Privy Council Appeal No. 103 *of* 1915.

Allahabad Appeal No. 19 *of* 1913.

Ahmad Raza and Others - - - - *Appellants,*

v.

Saiyid Abid Husain and Others - - - *Respondents,*

FROM

THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN PROVINCES, ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 21ST JULY, 1916.

Present at the Hearing:

LORD SHAW.
LORD PARMOOR.
MR. AMEER ALI.

[*Delivered by* MR. AMEER ALI.]

This appeal from a judgment and decree of the High Court of Allahabad arises out of a suit brought by the plaintiffs in the Court of the Subordinate Judge of Azamgarh, for the redemption of an usufructuary mortgage alleged to have been created in 1857 in respect of a twelve annas share in the village of Malgaon. The document on which they rely to establish the mortgage is a certified copy of a petition of compromise filed in Court on the 1st of April, 1857. It is not disputed that the record of the proceedings in which this petition was filed, was destroyed in the Mutiny, which broke out shortly after. The certified copy is, however, admissible in evidence relative to the facts recited therein, and was rightly admitted by the Subordinate Judge. The question for determination in this appeal is, however, whether if the petition is to be treated as creating the mortgage, it was properly stamped in accordance with the Indian Statute then in force to entitle the plaintiffs to sue upon it.

The facts which led to its being filed in Court are simple. A suit had been brought by the plaintiffs' ancestors against the predecessors of the defendants for a decree for possession "by partition" of the twelve annas share in Mowzah Malgaon to

which they claimed to be entitled. Their claim appears to have been dismissed by the first Court. The appeal from this dismissal of their suit, preferred by the plaintiffs, was pending before the Zillah Judge. The parties, however, came to a compromise, and, as stated already, on the 1st April, 1857, filed before that officer the petition in question, signed by the pleaders of the parties. In this petition they notified to the Court the terms of the settlement, and prayed that the case might be decided according to the conditions set forth above. These "conditions" are stated in the body of the petition in the following terms :—

"Now the parties have come to a settlement in this way, that we, the respondents, admit the ownership of the appellants, and that the claim has been brought within time; that the respondents shall remain in possession of the aforesaid property for a period of twelve years in lieu of the mortgage money; that the appellants shall redeem the aforesaid property after twelve years, on payment of the mortgage money out of their own pocket."

The order endorsed on the document is as follows :—

"To-day the pleaders for the parties filed this compromise in the presence of their respective clients, and verified and admitted all the conditions laid down therein. It is, therefore, ordered that the compromise be placed on the record, and the case be put up to-morrow in the forenoon for final disposal."

And then follows the date (1st April, 1857), and the Judge's signature in English.

On the 28th April, 1857, the certified copy now filed was issued to the pleader acting for the predecessors of the plaintiffs.

The present suit is based on the recital in the petition relating to the mortgage. The defendants, among other pleas, raised the objection that the contract was not enforceable, inasmuch as the document was not properly stamped. The Subordinate Judge overruled this objection, and holding in favour of the plaintiffs on the other points decreed their claim. The District Judge on the appeal of the defendants came to different conclusion. He was of opinion that "the original deed of compromise" bore only a stamp of 1 rupee, and he went on to say :—

"If the original had borne a stamp of 10 rupees the stamp on the copy would also have been one of 10 rupees, as required by article 20 of Schedule (A) of the Regulation. I hold that the original compromise bore a stamp of 1 rupee only; that the document required a stamp of 10 rupees; and that as the document was insufficiently stamped its copy is not admissible in evidence."

He accordingly reversed the decision of the Subordinate Judge and dismissed the suit. The plaintiffs thereupon appealed to the High Court of Allahabad, which set aside the decree of the District Judge and restored that of the first Court.

The defendants have appealed to His Majesty in Council, and their main contentions against the judgment and decree of

the High Court are the same that found acceptance before the District Judge.

In their Lordships' opinion there are two short answers to the defendants' objections. It is not disputed that before the Indian Transfer of Property Act (IV of 1882) came into force, such mortgages could be created without any writing, outside the Presidency towns by simple delivery of possession. The petition by which the compromise was notified to the Court recites the terms on which the dispute was settled, among them being the agreement relating to the usufructuary mortgage. The mortgage was made verbally, and was valid according to the law then in force ; it was notified to the Court as a part of the settlement. The present suit is not based on any agreement contained in the petition ; it is based on a contract made outside and recited in it to enable the Court to make a decree in accordance with the settlement. If the Zillah Judge passed a formal order, as he proposed to do, embodying in his decree the terms of the settlement, and there is no reason to suppose that he did not, the present objection must necessarily fall to the ground. But whether he did or did not, the present suit, based on the agreement made independently of and before the petition was filed in Court, would be clearly maintainable.

Again, if the petition is to be treated as the document creating the mortgage, it may be rightly presumed that the officer before whom it was presented satisfied himself that it was properly stamped. No inference can be derived from the fact that the copy bears a 1-rupee stamp. Under the Court Fees Act (VII of 1870) it is the proper stamp for issuing a copy of the proceeding in the Zillah Court ; and as a copy of the petition and the order thereon, it bears the right Court fee stamp of 1-rupee. The District Judge clearly fell into an error in taking the stamp on the certified copy as an indication of the stamp on the petition itself.

Their Lordships concur generally with the reasons given by the learned Judges of the High Court for overruling the decision of the District Judge, and they are of opinion that this appeal should be dismissed with costs.

And they will humbly advise His Majesty accordingly.

In the Privy Council.

AHMAD RAZA AND OTHERS

v.

SAIYID ABID HUSAIN AND OTHERS.

DELIVERED BY

MR. AMEER ALI.

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