

1902

ISHRI
alias
HATIM
ALIv.
MUHAMMAD
HADI.

to the Police. As the suit was instituted on the 28th of April, 1899, it was beyond time and should have been dismissed. We allow the appeal, set aside the decree of the Court below, and dismiss the suit with costs here and in the Court below.

Appeal decreed.

FULL BENCH.

1902

March 14.

Before Mr. Justice Knox, Mr. Justice Blair, and Mr. Justice Banerji.

REFERENCE UNDER SECTION 57 OF ACT No. II OF 1899.*

Act No. II of 1899 (Indian Stamp Act), sch. i., Arts. 23, 55, 62(e)—Stamp—Conveyance—Release—Document executed by a benami purchaser professing to relinquish in favour of the real purchaser any claims which he might have in virtue of the purchase.

Held, that a document by means of which the certified purchaser of property sold by auction in execution of a decree purported to relinquish in favour of a person whom he alleged to be the real purchaser of the property, any claims which he might have in respect of the property by reason of his being the certified purchaser thereof was to be stamped as a release according to article 55 of the first schedule to the Indian Stamp Act, 1899.

THIS was a reference made under section 57 of Act No. II of 1899 by the Board of Revenue under the following circumstances:—

A bond was executed in favour of one Reoti Saran. On that bond he sued and obtained a decree. In execution of that decree certain property was sold; and Babu Reoti Saran, the decree-holder, became the certified purchaser. Babu Reoti Saran subsequently executed a document, in which he recited that through-out these transactions the real owner of the decree and the real purchaser of the property was his brother, Raghubir Saran. In this document the executant stated:—“Actually Babu Raghubir Saran is the owner of all the property, and he is the proper man entitled to obtain possession, and to get his name recorded in the revenue records. I have no right or concern of whatever kind with the said property, nor shall I have anything to do with the same: wherefore this agreement is given by way of release that it may be of use.” The question having arisen as to whether this document was a conveyance or a release, or any

* Miscellaneous No. 148 of 1901.

other kind of instrument liable to duty under the Stamp Act, this question was referred by the Commissioner of Stamps to the Board of Revenue, and by the Board of Revenue to the High Court.

Mr. A. E. Ryves, on behalf of the Board of Revenue:—

It is suggested that the effect of the execution of this document by Reoti Saran is to convey his rights under the purchase and sale certificate to Raghubir Saran; and that therefore it should have been stamped as a "conveyance." But the document cannot operate as a transfer. It does not even purport to give Raghubir Saran any rights: all it does is to recite that the purchase was *ism farzi* and that the real purchaser was Raghubir Saran. It expressly recites that Reoti Saran has no rights in the property: it cannot therefore, and indeed does not, convey any rights. On the other hand the person who has purchased land at an auction sale and obtained a "sale certificate" has thereby acquired a good title to the land included in the certificate, and is entitled on the strength of it to go to the Revenue Court and obtain mutation of names in his favour and be put in actual possession of the land. This document, if it has any force, would then be included in the term "release"* because Reoti Saran gives up his right to complete his possession of the land. In this view the document should be stamped as a release.

KNOX, BLAIR, and BANERJI, JJ.—The question referred to us is whether a certain document which is upon the record is a release or a conveyance, or whether it is any other kind of document liable to stamp duty, such as a transfer under schedule I, article 62, clause (e) of the Act.

The document is one in which one Babu Reoti Saran, a certified purchaser of property sold in execution of a decree, recites that the real owner of the decree, and the real purchaser of the property from first to last and throughout, has been his brother, Babu Raghubir Saran. The executant adds that the document, which he calls an agreement, is given by way of release that it may be of use.

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* In Act No. II of 1899, schedule I, article 55 the term "release" is thus defined:—"Any instrument whereby a person renounces a claim upon another person or against any specified property."

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The term "conveyance" has been defined in Act No. II of 1899. Looking to the document as it stands, it cannot be said that it is an instrument by which property is transferred *inter vivos*. The writer says that he has nothing to transfer, and he does not pretend to transfer anything. On the other hand, we find upon turning to schedule i, clause 55, that a release which is liable to stamp duty is set out as being an instrument whereby a person renounces a claim upon another person or against any specified property. If this document is to be of use in any way, it may be said it is a document whereby Babu Reoti Saran renounces all claims he may have, or be supposed to have, against the property of which he is recorded as certified purchaser.

The question is not free from difficulty, as the Board of Revenue point out. Looking to the curious way in which both the term "instrument" and the word "release" are defined and explained in the Act, we hold that the document is a release on which stamp duty should be paid.

This is our answer to the reference.

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March 14.

Before Mr. Justice Know, Mr. Justice Blair, and Mr. Justice Banerji.

REFERENCE UNDER SECTION 57 OF ACT NO. II OF 1899.*

Act No. II of 1899 (Indian Stamp Act), sections 35(b) and 42—Stamp—Penalty—Unstamped receipt.

In applying proviso (b) of section 35 of Act No. II of 1899 the Court should not levy the duty of one anna as well as the penalty of one rupee, and when a receipt is admitted in evidence under the proviso above referred to, it is not necessary that the receipt should be endorsed in the manner provided for in section 42.

THIS was a reference made by the Board of Revenue under section 5 of Act No. II of 1899 at the instance of the Commissioner of Stamps. It appears that it was the practice of some Courts in dealing with receipts under section 35(b) of Act No. II of 1899 to require the duty of one anna to be paid in addition to the penalty of one rupee prescribed by the section, and also to endorse the receipts thus dealt with in the manner laid down in section 42. It appearing doubtful whether this procedure was correct, the following questions were formulated for the opinion of the High Court:—“(1) In applying proviso (b) to section 35 of

* Miscellaneous No. 172 of 1901.

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Act No. II of 1899, should the Court levy the duty of one anna as well as the penalty of one rupee? (2) When a receipt is admitted under the proviso, should it be endorsed as required by section 42?"

Mr. A. E. Ryves on behalf of the Board of Revenue:—

Under the old Stamp Act a document which required to be stamped with a one anna stamp to be "duly stamped" could under no circumstances be received in evidence unless it had been "duly stamped" when executed. Under Act No. II of 1899, however, section 35(b) provides that "where any person from whom a stamped receipt could have been demanded has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it." In the present case A tendered in evidence against B a receipt, which ought to have been, but was not, stamped by having affixed to it a one anna receipt stamp. The Court directed that the receipt be stamped with a one anna stamp and that a penalty of one rupee should be paid under section 35(b). On payment of the duty and penalty the Court, purporting to act under section 42, endorsed a certificate on the back of the receipt in terms of section 42(1). Two questions arise—(1) whether the duty of one anna should have been levied as well as the penalty? and if this is answered in the negative, then (2) whether section 42 applies. It is argued that as to (1) no duty is chargeable: the penalty only can be levied; and the effect of that is to make the receipt admissible in evidence, not generally, but only as against the particular person specified in the schedule. If the duty was levied as well as the penalty, there would be no reason why the receipt should not be admissible in evidence for all purposes; but this would be directly opposed to the intention of the Legislature. Not one receipt in a thousand perhaps is ever produced in Court, and if the omission to stamp a receipt could be subsequently completely cured for all purposes by payment of the duty and penalty, it would not be worth while to stamp a receipt, and great loss would be caused to the revenue. As to (2), section 42 only applies where duty is levied as well as a penalty. In the case

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of a receipt requiring a one anna stamp, the duty is not leviable, consequently section 42 has no application, and the Court is not justified in acting under clause (1) of section 42.

The following opinion was pronounced:—

KNOX, BLAIR, and BANERJI, JJ.—The questions which are referred to us are (1) whether, in applying the proviso (b) of section 35 of Act No. II of 1899, the Court should or should not levy the duty of one anna as well as the penalty of one rupee; and (2) when a receipt is admitted under the proviso, whether it should or should not be endorsed as required by section 42.

Our answers to both the questions are in the negative.

1902
April 7.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Burkitt.

DUNGAR MAL AND OTHERS (OPPOSITE PARTIES) v. JAI RAM

(PETITIONER).*

Civil Procedure Code, section 211—Mesne profits—Allowance of expenses of collection of rents to a trespasser against whom a decree for mesne profits has been passed—Principle upon which such expenses should be allowed or disallowed.

In estimating the mesne profits which the owner of land is entitled to recover from a trespasser the costs of collecting rents, which are ordinarily incurred by the owner, should be allowed to the trespasser only where such trespasser entered on the land in the exercise of a *bona fide* claim of right. But when the trespass is altogether tortious and malicious, in other words, when the trespasser has entered or continued on the property without any *bona fide* belief that he is entitled to do so, where, in defiance of the rights of another, he has thrust himself into an estate, although he may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the Court in estimating damages to allow the wrong-doer even such charges as would ordinarily but voluntarily be incurred by an owner in possession. *Altaf Ali v. Lalji Mal* (1) followed. *McArthur v. Cornwall* (2), *Girish Chunder Lahiri v. Shoshi Shikhareswar Roy* (3) referred to. *Abdul Ghafur v. Raja Ram* (4) distinguished.

In the suit out of which this appeal arose the plaintiff claimed possession as the adopted son of one Tika Ram of lands which

* First Appeal No. 19 of 1901 from an order of Babu Achal Behari, Additional Subordinate Judge of Moradabad, dated the 3rd of December, 1900.

(1) (1887) L. L. R., 1 All., 518.

(3) (1900) L. R., 27 I. A., 110.

(2) (1892) L. R., 1892 A. C., 75.

(4) (1901) I. L. R., 23 All., 252.