

effect of such permission is to leave matters in the position in which they would have stood if no such suit had been instituted. Our attention has also been drawn to the decisions of this Court in *Itahi Bakhsh v. Imam Bakhsh* (1) and in *Mul Chand v. Bhikari Das* (2).

The question is not free from difficulty, but we are not inclined to differ from the view expressed by the Madras High Court in the case to which we have referred, and we think that it is most probable that the Legislature intended that when a suit was withdrawn with permission under the first paragraph of s. 373 of Act No. XIV of 1882, the effect should be to leave the parties in the same position as that in which they would have been if the suit had never been brought. This view is supported by s. 374 of Act No. XIV of 1882.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

## FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Knox and Mr. Justice Banerji.

REFERENCE UNDER ACT NO. I OF 1879 (INDIAN STAMP ACT), s. 49.

*Act No. I of 1879 (Indian Stamp Act), s. 3, cl. (13), s. 7—Stamp—Lease or mortgage.*

A zamindár leased certain land in his village to some cultivators at a rent of Rs. 365 per annum in cash and of certain cart-loads of straw and grass by a document which also contained an agreement by the lessees hypothecating certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the engagement for the delivery of the other articles; *Held* that the document above referred to should be stamped as a mortgage-deed according to the definition contained in s. 3, cl. 13 of Act No. I of 1879, and also that it fell within the second paragraph of s. 7 of the above Act. *Ex parte Hill* (3) referred to.

This was a reference under s. 49 of Act No. I of 1879, made by the Munsif of Saháranpur for the purpose of obtaining a decision as to the correct stamp to be placed upon a certain document.

(1) I. L.R., 1 All., 324.

(2) I. L.R., 7 All., 624.

(3) I. L.R., 8 Calc., 254.

1894

BEHARI LAL  
PAL  
v.  
SRIMATI  
BARAN MATI  
DASI.

1894

November 16.

1894

REFERENCE  
UNDER ACT  
No. I OF 1879  
(INDIAN  
STAMP ACT),  
S. 49.

The document in question was thus described in the Munsif's order of reference :—“ The lease provides for the payment of Rs. 365 per annum in cash, and a cart-load of straw and a cart-load of grass as zamíndári dues for eight years, and also provides that for the amount payable every year under the lease the property described below is pledged and hypothecated (*maqful aur mustagharāq*), and that the said property will not be transferred to any one in any manner, and, if transferred, such a transfer would be regarded as void.”

The document was stamped as a lease with a stamp of the value of Rs. 4 and the question referred was whether the document ought to have been stamped as a lease or as a mortgage-deed or as both, and what was the amount of stamp duty with which it was chargeable.

The following order was passed on this reference :—

EDGE, C. J., KNOX and BANERJI, JJ.—This is a reference by the Munsif of Saháranpur under s. 49 of the Indian Stamp Act of 1879. The question is whether a document produced before him at the trial was chargeable with duty as a lease or was chargeable with duty as a mortgage-deed. There was a further question submitted to us, namely, in case the document was a lease and also a mortgage-deed, did it fall within paragraph 2 of s. 7 of the Indian Stamp Act, that is, was it chargeable with duty only as a mortgage-deed, that being the higher duty ?

The document in question was stamped as a lease. The document in question was a document by which the zamíndár leased certain land in his village to some cultivators at a rent of Rs. 365 per annum in cash and of certain cart-loads of straw and of grass, valued by the Munsif at Rs. 10 per annum, for eight years, as zamíndári dues. The lessees by the deed hypothecated certain other property belonging to them for the purpose of securing the payment of the agreed rent and for the performance of the engagement for the delivery of the articles valued by the Munsif at Rs. 10 per annum. It appears to us that the document was certainly a

mortgage-deed, as a mortgage-deed is defined in clause 13 of s. 3 of the Indian Stamp Act of 1879. It is an instrument by which, for the purpose of securing a future debt, that is, the rent to be paid, and for securing the performance of an engagement, that is, the engagement to pay the rent and to deliver the other articles yearly, the lessees created in favor of the lessor a right over specified property.

As to the second question, in our opinion the document in question cannot be regarded as an instrument comprising or relating to several distinct matters. The matter to which the instrument relates was the terms upon which the lessors let the land and the lessees took the holding. The mortgage was not a distinct matter from the lease. It was as much the matter of the lease as an ordinary covenant to pay would be part of the matter of the lease. We are consequently of opinion that paragraph 2 of s. 7 of Act No. I of 1879 applies to this case. We are fortified in this opinion by the decision of the Calcutta High Court in *Ex parte Hill* (1). The papers will be returned to the Munsif through the District Judge with this expression of our opinion. There are some independent papers which have been sent up with the document we have expressed our opinion upon, but there is nothing to show whether those papers are relevant or not. The opinion which we express is simply on the document in question.

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 REFERENCE  
 UNDER ACT  
 NO. I OF 1879  
 (INDIAN  
 STAMP ACT),  
 s. 49.

## APPELLATE CRIMINAL.

1894  
 November 17.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Banerji.*

QUEEN-EMPRESS v. TAJ KHAN AND OTHERS.

*Criminal Procedure Code, ss. 161, 162—Use at trial in Sessions Court of statements made to Police officer investigating case—Evidence.*

Though, speaking generally, statements, other than dying declarations, made to a Police officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure may be used at the trial in favor of an accused person, such statements can only be so used when they are legally brought as evidence before the Court, that is to say, a witness having been cross-examined as to a statement, it may

(1) I. L. R., 8 Calc., 254.