Before Mr. Justice Field and Mr. Justice O'Kinealy.

1885 *June* 1.

PUNCHANUND DASS CHOWDHRY (PLAINTIFF) *v.* TARAMONI CHOWDHRAIN, FOR SELF AND AS GUARDIAN OF HER MINOR SONS PARBATI CHURN DAS AND ANOTHER (DEFENDANTS).*

Stamp Act (I of 1879), s. 3, sub-sec. 4, cl. b, s. 34, pro. 1 and 3, s. 50—Unstamped document admitted by Original Court on payment of duty and penalty—Power of Appellate Court to review such admission.

Where the Court of first instance has, on payment of the prescribed duty and penalty, admitted an unstamped document as evidence, under s. 3, provision 1 of Act I of 1879, a superior Court sitting in appeal has no jurisdiction to review the lower Court's proceedings, in so far as they concern such admission, except in the case provided for by s. 50 of that Act.

THE plaintiff in this suit is the son of one Petamber Dass Chowdhry, deceased; the defendants are his widow Taramoni, and his two infant sons represented by her. Plaintiff claimed a third part of Petamber Dass Chowdhry's estate, including, *inter alia*, the sum of Rs. 600, being one-third of a sum of Rs. 1,800, alleged by him to have been deposited with Taramoni by her husband, for division between plaintiff and the two infant defendants, on their attaining majority. In support of his claim plaintiff put in a *roka* by which Taramoni had bound herself to pay the said sum of Rs. 1,800 to plaintiff. This document was not stamped, and an issue was raised before the Munsiff as to whether it was admissible in evidence. The Munsiff held that, being an instrument attested by witnesses, not payable to order or bearer, by which Taramoni obliged herself to pay a sum of money to plaintiff, it was a bond within s. 3, sub-sec. 4, clause *b*, of the Stamp Act (I of 1879), and therefore came within proviso 1 of s. 34 of the same Act. He thereupon ordered plaintiff to pay the full duty and fine, and admitted the document; but on examination found it to be not genuine, and dismissed plaintiff's suit as far as that portion of his claim was concerned.

Against the Munsiff's finding plaintiff appealed to the Second Subordinate Judge of Tipperah, and defendants filed a cross

* Appeal from Appellate Decree No. 74 of 1884, against the decree of Baboo Ramanath Seal, Second Subordinate Judge of Tipperah, dated the 17th of September 1883, reversing the decree of Baboo Nilmadhub Dey, Second Munsiff of Bramhunberia, dated the 1st of August 1882.

objection as to the admission of the document on payment of duty and fine. The following is the judgment of the Subordinate Judge on this point: "The *roka* bears date the 22nd Assin 1277 (7th Oct. 1870). The provisions of the Stamp Act of 1877 have been misapplied to it by the Munsiff, as Act XVIII of 1869 was in force on the date of the execution of the *roka*. In this Act the following definition is given of 'bond': 'Bond includes every instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specific act is performed, or is not performed as the case may be.' See No. 5, s. 3 of the Act. This section does not contain any provision similar to clause *h*, No. 4, s. 3 of Act I of 1879. The *roka* therefore does not come under the definition of 'bond' as given in Act XVIII of 1869. It comes under No. 5, sched. 2 of this Act, which is as follows: 'Note or Memorandum written in any book, or written on a separate paper whereby any account debt or demand, or any part of any account debt or demand therein specified, and amounting to Rs. 20 or upwards, is expressed to have been balanced, or is acknowledged to be due.' The stamp duty payable on such an instrument is an adhesive stamp of one anna. Section 28 of the Act provides that, 'except as provided in ss. 8 and 26, no stamp shall be affixed to, or impressed on, any bill of exchange or promissory note, or any instrument chargeable hereunder with the duty of one anna, subsequent to the execution thereof, nor shall the provisions of ss. 20 and 24 apply to any such instrument.' The Munsiff was, therefore, not authorized to levy the duty and penalty, and admit the *roka* in evidence. By reading ss. 18 and 28 of the Act together, the *roka* cannot be admitted in evidence in any civil proceeding. It is unnecessary therefore to look at the evidence bearing on the genuineness of the *roka*, as the oral evidence on this point is not admissible, the document itself being inadmissible."

The appeal was therefore dismissed.

The plaintiff then appealed to the High Court.

Munshi *Serajul Islam* for appellant.

Baboo *Boikant Nath Dass* for respondents.

The judgment of the Court (FIELD and O'KINEALY, JJ.) was delivered by

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PUNCHANUND DASS CHOWDHRY v. TARAMONI CHOWDHRAIN.

FIELD, J.—The only point taken in this appeal is that the lower Appellate Court was wrong in holding that the *roka* was not admissible in evidence. The *roka* was admitted by the Munsiff, who was of opinion that it ought to have been stamped; and he required the person who filed it to pay stamp duty and a penalty. Such stamp duty and penalty having been paid, he admitted the document in evidence.

The Subordinate Judge was of opinion that the Munsiff had wrongly applied the provisions of the Stamp Act. He considered that the stamp which ought to have been put upon the *roka* was a one anna adhesive stamp; and inasmuch as this stamp had not been originally affixed, he held that the defect could not be cured by the payment of a penalty, and that the document was absolutely inadmissible in evidence.

We think that the Subordinate Judge had no authority, sitting in appeal, to review the Munsiff's proceeding in so far as it concerned the admission of the *roka* in evidence. The new Stamp Act, I of 1879, governs the case, the point being one of procedure. Section 34 of this Act enacts, "that no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law, or consent of parties, authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer, unless such instrument is duly stamped: *provided* that,—then come two provisos;—and the third proviso is that "when an instrument has been admitted in evidence, such admission shall not, except as provided in s. 50, be called in question at any stage of the same suit or proceeding, on the ground that the instrument has not been duly stamped." Section 50 empowers an Appellate Court of its own motion, or on the application of the Collector, to take into consideration the order of a Subordinate Court admitting an instrument in evidence upon payment of the duty and penalty, but for one purpose merely, that is, for the purpose of ascertaining whether the Government revenue has suffered; whether a higher duty and penalty than that required by the Court of first instance ought to have been demanded from the person filing the document. This section clearly does not apply to the present case. The result is that, inasmuch as the third clause

of s. 34 is not as regards this case affected by s. 50, the admission in evidence of the document by the Court of first instance could not be questioned or interfered with by the Court of Appeal.

We think, therefore, that the Subordinate Judge was wrong in excluding the *roka* from his consideration on the ground that it was not admissible in evidence. We must, therefore, set aside his decree, and remand the case in order that the Subordinate Judge may consider the effect of the *roka* as evidence, and decide the appeal accordingly. Costs will abide the result.

Appeal allowed and case remanded.

Before Mr. Justice Wilson and Mr. Justice Beverley.

MAHOMED ZAMIR (PLAINTIFF) *v.* ABDUL HAKIM AND ANOTHER (DEFENDANTS)*

1885. *June* 30.

Sale for arrears of rent—Bengal Regulation (VIII of 1819), s. 8—Notice of Sale—Publication of Proof of Service.—Suit to set aside sale.

Compliance with the directions in Regulation VIII of 1819 as to service of notice is essential to the validity of a sale under that Regulation. Where there was evidence of service upon the defaulter personally, but not of service at his *kachari*: *Held* that this was not sufficient, and that the sale must be set aside.

Maharajah of Burdwan v. *Tarasundari Debi* (1) and *Maharajah of Burdwan* v. *Kristo Kamini Dasi* (2) followed.

THIS was a suit to set aside a sale under Regulation VIII of 1819. The plaintiffs were talukdars of a plot of land in the zemindari of defendant No. 2. Defendant No. 1 was the auction-purchaser at the sale sought to be set aside. Plaintiffs objected to the sale on the ground, among others, that notice thereof had not been given in accordance with s. 8 of the Regulation. That section provides that notice shall be posted at the *kachari* of the defaulter whose land is to be sold. The Munsiff of North Putia, who tried the case, found that the evidence adduced by

*Appeal from Appellate Decree No. 1827 of 1884, against the decree of Baboo Kanie Lall Mukherji, First Subordinate Judge of Chittagong, dated the 17th of April 1884, reversing the decree of Baboo Hara Kumar Rai, Munsiff of Utterpotia, dated the 6th of October 1882.

(1) L. R., 10 I. A., 19; I. L. R., 9 Calc., 619.

(2) I. L. R., 9 Calc., 931.