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think that, out of consideration for the parties themselves, no such direction ought to be given. Had it been possible, when the original certificate was applied for, to have established that the value of those 2 biswas exceeded the Rs. 10,000—a perfectly simple and straightforward thing to do—all this difficulty as between the value of the estate and the value of the mortgage would at once have vanished, but it seems impossible to read the judgement of the High Court without seeing that there were two contentions, and only two, before them. Upon the one contention the appellant would have failed, and that was that the subject-matter of the suit related to the 2 biswas, and on the other contention she would have succeeded, and that was that the subject-matter of the suit was affected by the value of the mortgage debts. It was the latter contention which the High Court wrongly adopted.

Their Lordships will therefore humbly advise His Majesty that this objection must succeed, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant : *Douglas Grant.*

Solicitors for the respondent : *Barrow, Rogers and Nevill.*

J. V. W.

AHMAD RAZA AND OTHERS (DEFENDANTS) v. ABID HUSAIN AND OTHERS
(PLAINTIFFS).

[On appeal from the High Court of Judicature at Allahabad.]

Evidence—Secondary evidence—Certified copy of petition of compromise made in 1857—Record of proceedings destroyed in the Mutiny—Evidence to establish mortgage in suit for redemption of mortgage not made in writing—Stamp—Bengal Regulation, X of 1829—Objection that certified copy is insufficiently stamped—Petition treated as document creating mortgage.

In a suit for the redemption of a usufructuary mortgage alleged to have been created in 1857, the document on which the plaintiffs relied to establish the mortgage was a certified copy of a petition of compromise filed in Court on 1st of April, 1857. The record of the proceedings was admittedly destroyed in the mutiny of that year. The document, which was admitted in evidence by the Subordinate Judge, recited the terms on which the dispute was settled amongst them being the agreement relating to the mortgage, and an endorsement on it, after reciting that "the pleaders for the parties filed the compromise in the presence of their respective clients, and verified and admitted all the

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* *Present.*—Lord SHAW, Lord PARMOUR and Mr. AMBER ALLI.

conditions laid down therein," ordered that "the compromise be placed on the record, and the case be put up to-morrow for final disposal." Then followed the date and the signature of the Zillah Judge in English. The certified copy was on the 28th of April, 1857, issued to the pleader acting for the predecessors of the plaintiffs. It bore a stamp of one rupee. The defence was that the contract was not enforceable as the document was not properly stamped. The Subordinate Judge overruled the objection and decreed the suit. The District Judge held that the copy was required by article 20 of Regulation X of 1829, to bear a stamp of the same value as the original compromise; that the original bore a stamp of one rupee only, but required a stamp of ten rupees, and as it was insufficiently stamped its copy was not admissible in evidence. He reversed the decision of the first court and dismissed the suit. The High Court on appeal restored the decision of the Subordinate Judge.

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Held by the Judicial Committee (affirming that decision) that the mortgage was made verbally and was valid according to the law then in force, and it was notified to the court as part of the settlement. The present suit was not based on any agreement contained in the petition, but on a contract made outside and recited in it to enable the court to make a decree in accordance with the settlement. If the Judge did so, the defendants' objection fell to the ground, and, whether he did or not, the suit based on the agreement made independently of and before the petition was filed in Court was clearly maintainable.

If, however, the petition was treated as the document creating the mortgage it might rightly be presumed that the officer before whom it was presented satisfied himself that it was properly stamped. No inference could be drawn from the fact that the copy bore a one rupee stamp, for that 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 bore the proper Court fee stamp of one rupee. The District Judge fell into an error in taking the stamp on the certified copy as an indication of the stamp on the petition itself.

APPEAL No. 103 of 1915, from a judgement and decree (2nd April, 1913) of the High Court at Allahabad, which reversed a judgement and decree (28th May, 1912) of the District Judge of Azamgarh and restored a judgement and decree (29th March, 1912) of the Subordinate Judge of Azamgarh.

The only question for determination on this appeal was whether a document which had been admitted in evidence in the court of the Subordinate Judge was properly stamped.

The suit which gave rise to the appeal was instituted on the 7th of December, 1910, by the respondents against the appellants for the redemption of a usufructuary mortgage of a 12-anna share in a village called Malgaon.

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The appellants denied the execution of the mortgage, and in the course of the hearing the respondents tendered as evidence of the mortgage a certified copy of a *sulehnama*, or petition of compromise, filed in a partition suit between the ancestors of the parties respectively, and dated the 1st of April, 1857. The petition recorded a compromise come to between the parties which contained the terms of the mortgage now sued upon, and was signed by the pleaders of both parties, and bore the following endorsement by the District Judge :—

“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.”

(Signature of the District Judge in English.)

The copy was stamped with an engraved one rupee stamp.

The records of the suit were, with many others, destroyed in the mutiny, and the copy was therefore the only available evidence of the terms of the compromise.

The document was objected to on the ground that it was not properly stamped, but the Subordinate Judge held that the stamp was sufficient, and admitted it in evidence. In giving his judgment he held as to the document that though it was only stamped as a petition, it was admissible in evidence as there was nothing to show that the agreement recited in it was ever reduced to writing, and he decreed the suit in favour of the respondents on the basis of the mortgage with costs.

The District Judge on appeal held that though an oral mortgage would have been valid according to the law then in force, yet, having regard to the way in which the case was presented in the present suit it must be taken that the document was not relied on as evidence of an oral agreement, but as being the mortgage itself; and that having regard to article 20 of Regulation X of 1829, it must be taken that the original petition was stamped in the same way as the copy, whereas according to the law then in force the original should have borne a stamp of Rs. 10. The District Judge accordingly held that the document was not admissible in evidence as being improperly stamped, and there being no other evidence of the mortgage in suit, he dismissed the suit with costs of both courts.

The respondents appealed to the High Court (Sir H. D. GRIFFIN and A. E. RYVES, JJ.), who held that under section 36 of the Stamp Act (II of 1899), the document, having been admitted as properly stamped by the court of first instance, could not be objected to on this ground in appeal; that even if article 20 of the Regulation relied upon was applicable to a certified copy given by the Court, it did not follow that the original must have been stamped in the same way as the copy; and that in the absence of any evidence to the contrary, it must be presumed that the court acted according to law, and was satisfied under section 3 of the Regulation that the document was duly stamped before it was placed on the record. The High Court accordingly allowed the appeal, and restored the judgement and decree of the court of first instance with costs throughout.

The material portion of the judgement was as follows:—

“ Relying on this copy the first court decreed the suit. On appeal it was argued, *inter alia*, that even if the copy were genuine it is not admissible in evidence because the original was not properly stamped. The learned Judge upheld this contention and came to the conclusion that ‘ the original compromise bore a stamp of one rupee only, that the document required a stamp of Rs. 10, and that as the document was insufficiently stamped its copy was not admissible in evidence.’ He goes on to say, ‘ When that document is removed there is no evidence to prove the mortgage alleged by the plaintiff.’ In the result he allowed the appeal and dismissed the suit.

“ Before us the only question is whether the learned Judge was right in discarding the copy. In my opinion he was not. The copy itself was admitted in evidence by the first court, and although there is no distinct finding by that court, in so many words, that the document was properly stamped, yet such a finding must be inferred from the fact that the court relied on the case of *Ramdyal v. Dhoobey Jhaunman Lal* (1) and another case as its authority for holding that the document was admissible in evidence. The head-note in *Ramdyal v. Dhoobey Jhaunman Lal* runs as follows:— ‘ A document in the shape of a petition to a court setting forth an arrangement come to between the parties in a suit, may be received in evidence in support of a fresh suit founded upon the agreement recited in such petition, although only stamped as a petition, it not appearing that the agreement recited was made in writing.’

As the document was admitted in evidence no further question can arise under section 36 of the Stamp Act of 1899, as to its admissibility on the ground that it was not duly stamped. If, however, it could be shown that the original document of which it was a copy was not duly stamped, it would not be available as secondary evidence of the original. But there is no evidence whatsoever as to what stamp, if any, was affixed to the original. The learned Judge

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holds that the copy required to be stamped in accordance with article 20 of Regulation X of 1829. The article runs as follows :—‘ Copy or counterpart of any deed or instrument attested to be a true copy and furnished to a party to the same, for the purpose of being given in evidence for the recovery of any sum of money, property, interest or rights secured thereby—the same duty as prescribed for the original deed by this Regulation.’ He considers that the compromise should have been stamped as a mortgage with a ten rupee stamp. Inasmuch as the copy is on a paper with a one rupee engraved stamp he says, ‘ It is clear therefore that on the original deed of compromise the stamp affixed was of one rupee.’ Even if article 20 was applicable to a copy like this given by a court, of a document filed in a judicial proceeding, I do not think it at all follows that because the copy bears a particular stamp that the original must have borne a stamp of the same value. The concluding words of the article are ‘ the same duty is prescribed for the original deed.’ If they had been ‘ the same duty as paid for the original deed,’ there might have been some force in the argument. In the absence of any evidence to the contrary, I think we must presume that the court acted according to law, and according to section 3 of the said Regulation was satisfied that the document was duly stamped before it was placed on the record.

“ The various cases which have been cited by the learned Judge are all distinguishable from this case, inasmuch as in every one of them the original document was before the court and the stamp was patent on the face of it. Here, as I have said, the original records were destroyed in the mutiny and there is nothing to show how the document was stamped. In my opinion therefore there was no evidence on which the learned Judge could come to the conclusion that the original document was not duly stamped.”

On this appeal ^{and B. Dube}

E. B. Raikes, for the appellants contended that the document was inadmissible in evidence as not being properly stamped, and was rightly rejected by the District Judge. Secondary evidence could not, it was submitted, be given without proof that the lost document was duly stamped. If the original document was not stamped a penalty could be paid and this document could be stamped, but if the original is lost the copy could not be stamped as the Stamp Act (II of 1899), did not provide for the payment of a penalty on the copy. Reference was made to section 36 of Act II of 1899, and to *Sri Venkata Sveta Chalapati Ranga Rao (Raja of Bobbili) v. Inuganti China Sitaramasami Garu* (1). The District Judge found that the compromise was only stamped with a one rupee stamp which he held was insufficient, as it should have borne a ten rupee stamp under section 20 of schedule A of Regulation X of 1829. Assuming

that the document admitted in evidence, which is a copy of a compromise said to create the relationship of mortgagor and mortgagee, was properly stamped the question arises whether that relationship was created. Did the compromise require to be stamped as a mortgage deed or not? The Subordinate Judge was of opinion that it was merely the recital of an oral agreement between the parties. [Lord SHAW: The document was filed in Court in 1857, and afterwards destroyed in the mutiny. Do you ask us to assume it was not properly stamped at the time it was filed, and that when the Court ordered it "to be put up to-morrow for final disposal," nothing was done with it afterwards?] An application for a consent decree on a compromise was not a document which would ordinarily be stamped: and there was nothing to show that the Court made a decree on the compromise. [Mr. AMEER ALI: At that time the parties might have made a verbal mortgage which was embodied in the petition.] That was the view taken in the case of *Ramdyal v. Dhoobey Jhannan Lal* (1) referred to by the Subordinate Judge, but the facts of that case were different from those of the present case which made it distinguishable, and inapplicable. Reference was made to Regulation X of 1829, Schedule A, article 20; and schedule B, articles 3 and 17; and it was submitted that the decree of the District Judge should be restored.

De Gruyther, K. C., and *Sir W. Garth* for the respondents were not called on.

1916, July 21st:—The judgement of their Lordships was delivered by Mr. AMEER ALI:—

This appeal from a judgement 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 a usufructuary mortgage alleged to have been created in 1857, in respect of a 12 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,

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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 12-anna share in mauza 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 of 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 of 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 a different conclusion. He was of opinion that "the original deed of compromise" bore only a stamp of one rupee, and he went on to say :—

"If the original had borne a stamp of ten rupees, the stamp on the copy would also have been one of ten rupees, as required by article 20 of Schedule (A) of the Regulation. I hold that the original compromise bore a stamp of one rupee only; that the document required a stamp of ten 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 judgement 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

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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 one 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 one 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.

Appeal dismissed.

Solicitors for the appellants:—*T. L. Wilson & Co.*

Solicitors for the respondents:—*Watkins & Hunter.*

J. V. W.

APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice
Muhammad Rafiq.*

UDIT NARAIN MISIR AND OTHERS (DEFENDANTS) v. ASHARFI LAL
(PLAINTIFF) AND AKHRAJ LAL AND OTHERS (DEFENDANTS).*

Mortgage—Subrogation—Partial discharge of prior incumbrance—Purchaser of equity of redemption entitled to stand in the shoes of prior incumbrancer to the extent that incumbrance has been discharged.

A purchaser of the equity of redemption is entitled to stand in the shoes of a prior incumbrancer where the purchaser has, with the consent of that incumbrancer, partially discharged the liability.

Gurdeo Singh v. Chandrikah Singh (1) dissented from. *Chetwynd v. Allen* (2) followed. *Baroness Wenlock v. The River Dee Company* (3) referred to.

THE facts of the case are as follows:—

The plaintiff Asharfi Lal instituted the present suit to enforce a mortgage, dated the 29th of June, 1904, executed

* Second Appeal No. 140 of 1915, from a decree of Lal Gopal Mukerji, Subordinate Judge of Gorakhpur, dated the 22nd of September, 1914, modifying a decree of Charu Deb Banerji, Munsif of Bansi, dated the 10th of December, 1912.

(1) (1907) L. L. R., 36 Cal., 193. (2) [1899] 1 Ch. D., 853.

(3) (1867) L. R. 19 Q. B. D., 155.

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