authority, and Distt. Registrar and Collector, Hyderabad and Another Vs. Canara Bank Etc., . In Lala Uttam Chand v. Perman Nand and Ors., it was held that no court has a right to compel a party to produce a document against his wishes. If a party does not produce a material document the party will suffer its consequences. The word "produced" in Section 33 of the Indian Stamp Act was defined to mean production in the ordinary course of law and not under compulsion. In Re: Narayandas Nathuram AIR 1943 Nag 97 Vivain Bose, J. held that the word "produced" has a technical meaning and means either produced in response to summons or produced voluntarily for some judicial purpose such for instance as evidence and not to documents which fall accidentally or incidentally into a judge's hands. The learned judge has given the example of a document submitted mistakenly under the impression that it is another document. In such a case there is no intention to produce the document. The same view was taken by the Full Bench of this Court in Raja Mohammad v. Deputy Commissioner, Sitapur 1956 ALJ 220 . That was a case in which an instrument was produced before the Collector for his opinion about the stamp duty required to be paid thereon. It was held that after determining the duty payable the Collector became functus officio and he could not impound the instrument if the duty determined was not paid. It was held that the words "is produced or comes in the performance of his functions" used in Section 33 of the Act mean the production of the instrument concerned in evidence or for the purposes of placing reliance upon it by one party or the other. The decision of this Court in Raja Mohammad's case was affirmed in appeal by the Apex Court in Government of Uttar Pradesh and Others Vs. Raja Mohammad Amir Ahmad Khan, . In District Registrar and Collector v. Canara Bank (supra) the provisions of Sections 31, 33 and 36 were again considered and it was held in the context of Section 33 that to attract the provision the document must have been voluntarily produced or come before the authority or person in charge in performance of its functions. It is to be noted that there is no provision in the Stamp Act requiring a person to get the stamp duty assessed such as by filing a return. Even the production of the instrument for the purposes of Registration is voluntary. When however the instrument is produced for registration the adequacy of stamp duty can be examined u/s 47-A. From the scheme of the provisions of the Stamp act and the cases above referred to it appears that duty can be charged only upon a voluntary production of the original instrument. But what does a voluntary production mean. It would appear from the cases aforesaid that if a document is summoned in evidence and produced by a party called upon to produce it it would be a "production" within the meaning of Section 33 and the document can be impounded vide In Re Naraindas Nathuram (supra). In such a situation it cannot be said that the production was not voluntary. But if a party refuses to

produce it despite the summons it may suffer the consequences of withholding evidence in the case, but it cannot be compelled to produce it for the purposes of the Stamp Act. But it appears from the cited cases that it was in the context of proceedings to recover the duty that it was observed that the proceedings could be initiated only on a voluntary production of the instrument.

16. What can be inferred from the aforesaid decisions is that the machinery for recovery of stamp duty can be triggered only when the instrument is voluntarily produced. But the circumstances in which the machinery of the Act to recover escaped stamp duty is set into motion is not directly related to the nature of the levy. The nature of the levy can be conceptualized primarily from the subject matter over which the levy is imposed; the person on whom the levy is imposed and the event in which the levy is attracted. These incidents of a levy are the subject matter of the charging sections. The nature of the levy is therefore to be determined primarily from the charging sections. We shall now refer to some of the other provisions of the Act which have a bearing upon the concept of stamp duty.

Section 17 of the Indian Stamp Act reads as below;

17. Instruments executed in India. All instruments chargeable with duty and executed by any person in India, shall be stamped before or at the time of execution.

17. From this section it is clear that stamp duty is payable before or at the time of execution of the instrument. This is also clear from the definition of the word "chargeable" contained in Section 2 of the Indian Stamp Act. Under this definition stamp duty is chargeable according to the law in force at the time the instrument was executed. It would follow from the provisions of Section 17 and Section 2(6) that the duty becomes payable before or at the time of execution.

18. The submission of the learned Advocate General is that Section 33 including Sub-sections (4) and (5) thereof only provide for a machinery to recover stamp duty. Let us examine the contention. Taxing statutes usually consist of three parts, charging provisions, machinery provisions and provisions for recovery of tax. This scheme of taxation laws has been explained by Lord Dunedin in *Whitney V. I.R.C.* (1925) 10 TC 88 thus:

My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the

methods of recovery, if the person taxed does not voluntarily pay.

Sub-section 4 of Section 33 provides that where the deficiency in stamp duty is noticed from the copy of any instrument the Collector may in the circumstances given under that sub section call for the original instrument for the purpose of satisfying himself as to the adequacy of the duty paid thereon and the instrument so produced before the Collector shall be deemed to have been produced or come before him in the performance of his functions. Sub-section 5 comes into operation in the event of the instrument not being produced within the period specified by the Collector. The Collector may then require payment of the deficit stamp duty if any together with penalty u/s 40 on the copy of the instrument. Sub-section 5 also contains two provisos to the effect that no action shall be taken under Sub-sections 4 and 5 after the period prescribed therein has run out. Sub-section (1) of Section 33 provides for impounding of an instrument not duly stamped or which comes in the performance of the functions of a person having authority to receive evidence or in charge of a public office. Sub-section (2) of Section 33 casts a duty upon the person impounding the document to examine it and to ascertain whether it is duly stamped. Sections 38 and 40 which are part of the same Chapter as Section 33 lay down the manner in which an impounded instrument is to be dealt with for recovery of deficit stamp duty and penalty. Section 33 therefore appears to be a part of the machinery provisions in the Act for recovery of deficient stamp duty and imposition of penalty. Section 33 bears the heading: Examination and impounding of instruments. From its heading also Section 33 appears to be part of the machinery sections providing for recovery of stamp duty and not part of the charging section. The words used in Sub-section (4) are to the effect "where deficiency in stamp duty is noticed from the copy of any instrument". Sub-section 4 merely refers to the copy of the instrument as a source from which the deficiency in stamp duty is detected. The provision cannot be interpreted to mean that it is referring to the deficiency in stamp duty upon the copy itself. The words are not to the effect "Where deficiency in stamp duty paid on the copy of the instrument is noticed". If the legislature had intended to levy duty upon the copy of the instrument it could have said so in clear terms for it is well settled that if there is any ambiguity in the levy it has to be interpreted in favour of the subject. The scheme of the provisions also suggests that a copy is not being charged to duty. If duty was intended to be imposed upon the copy there would be no purpose in calling for the original instrument. Under Sub-section (4) the Collector is required to call for the original instrument for the purpose of satisfying himself as to the adequacy of the duty paid. It is thus evident that it is the adequacy of duty upon the original instrument which has to be examined by the Collector. If the original instrument is produced Sub-section 5 would not come into operation and no duty would be required to be paid on the copy. The effect of Sub-sections 4 and 5 is that deficiency in duty on the original instrument when noticed from a copy of the instrument can in the situation where the original is not produced despite the Collector summoning it, be recovered and paid on the copy. It appears that the

scheme of Sub-sections 4 and 5 is that if the original instrument is withheld the Collector can proceed to recover the deficient duty on the basis of the copy. The Amendment appears to be similar to Section 48-B introduced in the Stamp Act by Madhya Pradesh Amendment. In Hari Om Agarwal's case (supra) the Supreme Court considered the M.P. Amendment, and observed: "If in spite of the notice the original is not produced before the Collector, the Collector would draw a presumption that original document is not duly stamped and thereafter may proceed in the manner provided in Chapter IV." It was however held that from a plain reading of Section 48-B it does not appear that the Collector is authorized to impound the copy.

19. The words "executed" and "execution" have been defined with reference to instrument as meaning "signed" or "signature". The liability to pay stamp duty arises u/s 17 before or at the time the instrument is executed. The question of determining deficiency in stamp duty upon the copy of the instrument would arise only if there is some other independent provision charging a copy with duty. There is no such provision under which duty is payable upon a copy. It thus appears that Sub-section 4 is applicable to a case for recovery of deficient stamp duty on the original instrument. To interpret Sub-sections 4 and 5 of Section 33 in a manner that they impose stamp duty upon a copy of an instrument would be doing violence upon the scheme of the Stamp Act. Under Sections 3 and 17 of the Indian Stamp Act it is the instrument, which is chargeable with duty and not the copy. The instrument is required to be stamped before or at the time of execution. The taxing event is the execution of the instrument. It is the instrument which is executed and not a copy and the interpretation that Sub-sections 4 and 5 have the effect of charging a copy of the instrument with stamp duty cannot be accepted unless the language of Sub-sections (4) and (5) compels such an interpretation. Apart from the fact that such an interpretation is not warranted by the language of these provisions or by the scheme of the Stamp Act it is also settled law that a taxing provision has to be strictly interpreted and if there is any doubt about the levy it has to be resolved in favour of the citizen. It appears that the requirement to pay the deficit stamp duty together with penalty u/s (4) on the copy of the instrument is a part of the machinery provisions for the recovery of the deficit stamp duty on the original instrument. These provisions deal with the powers of the State to detect evasion of stamp duty upon the original instrument by permitting the State to calculate the stamp duty on the basis of the copy of the instrument in a case where despite the notice of the Collector a person does not produce the original document.

Sub-section 4 of Section 33 also provides that if the original instrument is produced in consequence of the direction of the Collector the document shall be deemed to have been produced or have come before him in the performance of his functions. The effect of this provision is to make inapplicable the judicial decisions on the point that the production of the instrument must be for the purpose of evidence or for some judicial purpose. The Legislature has thus by

amendment modified the meaning of the words "is produced or comes in the performance of his functions" in cases under Sub-section (4) where the Collector calls for the original instrument after noticing the deficiency of stamp duty in the copy of the instrument and the original instrument is consequently produced. Sub-sections (4) and (5) of Section 33 are not charging provisions but are a part of the machinery provisions and are not repugnant to the concept of stamp duty under Entry 44 of the 7th Schedule of the Constitution.

20. it was then submitted by the counsel for the petitioner that these Sub-sections 4 and 5 of Section 33 can be invoked only if the copy of the instrument is voluntarily produced just as in case of the original instrument itself. In order to appreciate the contention it is necessary to make a comparative analysis of the provisions of Sub-section 1 of Section 33 with those of Sub-section 4 of Section 33. Sub-section 1 of Section 33 clothes a person having authority to receive evidence or a person in charge of public office to impound an instrument deficiently stamped if it is produced before him or comes into his hands in the performance of his duties. It has already been noticed that in Sub-section 4 of Section 33 a deemed meaning has been given to the expression "produced or comes before him in the performance of his duties" and the situation in which the deemed meaning is to be given in Subsection 4, namely, where the Collector calls for the original instrument and it is consequently produced differs from the situation envisaged in Sub-section (1) of Section 33 where that expression also occurs. Action under Sub-section 1 of Section 33 and that Sub-sections 4 and 5 of Section 33 is taken in different situations. The courts have uniformly interpreted Sub-section (1) of Section 33 as being applicable to a voluntary production of the document. These cases would have no application to sub Section 4 of Section 33 which applies in a different situation, namely, a situation where the Collector has summoned the original instrument. There is however nothing in Sub-section 4 of Section 33 which may lead to the inference that the Collector can compel the production of the copy of the instrument. That sub section would apply when the deficiency in stamp duty is noticed from a copy of the instrument. Such a situation may arise when the copy is voluntarily produced or when it incidentally comes into the Collector's hands or when it comes before him on a reference made by a court or by the other authorities referred to in Sub-section 4.

21. The petitioner's case that it was compelled to produce the copy of the instrument by the Collector and that the same was not voluntarily produced may now be considered on facts. It appears that a notice dated 9.11.2004 was issued to the petitioner to the effect that the petitioner was taking immovable property on rent but the deeds were not being adequately stamped or registered in violation of Section 17 read with Article 35 Schedule 1 -B of the Indian Stamp Act and Section 17 of the Registration Act causing huge financial loss to the State of U.P. The petitioner was called upon to attend a meeting and to be present with all information/records according to the enclosed form. The copy of the notice along with the copy of the form in which the information was required has been

annexed to the petition as Annexure P-5. The said form indicates that the petitioner was required to bring the copy of the rent deeds/records and also to furnish the information required under the prescribed proforma. The petitioner's case is that this letter was not served upon the petitioner but later on when the petitioner received a copy thereof it responded to this notice and supplied the information required in the form and the copy of the instrument was furnished by the petitioner along with its letter dated 27.1.2005 to the Assistant Collector (Stamps). It is thus clear that the copy of the agreement was furnished by the petitioner on the same being demanded by the Collector/Assistant Collector. The question is whether in these circumstances the production of the copy of the instrument was an act of compulsion or would it be regarded a voluntary production. It is to be noticed that even in the context of Sub-section (1) of Section 33 it has been held in AIR 1943 97 (Nagpur) that production of a document in evidence or in consequence of issue of summons would be a production of the document within the meaning of Section 33(1) of the Act and on the foundation of such production the instrument if deficiently stamped shall be impounded and the provisions relating to recovery of the duty would be set in motion. If the petitioner had not complied with the letter and not produced the copy of the license deed the Collector could not have compelled him to do so for there appears to be no provision in the Stamp Act whereunder the Collector can compel the production of a copy of the deed. In the facts of this case it cannot be said that the petitioner was compelled to produce the copy. The production would be treated as a voluntary production of the copy.

22. It was then submitted that the U.P. Amendments are unconstitutional and void on the ground of unreasonableness, inconsistency with the scheme and provisions of the Stamp Act and therefore violative of Article 14 of the Constitution of India. It is also submitted that the amendment violates the fundamental rights and liberty of a citizen including rights of privacy and breaches Articles 19 and 21 of the Constitution of India. Reliance is placed by the petitioner upon the decision of the apex court in Distt. Registrar and Collector, Hyderabad and Another Vs. Canara Bank Etc., . In that case the apex court held the provisions of Section 73 of the Andhra Pradesh Act 17 of 1986 as ultra vires. The provisions of Section 73(1) as substituted by the Andhra Pradesh Amendment were as follows;

:6. For Section 73, of the principal Act, the following section shall be substituted, namely,

73. (1) Every public officer or any person having in his custody any registers, books, records, papers, documents 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, shall at all reasonable times permit any person authorized in writing by the Collector to enter upon any premises and to inspect for such purposes the registers, books, records, papers, documents and proceedings, and to take such notes and extracts as he may deem necessary,

without fee or charge and if necessary to seize them and impound the same under proper acknowledgment:

Provided that such seizure of any register, books records, papers, documents or other proceedings, in the custody of any bank be made only after a notice of thirty days to make good the deficit stamp duty is given.

Explanation....

23. The apex court has considered the scheme of Sections 31 and 33 of the Indian Stamp Act and has held that Section 31 involves an element of voluntariness in the persons seeking adjudication to apply before the Collector and under that provision the Collector cannot compel its production. Section 33 confers power of impounding a document deficiently stamped if the document is produced or comes before the authority in performance of its functions and thus there is also an element of voluntariness in the production of the document u/s 33. The apex court traced the development of the law of privacy from a property right to a personal right. It found that the powers of inspection of documents contained in the Andhra Pradesh Amendment were drastic and that the provision violates the right of privacy. The difference between the power of inspection in Section 74 of the Act on the one hand and that in the Andhra Amendment was contrasted in Paragraphs 43 and 55 of the reports as follows;

43. It will be seen that u/s 74, the Collector could inspect the "register, books, records, papers, documents or proceedings" in the public office. Obviously, this meant that the inspection must relate to "public documents" in the custody of the public officer or to public record of private documents available in his office. The inspection could be carried out only by a person authorized - in writing - by the Collector. The purpose of inspection has to be specific and has to be based upon a belief that (i) such inspection may tend to secure any (stamp) duty, or (ii) it may tend to prove any fraud or omission in relation to any duty, or (iii) it may tend to lead to the discovery of any fraud or omission in relation to any duty.

In paragraph 55 of the reports the apex court referred to the impact of the amendment. Paragraph 55 is quoted below;

55. The A.P. Amendment permits inspection being carried out by the Collector by having access to, the documents which are in private custody i.e. custody other than that of a public officer. It is clear that this provision empowers invasion of the home of the person in whose possession the documents "tending" to or leading to the various facts stated in Section 73 are in existence and Section 73 being one without any safeguards as to probable or reasonable cause or reasonable basis or materials violates the right to privacy both of the house and of the person. We have already referred to R. Rajagopal case wherein the learned judges have held that the right to personal liberty also means life free from encroachments unsustainable in law, and such right flowing from Article 21 of the Constitution.

24. The test of the limits to which the drasticity of power can be upheld would be the proportion, which it bears to the purpose sought to be achieved. There has thus to be a reasonable nexus of the provisions and the purpose sought to be achieved. It was held by the apex court that the power under the amended Section 73 of Andhra Pradesh Act was unbridled and was disproportionate to the purpose sought to be achieved. Paragraphs 58 of the reports is quoted below;

"58" An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence and it cannot be acted upon by that person or by any public officer. This is the penalty which is imposed by law on the person who may seek to claim any benefit under an instrument. If it is not duly stamped. Once detected, the authority competent to impound the document can recover not only duty but also penalty, which provisions protects the interest of revenue. In the event of there being criminal intention or fraud, the persons responsible may be liable to be prosecuted. The availability of these provision, in our opinion, adequately protects the interest of revenue. Unbridled power available to be exercised by any person whom the Collector may think proper to authorize, without laying down any guidelines as to the persons who may be authorized and without recording the availability of grounds which would give rise to the belief, on the existence where of only, the power may be exercised, deprives the provision of the quality of reasonableness. Possessing a document not duly stamped is not by itself any offense. Under the garb of the power conferred by Section 73 the person authorized may go on a rampage searching house after house i.e. Residences of the persons or the place used for the custody of documents. The possibility of any wild exercise of such power may be remote, but then on the framing of Section 73, the provisions impugned herein, the possibility cannot be ruled out. Any number of documents may be inspected, may be seized and may be removed and at the end the whole exercise may turn out to be an exercise in futility. The exercise may prove to be absolutely disproportionate to the purpose sought to be achieved and, therefore, a reasonable nexus between stringency of the provisions and the purpose sought to be achieved ceases to exist.

Sub-sections 4 and 5 of Section 33 of the Stamp Act introduced by the U.P. Amendment do not contain any such power as was contained in Section 73 of the Andhra Pradesh Act. The machinery of Sub-section 4 and 5 of Section 33 is triggered off when the deficiency in stamp duty is noticed from a copy of the instrument. There is nothing in these provisions to indicate that the Collector can compel the production of the copy or of the original instrument. The situation in which the Collector can call for the production of the original instrument is specifically provided for under Sub-section 4. It is when the deficiency in stamp duty paid is noticed from the copy of an instrument. The power thus can be exercised only when the deficiency of stamp duty in the original instrument is noticed from its copy. The purpose for which the instrument is being called for has also been specifically provided for in Sub-section 4 as satisfaction of the Collector as to the adequacy of the duty paid. It is evident from Sub-section 5

that the Collector has to provide time to the party concerned to produce the instrument and it is only on the non-production of the original instrument within the time granted by the Collector that he can take the copy of the instrument as the basis for determining the stamp duty and requiring its payment. The two provisos of Subsection 5 also provide a time limit within which the action u/s 33(4) and 33(5) can be taken. Sub-sections 4 and 5 of Section 33 do not contain any such drastic power empowering the Collector to seize or search any document. The reasons given by the apex court for holding the amended Section 73 as applicable to Andhra Pradesh as ultra vires the Constitution do not apply to the U.P. Amendment contained in Sub-section (4) and (5) of Section 33. In *District Registrar v. Canara Bank* the apex court had found that the drasticity and stringency of the power u/s 73-A of the Andhra Amendment was not proportional to the purpose to be achieved. The apex court has specifically noticed this aspect in paragraphs 43, 55 and 58 of the Reports quoted above. The apex court also found that the production of documents envisaged in Sections 31 and 33 of the Indian Stamp Act is voluntary and unless the party concerned had itself produced the document in the case of Section 31 for obtaining opinion of the Collector as to chargeability of the instrument to duty and its quantum and in the case of Section 33 for the purpose of being tendered in evidence or its coming in the hands of the authority in the course of performance of his duty the Collector could not impose any duty by compelling the production of the document. The impact of the Andhra Amendment was noticed in contrast to these provisions and it was found that the power of inspection contained therein was drastic and such drasticity was not proportional to the purpose which it could be expected to achieve. Section 33 however has been amended in U.P. and it has been provided that if as a consequence of a direction by the Collector to produce the original instrument the instrument is so produced, the same shall be deemed to have come in the hands of the Collector in the performance of his duty. The U.P. Amendment introducing Sub-sections 4 and 5 of Section 33 does not give any power to compel the production of the copy of the instrument or the original instrument. Sub-sections 4 and 5 of Section 33 do not invade the right to privacy. Section 73 of the Indian Stamp Act has also been amended and the new provisions of Section 73-A introduced in the State of U.P. do not suffer from the vice of drasticity from which the Andhra Pradesh Amendment suffered. Indeed the petitioner has not challenged the validity of Section 73-A substituted in the State of U.P. The U.P. Amendment has provided safeguards against the arbitrary exercise of the powers of search and seizure and such power can be exercised only in a situation where the Collector has reason to believe that any instrument chargeable with duty has not been charged at all or has been incorrectly charged. It is, however, not necessary to examine the validity of Section 73-A as the same has not been challenged.

25. Counsel for the petitioner then submitted that the Amendment is violative of Article 14 of the Constitution for a variety of reasons. He placed reliance upon the provisions of Chapter II-B, Sections 10 - 16 of the Indian Stamp Act as well

as upon Chapter IV Sections 33 - 48-A of the Indian Stamp Act particularly Section 42 thereof and submitted on the basis of these provisions that unless the original instrument is before the concerned authority the requirement of these provisions cannot be met and the provisions of sub-sections 4 and 5 of Section 33 introduced by the U.P. Amendment do not fit into the scheme of Chapter II-B or Chapter IV. This contention also does not have any merit. Chapter II-B deals with the manner of payment of stamp duty on the original instrument but not with the assessment or recovery of stamp duty in a case of deficit stamp duty on the instrument or in a case where no stamp duty has been paid on the original instrument. Thus Section 10 provides for the manner how the duty is to be paid namely in stamp. Section 10-A provides for the payment of duty in cash. Section 11 provides for the use of adhesive stamps. Section 12 relates to cancellation of adhesive stamps. Section 13 relates to the manner in which an instrument to be stamped with impressed stamp has to be written so as to prevent its use again. Section 14 provides that only one instrument is to be written on the same stamp paper. Section 15 provides that the instrument written contrary to Sections 13 or 14 shall be deemed unstamped. Section 16 deals with denoting duty in a case where the duty payable depends on the duty paid in respect of an other instrument. Reliance has been placed by the petitioner upon Section 42 of the Act which provides that when deficit duty or penalty has been made good in respect of any instrument under Sections 35 : 40 : 41 or 47-A the person admitting the instrument or the Collector as the case may be, shall certify the payment by endorsement upon the instrument whereupon the instrument shall become admissible in evidence and may be registered and acted upon. It is true that the payment of the deficit duty on the copy may still not make it admissible as primary evidence but if the original instrument is produced together with proof that the duty has been paid on the copy, the original there appears to be no reason why would not be admissible and capable of being acted upon or being registered. The provision in Sub-section 5 of Section 33 for payment of deficit stamp duty together with penalty on the copy of the instrument appears to have been made in view of the fact that the original instrument has not been produced and the endorsement contemplated in Section 42 cannot be made thereupon. In such a case the legislature has provided that stamp duty be paid upon the copy of the instrument from which the deficiency was noticed. There is therefore nothing in the provisions of Sub-sections 4 and 5 of Section 33 which may make them inconsistent with the scheme of the provisions of Chapter II-B or with Section 42 or 32 of the Act. The provisions of Sub-sections 4 and 5 are rather supplementary to the provisions of Chapter II-B. Sub-sections 4 and 5 of Section 33 deal with recovery of deficient stamp duty. If the original instrument is produced in consequence of the Collector calling for it in exercise of power under Sub-section (4) it would be deemed to have been produced or come before him in the performance of his functions. In view of the judicial decisions such production of the instrument in the absence of the deeming provisions would not have been a production on the basis of which the machinery provisions for recovery of stamp duty could have been triggered off. The fiction however

confers validity upon the production of the instrument for the purposes of Sub-section (1) of Section 33. If it is found that the instrument is deficiently stamped the provisions of Section 33(1) relating to impounding of the instrument would become applicable in view of the fiction created by Sub-section 4 that the instrument so produced shall be deemed to have been produced or come before him in the performance of his functions and the instrument would be dealt with in accordance with Section 40. Section 42 would apply in such case. The procedure for payment of duty on the copy under Sub-section 5 is to be adopted when the original instrument is not produced. The endorsement on the instrument contemplated in Section 42 cannot therefore be made on the original instrument. The purpose of Sub-sections (4) and (5) is to recover deficit stamp duty. The validity of the provision would not be affected by the fact that the copy of the instrument would not be equated to the original instrument for other purposes such as for admissibility in evidence. The copy would remain secondary evidence and would be admissible in * evidence in the circumstances in which admission of secondary evidence is permissible under the Evidence Act. The counsel for the petitioner submitted that the definition of "instrument" in Section 2(14) even after the U.P. Amendment does not include a copy of the instrument. Accordingly, the charging section, Section 3, continues to make only the instrument chargeable with duty and not a copy of the same. In the absence of the charging section levying the charge, the assessment and recovery or the machinery provisions contained in the various sections in Chapter IV, including Section 33, would not result in giving rise to the levy. Sub-sections (4) and (5) of Section 33 are only in the nature of machinery or recovery provisions. So long as the charging section, Section 3, does not create the charge of duty on the copy, there is no jurisdiction in Sub-sections (4) and (5) for the authorities to seek to recover ("require payment of the duty on the copy of instrument

Counsel relied upon;

Sodhi Transport Co. and others Vs. State of U.P. and others,

Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others,

Harshad Shantilal Mehta Vs. Custodian and Ors,

The State of West Bengal Vs. Kesoram Industries Ltd. and Others,

26. I have already held that Sub-sections (4) and (5) of Section 33 relate to the recovery of deficient stamp duty upon the original instrument and that stamp duty is merely paid upon the copy for the reason that the original not being available the copy is made the basis for calculation of duty. The cases cited above therefore have no application. I have already held that the provisions of Sub-sections (4) and (5) of Section 33 are supplementary to the other provisions. There does not appear to be any merit in the petitioner's contention that Sections 33 (4) and (5) are unworkable for the reason that these provisions do not determine the person who would be liable to pay stamp duty on the copy. The determination of person who is liable to pay duty is governed by Section 29

of the Act. The said provision would be applicable even where the provisions of Sections (4) and (5) of Section 33 are invoked because the duty which is being sought to be recovered under these provisions is the deficient duty on the original instrument.

27. The contention that Sub-sections (4) and (5) of Section 33 curtail the right u/s 31 and therefore do not fit into the scheme of the Act also has no merit. The submission is that Section 31 confers a right to obtain opinion of the Collector as to the proper duty payable on an instrument whether executed or not and that there is no time limit within which the right can be exercised. The exercise of power under Sub-sections 4 and 5 of Section 32 takes away the right to obtain opinion of the Collector u/s 31. It is to be noted that even when Sub-section (1) of Section 33 is invoked the right u/s 31 is lost. If the petitioner's contention is accepted Section 33 itself would suffer from the same vice. I have already taken the view that there is nothing in Sub-sections (4) and (5) which may empower the Collector to compel the production of the original instrument or of the copy. The party called upon to produce the instrument under Sub-section (4) may refuse to do so. The right u/s 31 continues till such time that the powers u/s 33 are not invoked. The provisions of Section 31 and 33 have to be read together to determine their scope and application and Section 31 cannot be given an overriding effect upon Section 33, 28. For the aforesaid reasons there does not appear to be any merit in the petitioner's contention that the provisions of Sub-section (4) and (5) of Section 33 are inconsistent with the scheme of the other provisions of the Act or that they are unworkable or violative of Article 14 of the Constitution of India.

29. The validity of Section 56(1-A) has also been challenged. The validity of the Section has however been upheld by a Division bench in *Syed Mahfood Husain v. State of U.P.* 2004 ALJ 2799 and the issue thus stands concluded.

30. The contention of the petitioner is that the instrument in question is a license deed and not a lease. The Indian Stamp Act does not define "license". License has been defined in Section 52 of the Easements Act as follows;

52. "License" defined. Where one person grants to another, or to a definite number of other persons, a right to do or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license.

Lease has been defined both under the Transfer of Property Act and under the Indian Stamp Act. In Section 105 of the Transfer of Property Act lease is defined as follows;

105. Lease defined. - A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on

specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

Lessor, lessee, premium and rent defined - The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent.

In Section 2(16) of the Indian Stamp Act lease is defined as under;

2(16) "Lease". - "Lease" means a lease of immovable property and includes also:

- (a) a patta;
- (b) a kabuliyat or other undertaking in writing not being a counterpart of a lease, to cultivate, occupy, or pay or deliver rent for immovable property;
- (c) any instrument by which tolls of any description are let;
- (d) any writing on an application for lease intended to signify that the application is granted;
- (e) any instrument by which mining lease is granted in respect of minor minerals as defined in Clause (e) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957.

The question is whether a lease having been defined in Section 2(16)) of the Indian Stamp Act it is that definition alone which would be relevant for the purposes of duty under the Indian Stamp Act or the definition of that term under the Transfer of Property Act and of "license" under the Easements Act can be considered. It may be noticed that under the Indian Stamp Act the definition of lease includes a lease and also includes the other items including a patta and kabuliat. A patta is an instrument executed by a landlord granting tenancy. A kabuliat is executed by the lessee accepting the terms of the lease. Clause (b) of Section 2(16) also includes apart from a kabuliat any other undertaking in writing not being a counterpart of a lease, to cultivate, occupy or pay or deliver rent for immovable property.

Rent has been defined in Black's Law Dictionary, (6th edition 1990) as follows;

A common law, term referred to compensation or return of value given at stated times for the possession of lands and tenements corporeal;

31. In the dictionary of Law by L.B. Curzon (4th Edition 1994 reprint) it has been defined as under;

A periodic payment made by the tenant or other occupier of land to the owner for its possession and use. It is an acknowledgment of the landlord's reversionary title.

32. A Full Bench of the Madras High Court in Board of Revenue v. S.I. Railway considered the distinction between a lease and a license in the context of

whether contracts for stacking coal on small plots of the land in a station yard are to be stamped as leases or as mere licenses. The court took notice of the fact that there were instructions of the Government of India that railway companies have no permission to lease lands in their possession without the concurrence of the Secretary of State. The document described the person given possession as a licensee. Spencer C.J. In his judgment in that case held that grant of exclusive possession is the test to distinguish a lease from a license. Reading the terms of the instrument in question as a whole he held that the instrument was a license. One of the terms in the instrument, which was relied upon in that case was that the licensee was prohibited from erecting any building on the land and was permitted to use the land only for stacking his own goods. The license was also revocable on 15 days notice on either side and was a unilateral one. Kumaraswami Sastri, J. in his separate judgment relied upon the definition of lease u/s 105 of the Transfer of Property Act and that of a license u/s 52 of the Easements Act. He agreed with the view of Spencer C.J. that the instrument was a license deed. He found that the railway company had reserved to itself a very large measure of control and read as a whole the instrument gave merely a license to the grantees to keep the coal on the railway premises for some time and to pay for the privilege, which they had got. Krishnan, J. also relied upon the definition of license under the Easements Act and held that definition could be used for the Stamp Act also. It was held by Krishnan, J. that from the terms of the instrument in question no legal possession was intended to be given and the only right that the transferee was intended to have was the right to go upon the land to stack coal and nothing more. He also observed that there was nothing in the document to prevent the railway company from changing from time to time, the plot, which the grantee was to be given.

33. The decision of the Madras High Court was considered by a Full Bench of this Court in *In Re: Burmah Shell Oil Storage and Distributing Co. Ltd. of India*. The Full Bench was considering a case of an agreement on behalf of the Secretary of State also signed by the representative of Burmah Shell, which was described as a licensee in the agreement. Under the agreement Burmah Shell was to have the temporary use or occupation of a piece of land solely and entirely for the purpose of constructing and maintaining thereon an installation for the storage of petroleum etc. The company was forthwith to erect on the said land a petroleum installation at its own cost after approval by the railway authorities of the construction plans submitted by the company. The company was bound to allow the railway authorities free access at all times to the said land and to the petroleum installation, building etc. The company was also to pay the railway administration certain amounts every month in return for the use of the plot of land apart from local cesses, rates and tax. There was a provision prohibiting the company from transferring or sub-letting and also provision entitling the railway administration to determine the license upon seven clear days notice if the company was guilty of breach of the conditions. There was also a clause that nothing in the document would be considered to create a tenancy or to prejudice

the rights and powers of the Railway Administration in and over and in relation to the said land and the use and enjoyment thereof and the exercise by the licensee of the liberties and licensees thereby granted and that the Railway Administration would have full power from time to time in what manner such liberties and licensees should be exercised and enjoyed. Sulaiman C.J. one of the learned judges in the Bench relied upon the definition of lease u/s 105 of the Transfer of Property Act and held that that definition under the Transfer of Property Act was borrowed in Section 2(16) of the Stamp Act with the addition in the definition that lease shall include amongst other things a kabuliat or other undertaking in writing not being the counterpart of a lease to cultivate occupy or pay or deliver rent for immovable property as mentioned in Clause (b) of Sub-section 16 of Section 2. It was held by him that the definition of lease under the Stamp Act was wider and more comprehensive than the definition of that term under the Transfer of Property Act. The learned judge went on to hold that in order to be covered under Clause (b) of Sub-section 16 of Section 2 it was not necessary for the instrument to be a unilateral one signed by the lessee alone. The mere fact that the lessor also is a party to the instrument and has signed it would not take it outside the scope of the said clause. Sulaiman, C.J. held that under the terms of the instrument in question the company was to put up a substantial building of a permanent character and, therefore, after the construction of the building the actual possession of the land could not remain with the Railway Administration and only their officers were allowed access to the land for purposes of inspection. It was found that under the terms of the agreement the Oil Company which had the use and occupation of the land was bound forthwith to erect on a part of the said land a petroleum installation and to maintain the building and the structures in proper condition and to take necessary precautions and safeguards and even if they did not actually occupy the land they were liable to make periodical payments. In view of these terms it was held that it could not be said that the document did not amount to an undertaking in writing to occupy an immovable property. It was therefore a lease.

34. The decision of the Board of Revenue, Acting Secretary v. S.I. Railway Company was distinguished on the ground that the right given by the railway company in that case to the municipal corporation was for the purpose of storing coal imported by the municipality on the land in the possession of the railway company and also on the ground that the railway company had no authority to grant a lease of the land but could grant only a license. It was held that the right to store coal on a piece of land without a right to put up a building thereon is very much in the nature of a mere license and it may well be said that there is no right to occupy the land in the sense of retaining exclusive possession over it but a mere right to use the land for the purpose of stacking coal. Mukherjee, J. in his separate judgment agreed with the view of Sulaiman C.J. that the document in question is a lease within the definition of that term in the Stamp Act. He held that the answer to the question should be looked for in the Stamp Act. It was held by him that if the document comes within the definition of the word "lease"

under the Stamp Act it must be held that the document is chargeable with duty even if it is also found that the transaction would be a license within the meaning of Section 52 Easements Act. Applying this test Mukherjee, J. held that by the document the petroleum company gave an undertaking in writing to occupy immovable property and the document was not a counterpart of a lease because there was no separate lease and that it was simply an undertaking in writing to occupy an immovable property and therefore chargeable to stamp duty as a lease. The learned judge dissented from the view taken by the Full Bench of the Madras High Court and observed that two of the judges who decided that case did not consider the definition of lease in the Stamp Act and the third judge seems to have held that the word lease must be a lease as defined in the Transfer of Property Act and a license for the purpose of stamp duty must be a license as defined in the Easements Act. In the view of Mukherjee, J. neither the Transfer of Property Act nor the Easements Act could be looked into for determining whether the instrument is a lease and it is only the definition in the Stamp Act, which could be seen. King, J. who was the third judge in the Full Bench of this Court in *Burmah Oil Company* in his short order held that in his opinion the document in question was an undertaking in writing to occupy immovable property and is not a counterpart of a lease and must, therefore, be treated as a lease for the purposes of the Stamp Act. Sulaiman C.J. However held that in absence of any other definition of license" the definition of it as contained in the Easements Act might well be adopted. He was also of the view that the definition of lease under the Stamp Act was wider than the definition of that term under the Transfer of Property Act and that even if a transaction does not amount to a lease u/s 105 of the Transfer of Property Act it may nevertheless be a lease for the purposes of the Stamp Act.

35. In *Gopal Saran Vs. Satyanarayana*, it was held in the context of a case where a shop had been let out and where the tenant was also running the business of advertisement by displaying of various advertisements board and had got an advertisement board of another company fixed on the terrace of the shop let out to him and also took Rs. 1500 for three years that the tenant had by this act not assigned or sub-let or parted with the possession of the whole or any part of the premises within the meaning of Section 13(1)(e) of the Rajasthan Premises of Land and Eviction Act, 1950. The case did not relate to the Stamp Act and is useful only to determine in what circumstances it can be said that possession has been transferred so as to distinguish a lease from a license.

36. In *Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala*, the agreement was described as an agreement of lease and license and it contained a recital that the licensor was seized and possessed of and was entitled as the monthly tenant of the workshop premises in dispute and whereas the licensee had persuaded the licensor to allow him to occupy and use the said premises for the purposes of carrying on his business and workshop for a period of five years, the licensor had agreed to allow the licensee to use the premises. The recital went on that the licensee shall pay to the licensor a monthly

compensation of Rs. 225/- and that the licensee would be entitled to keep the keys of the said premises with him and shall be at liberty to work in the said premises for 20 hours. The document further provided that the licensee shall be at liberty to construct loft and electric fittings etc. but shall not allow any other person to use and occupy the premises and that the licensor has the full right to enter upon the premises and inspect the same at any time. The apex court held that in view of the intention of the parties it was a license and not a lease. This case also did not relate to the Stamp Act in which there is a special definition of lease.

37. We shall therefore consider the question whether in this case the instrument creates a lease or a license from the point of view of the definition of "lease" under the Transfer of Property Act, which as Sulaiman C.J. said in the *Burmah Shell* case (supra) has been borrowed with some addition in the Stamp Act. We shall also examine the matter from the point of view whether it is an undertaking to occupy immovable property or for payment of rent and is therefore a lease independently as provided for in Clause (b) of Section 2 Sub-section 16 of the Indian Stamp Act. The cases on Section 105 of the Transfer of Property Act hold that transfer of the right of exclusive possession over immovable property for payment of rent is a necessary requirement of lease. For that purpose it is necessary to examine the various terms of the instrument. The terrace of the building which is the subject matter of the instrument is undoubtedly an immovable property within the meaning of Section 105 of Transfer of Property Act as well as under Clause (b) of Section 2(16) of the Stamp Act. It is stated in the preamble of the instrument that the grantor has agreed to grant a right to the use of the terrace space of the premises for the purpose of installing poles/towers, mounted antenna, shelters, D.G. space and other related equipment located in the premises. Article 1.1 of the instrument permits the petitioner to make the installation at the terrace space. The consideration for the grant is Rs. 10,000/- per month. Article 2.2 of the deed provides that the petitioner shall be entitled to take possession of the premises from 18.2.2004 and start commencement of its work. The duration for which the grant shall remain operative has been provided for in Article 3.1 and is shown as 216 months in the agreement. Article 2.3 contains a condition that the petitioner is obliged to hand over peaceful possession of the demised premises on expiry of the term of the grant or sooner determination thereof in accordance with the terms of the grant. Article 5.1 contains a condition that if the grantor plans any repairs, maintenance or renovation work to the terrace the grantor shall give at least ten days prior notice to the petitioner. Article 5.2 contains a condition that the grantor does not intend to make any further construction at terrace of the demised premises and further agrees that further constructions, if any, are to be made by the grantor only after prior consent of the petitioner and for providing suitable highest available space to the petitioner for installation of equipments for proper functioning. Article 7.3 provides that the grantor shall transfer all deposit, rents and any other payments made by the petitioner to the rightful owner. Article 8.2

contains a condition permitting the petitioner to make alteration to the equipments. Such improvements may include but are not limited to the expansion of the existing storage room for equipment or the installation of additional equipment deemed necessary on the agreed premises. Under Article 8.3 the petitioner shall have the right to put up another shelter/prefabricated shed and tower for the purpose of expansion of services and the grantor shall not have any objection to the same. If the petitioner acquires more area in addition to the described in the schedule the license fee shall be increased in proportion to the increase of area. In Article 9.1 the petitioner has been given right to terminate the deed without assigning any reasons by giving 30 days prior notice or compensation. But this Article for better appreciation has to be read with Article 3. Article 10.2 provides that a duplicate set of keys shall be handed over to the petitioner for access. Article 14.1 provides that the deed is a transferable one during the period of the deed or its renewal, the transfer/assignment is however subject to prior consent of the grantor. However, such consent shall not be unreasonably refused or withheld by the transferor. A composite reading of the terms of the deed indicate that the petitioner has been permitted to install tower and other equipments etc. on the terrace site. From the deed it appears that the installation permitted is substantial in nature and it is obvious that once the installation is made the space over which it is made cannot be used by the grantor and would remain in the exclusive possession of the petitioner during the period the agreement remains operative, namely, 116 months. The conditions referred to above read as a whole indicate that exclusive possession has been given to the petitioner over the terrace site. The petitioner has also been given the right to install further equipments. The agreement also refers to the date from which possession has to be taken and also that the petitioner will hand over peaceful possession on the expiry of the term. The agreement also contains the consideration for the grant, which in Article 7.3 is described as rent and at others as license fee. The agreement uses the word "demised", which means that interest in the property has been transferred. The clause that the deed is a transferable one also indicates that interest in the property was intended to be created. It thus appears that the deed in question creates a lease within the meaning of the Transfer of Property Act and is thus covered in the definition under the Stamp Act also. The terms of the deed read as a whole also indicate that it contains an undertaking in writing to pay an amount periodically to occupy immovable property. This payment has been described in Article 7.3 in the agreement as rent and at other as license fee. But the nature of the periodical payment is consideration for occupying immovable property. The nature of the payment is therefore rent. In the preamble of the agreement it is stated that the petitioner has agreed to take on grant the demised premises for a period of 216 months. In Article 3 of the Agreement there is a condition that the petitioner cannot terminate the deed except on the ground of the object of the deed elaborated in Article 9. The deed is therefore a lease also within the meaning of Clause(b) of Section 2(16) of the Indian Stamp Act.

38. For the reasons given above I do not find any merit in this petition. It is dismissed.