APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., Chief Justice, and Mr. Justice Srinivasa Ayyangar.

P. K. BHIMASENA RAO (FIRST DEFENDANT), APPELLANT,

v.

C. VENUGOPAL MUDALI AND TWO OTHERS (PLAINTIFF AND SECOND AND THIRD DEFENDANTS), RESPONDENTS.*

1924, November 26.

Stamp Act (II of 1899), sec. 35, proviso—Unstamped document—Admissibility in evidence—Document, damaged—Stamp duty, not ascertainable by Court owing to damaged condition—Duty of Court to admit—"Subject to all just exceptions" in proviso to sec. 35, meaning of—Original Side Appeal—Memorandum of objections, whether competent in an Original Side Appeal—Civil Procedure Code (V of 1908), Order XLI, rule 22—Applicability of, to Original Side Appeals—Letters Patent, clause 15.

Where an unstamped document, admissible in evidence on payment of stamp duty and penalty, was tendered in evidence with an offer by the party to pay the stamp duty and penalty on the Court determining the same, the Court cannot, under section 35 of the Stamp Act (II of 1899), reject the document on the ground that it cannot determine the amount of stamp duty owing to the damaged condition of the document.

The terms of the proviso to section 35 are mandatory and the Judge is bound to admit the document, unless it is rendered inadmissible by the provisions of any other statute for the time being in force, and the words "subject to all just exceptions" in the proviso to the section do not permit a Court to reject a document on the ground of its inability to determine the proper stamp duty thereon.

A memorandum of cross-objections cannot be filed by a respondent in an appeal preferred under clause 15 of the Letters Patent. The provisions of Order XLI, rule 22, Civil Procedure Code, do not apply to such appeals.

* Memorandum of Objections in Original Side Appeal No. 16 of 1922.

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MEMORANDUM of objections preferred by second and third respondents in Original Side Appeal No. 16 of 1922 presented against the judgment of PHILLIPS, J., passed in the exercise of the ordinary original civil jurisdiction of the High Court in Civil Suit No. 662 of 1920.

In this case an appeal was preferred by the third defendant against the judgment of PHILLIPS, J., who decreed the suit in favour of the plaintiff, who sued as a bandhu entitled to the properties of the last male holder, one Parthasarathy Mudali. The first and second defendants were vendee and mortgagee of portions of the suit properties, and the third defendant (who was subsequently joined as a defendant) claimed as an agnatic relation of the deceased to be his heir in preference to the plaintiff. The learned trial Judge held that the plaintiff was entitled to a decree. He rejected a document, which purported to be a partition-deed of the year 1851, as inadmissible, as it was unstamped and as the amount of stamp duty could not be determined by the Court on account of the damaged condition of the document. The third defendant appealed against the decree and impleaded the other defendants as well as the plaintiff as respondents. The first and second defendants (as respondents) preferred a memorandum of cross-objections under Order XLI, rule 22, Civil Procedure Code, disputing, *inter alia*, the title of the plaintiff as heir to the properties. The appellant, who had been ordered to furnish security for costs, defaulted in furnishing security and the appeal was consequently dismissed for default of prosecution. The first defendant urged his memorandum of objections. The plaintiff raised a preliminary objection that the memorandum of cross objections could not be heard, as the appeal had been dismissed for default.

Nugent Grant for the first defendant (respondent).—On the preliminary objection: The provisions of Order XLI, rule 22, apply; rule 351 of Original Side Rules contemplate the filing of memorandum of cross-objections. The provisions of Civil Procedure Code are applicable to the High Court on its appellate side. See *Sabitri Thakurain* v. *Savi*(1). In any event this memorandum should be treated as an independent appeal; the delay should be excused as the party was misled by the rule (rule 351) and the practice of the Court; stamp duty, if any is due, will be paid.

On the merits.—Plaintiff claims as a bandhu; third defendant is a near dayadhi (agnate). If the third defendant's relationship as dayadhi is proved, plaintiff has no title as heir. To prove this, Exhibit IV, an old unstamped partition deed of 1851 was tendered in evidence on payment of stamp duty and penalty. It was wrongly rejected by the learned Judge on the ground that he could not determine the amount of stamp duty as the document was damaged. In 1851, stamp was required under Regulation 13 of 1816, but there was no law of registration. Under the proviso to section 35 the document shall be admitted "subject to all just exceptions" on payment of penalty. Difficulty or impossibility for the Court to determine the amount of stamp duty is not a ground falling under the words "*subject to all just exceptions*," but the expression refers to such objections as are raised by other statutes, such as Registration Act.

V. K. Venugopal Nayudu, for respondent (plaintiff).—Under section 35, proviso, it is discretionary with the Court to admit or reject. The expression "subject to all just objections" is very general and covers the present case. The learned vakil supported the decision on the merits.

(1) (1921) I L.R., 48 Calc., 481 (P.C.).

JUDGMENT.

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COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—This is a suit by the plaintiff as a bandhu of one Parthasarathi Mudaliyar to recover the suit property and to have the mortgage and sale of it set aside. There were three defendants and the case which they all relied upon was that the plaintiff was out of Court being a bandhu because there was conclusive evidence to show that the third defendant was an agnatic relation. In support of that, there was tendered before the learned Judge a document dated the 20th October 1851, which, if admissible and genuine, clearly puts the plaintiff out of Court, because it not only shows that the parties to that document were Rangappa Mudaliyar from the one branch and Perumal Mudaliyar from the other but speaks of a certain Kolethi Mudali as being "our senior paternal uncle." A reference to the tree will show that that would mean that Kolethi was a brother of Venkatachala Mudali and Chinnathambi Mudali, the sons of the propositus, Perumal Mudali, and that Perumal Mudali, who was a party to this document, and Rangappa Mudali were the grandsons of the original Perumal Mudali. As I said, if this document is genuine, and I see no conceivable suggestion why it should not be, it is conclusive against the plaintiff's case.

As a matter of fact, the document, as tendered, was unstamped and it seems clear that, under Regulation XIII of 1816, it ought to have been stamped. Thereupon, the third defendant, who tendered it in evidence, offered to pay the penalty, such penalty as the Court should impose, together with the stamp duty. The learned Judge took a very remarkable view of this matter. Before I go to that, I will read the section which I conceive would show what the learned Judge's

duty was. It arises under the proviso to section 35 of the Indian Stamp Act, II of 1899 :

"Provided that any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, together with a penalty of Rs. 5."

That appears to me to be quite clear in its effect and to define without any ambiguity the duty of the learned Judge in the case of a document being tendered unstamped, to admit it, subject to all just exceptions, and those words have been universally understood in the statutes in which they occur to mean that the section is mandatory to the Judge, unless the instrument is rendered inadmissible by the provisions of any other statute for the time being in force. Now, what the learned Judge did was this. He seems to have construed these words of the section as giving him a general discretion as to the admission of a document in circumstances where he felt any doubt in his mind as to what the proper stamp duty was ; and I will read what he said about the document. The document is a very old one and is in a very dilapidated condition, but it is quite possible clearly to decipher all the material words I have already referred to. What the learned Judge says is this :—

"Plaintiff contends that this is one of the just exceptions and it should not be admitted. (That is this document I am speaking of, Exhibit IV in the case.) There is considerable force in his contention. In the first place the document refers to a house and pangu the values of which are not given. The stamp duty on that part of the document cannot therefore be calculated. Considerable portions of the document are missing which might themselves be liable to further stamp duty and it is impossible to state what duty is leviable."

That appears to be the main reason why the learned Judge excluded this document. That, because it was difficult for the Court to estimate the amount due by

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way of stamp duty and perhaps impossible to estimate it with absolute certainty, therefore the Court was entitled, finding itself in that difficulty, to exclude the document altogether. That, of course, is an absolutely untenable argument, and we hold that the learned Judge acted under a complete misconception with regard to it. The learned Judge gives certain other reasons for not admitting the document, some of which reasoning is clearly ill-founded, because it is based on matters that are not appearing on the face of the document but relate to the relations of the parties that arose since, about concluding that defendants 1, 2 and 3 were acting in concert. Well, of course they were. The business of each and all of them was to defeat the plaintiff's claim and this document was as available in the hands of any one of them to defeat the plaintiff's claim as in the hands of any other. A suggestion was made by Mr. Venugopal Nayudu, who of course finds himself in a very difficult position, that you can construe out of some observations of the Judge a suggestion that the document was not, within the words section 90 of the Evidence Act, produced from proper custody. It was in fact produced on a subpœna by a man called Janardhana. He was the person who propounded the will of Seethammal, who was the widow of Parthasarathi Mudaliar, a lineal ancestor of the third defendant and he is the descendant of a grandson of Perumal Mudali the younger in favour of whom this document was executed and to whom it will naturally belong. Therefore we think that the suggestion that it was not produced from proper custody entirely fails. It seems idle in those circumstances to neglect the plain words of the statute which says, to use a compendious expression, that a document purporting to be of this age when produced from a custody where it would naturally

be expected to be, proves itself. Of course it is open to anybody to argue that there were circumstances of suspicion either appearing from the look of the document or from any extraneous evidence that can be produced, but it might make the document, which is admissible, liable to be regarded by the Court as being either of no evidentiary value or possibly of being fraudulently concocted. There is no suggestion of that kind here at all. The onus would be entirely on the plaintiff to induce the Court to come to such a belief in view of the presumption clearly created by section 90 of the Evidence Act. I am therefore of opinion that the learned Judge was entirely wrong in rejecting this document: and having heard the argument of Mr. Venugopal Nayudu, he has not displaced from my mind the obvious *prima facie* conclusion that once that document is admitted his case was for ever gone. I desire to associate myself with the view that my learned brother is going to express with regard to the actual form in which this appeal comes before us; and I content myself with saying that, in my opinion, there is nothing to prevent us from doing substantial justice to the parties on the materials before this Court. In my opinion, the appeal succeeds and the plaintiff's suit must be dismissed with costs throughout. The second respondent (plaintiff) will pay the appellant (first defendant) his costs both here and in the lower Court. The appellant will pay a penalty of Rs. 5½ and a stamp duty of Rs. 75.

SRINIVASA AYYANGAR, J.—I shall only say a few words with regard to the preliminary objection that was taken to the hearing of the appeal by the learned vakil for the respondent. The third defendant originally filed an appeal and by an order of this Court he was directed to furnish security for the costs of the plaintiff-respondent.

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He failed to do so and in consequence the appeal went off for default. The objection taken by the learned vakil for the respondent is that in form the present appeal preferred by the first defendant was a memorandum of cross objections such as is contemplated under rule 22 of Order XLI of the Civil Procedure Code. His argument was that, when the appeal went off for default and there was no hearing of the appeal, the memorandum of cross objections could not be heard; but assuming that Order XLI of the Civil Procedure Code applies to this case, the legislature itself has provided for it in clause (4) of rule 22 of Order XLI. Before this new Procedure Code there was an expression of judicial opinion to the effect that such cross objections could not be heard if there was no hearing of the appeal itself. It is to provide against such contingencies that clause (4) provides that where, in any case in which any respondent has under this rule filed a memorandum of objections, and the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. Notice of the memorandum of objections has been served and therefore there is no valid objection to its being heard. But, in my opinion, Order XLI has no application whatever to appeals from the original side. The appeal is provided under clause (15) of the Letters Patent and it is not an appeal from one, the Subordinate Court, to another, the Appellate Court, but from one Judge of the same Court to two or more Judges of the same Court. Now, in such a case, the provision is only for an appeal from a judgment of one Judge. There is no doubt in the rules framed by this Court for original side appeals in rule 351, there is a reference to memorandum of objections, if any. The law of limitation provides 20 days for

appeals from a judgment of one Judge on the original side and any provision for the filing of memorandum of objections by the rules of this Court will have the necessary effect of extending the period prescribed by the law of limitation for original side appeals; but, in this case, apart from any question of limitation, there is absolutely no difficulty in treating what is called the memorandum of objections as a substantive appeal, because an appeal merely means a petition to the proper tribunal for the purpose of reversing or modifying a judgment of the Court or Judge from which or whom the appeal is preferred. This is that in form, and, apart from any nomenclature, there is absolutely no difficulty in dealing with the substance of this appeal and dealing with it as a substantive appeal. However, I think the appellant in this case should under the rules of this Court treating it as a substantive appeal be required to pay another sum of Rs. 75 as and for additional Court fee. There is, however, the question of limitation, and, though this appeal was not filed within 20 days of the judgment appealed against, still there is no doubt whatever that the appellant in this case was misled by the rules of this Court and by the practice of this Court so long, and, therefore, if there is any case in which the provisions of section 5 of the Limitation Act can be invoked, this is such a case. The delay in the presentation of the appeal will therefore be excused, and the appeal is thus rendered competent. For the reasons set forth in his judgment by my Lord the Chief Justice, I agree that the appeal should be allowed as stated by him.

K.R.