1922

MUHAMMAD AHMAD v. ZAHUR AHMAD.

concerned with the share which was claimed in that suit by Hashmat Ali. The decision in the previous suit did not affect any question of partition of the respective shares of Hashmat Ali and Muhammad Ahmad. In a suit of this nature, in which a co-sharer was made a defendant simply because he had an interest in the property which was claimed, a decision between the plaintiff and other defendants could not be held from any point of view to have the effect of *res judicata* as between the defendants whose title was not in issue and was never determined in the previous suit. This case very much resembles the case of *Somasundara Mudali v. Kulandaivelu Pillai* (1) which has been cited to us. The ruling in that case fully supports the view which we have expressed above.

The result is that the appeal must be dismissed as regards the share claimed as heir to Musammat Khurshed Jahan. As regards the share claimed by virtue of the purchase from Nizam-ud-din, the decree of this Court and of the courts below must be set aside and the case remanded to the court of first instance with directions to re-admit it under its original number in the register and to dispose of it according to law. In so far as the costs of the litigation relate to the share in regard to which the claim has been dismissed, the plaintiff must bear the costs of the defendants in all courts proportionately to the portion of the claim dismissed. As regards the remainder of the claim, costs here and hitherto will be costs in the cause.

Decree set aside and cause remanded.

FULL BENCH.

1922
January, 20.

Before Mr. Justice Piggott, Mr. Justice Lindsay and Mr. Justice Gokul Prasad.

IN THE MATTER OF MUHAMMAD MUZAFFAR ALI.*

Act No. II of 1899 (Indian Stamp Act), schedule I, article 33—Stamp—Deed of gift—Value of property not stated.

If in a deed of gift the value of the property dealt with is not set forth, the deed does not require any stamp, and it is not within the competence of the Collector to have the said property valued in order to assess the duty payable. If, however, the value of the property is intentionally omitted with a

* Civil Miscellaneous No. 195 of 1921.

(1) (1904) I. L. R., 28 Mad., 457.

1922

IN THE MATTER OF MUHAMMAD MUZAFFAR ALI

view to defraud the revenue, a prosecution will lie under section 64 of the Indian Stamp Act, 1899. *Reference under Stamp Act, section 46*, (1) followed.

THIS was a reference from the Chief Controlling Revenue Authority under section 57(1) of the Indian Stamp Act, 1899. The facts which gave rise to the reference are set forth in the following letter of the Board of Revenue:—

"I am directed to refer the following case under section 57 (1) of the Stamp Act for the decision of the Hon'ble the High Court. It has been referred for the orders of the Board of Revenue, as the Chief Controlling Revenue Authority, by the Deputy Commissioner of Bahraich otherwise than under section 56(2) of that Act.

"On the 1st of February, 1917, one Shaikh Muhammad Muzaffar Ali, taluqdar of Gandara, executed a deed of gift on plain paper in favour of one Hasan Khan. The property gifted is a grove, but the value thereof is not given in the deed.

"The deed was produced before the Tahsildar of Kaiserganj by the donee, Hasan Khan, and was impounded and sent to the Deputy Commissioner for action, under section 38(2) of the Act.

"The Deputy Commissioner had the value of the grove estimated (at Rs. 300) by the Tahsildar and is under the impression that duty can legally be charged on this amount. He has, however, submitted the case for the orders of the Board of Revenue as to whether the duty and penalty should be levied from the donor or from the donee. He has not yet levied any duty and penalty under section 40 (1) (*b*) nor has endorsed the instrument under section 42 (1) of the Act.

"The Chief Controlling Revenue Authority has considerable doubt that the instrument is chargeable with duty on the value of the property as estimated by the Collector; and section 29 of the Stamp Act is silent as to the party by whom the duty on a deed of gift is payable. In the present case there was presumably no agreement between the parties as two who was to pay the duty as they never intended to pay any. As regards the chargeability of the instrument with duty the following points arise:—

(1) whether the words "*set forth*" in article 33 of schedule I of the Stamp Act, relate to the word

(1) (1885) I. L. R., 8 Mad., 453.

"value" or the word "property" immediately preceding them;

(2) whether having regard to the definition of the words "duly stamped" given in sub-section (II) of section 2 of the Act and the opening words of section 3, an instrument in which the directions of section 27 have been disregarded and the value of the property is not set forth or the property is undervalued and in consequence either no duty or a lower duty than that chargeable on the real value of the property, has been paid, is deemed to be not duly stamped, and

(3) whether if such an instrument is not duly stamped the Collector to whom it is sent under section 38 (2) can under the law require the executant to show the true value of the property in the instrument or can himself estimate the value and then charge the duty thereon.

"The only case on the point that the Chief Controlling Revenue Authority is aware of is that reported in Indian Law Reports, 8 Madras, page 453. This related to a deed of settlement mentioned in article 58, schedule 1, of the Stamp Act, where a similar phraseology is used. It was held in this case that the words "as set forth in such settlement" applied not to the interest created by the instrument but to the value set forth in the settlement.

"The case in *Emperor* v. *Rameshar Das* (1) referred to a "conveyance", article 23, schedule 1, of the Act, where there is no room for doubt. The present question, where in a deed of gift no value whatsoever of the property is stated, has not, to the knowledge of the Chief Controlling Revenue Authority, been decided by any of the High Courts in India.

"If the deed is deemed to be not "duly stamped" there would be practical difficulties in the way of the Collector in levying the proper duty, as section 40 does not in the Board's opinion authorize the Collector to require the executant to amend the deed so as to show the consideration and other facts required

(1) (1910) I. L. R., 32 All., 171.

1922

IN THE MATTER OF MUHAMMAD MUZAFFAR ALI.

to be mentioned by section 27. Nor is there any authority in the Act for the Collector in such cases to estimate the value of the property and to levy the duty thereon.

"While admitting that it would open the door to serious evasion of duty the Board are inclined to the view that under the law as it at present stands the instrument has to be deemed as one not requiring any stamp and consequently as being under no disability whatsoever, although the executant can be prosecuted under section 64 of the Act for having failed to comply with the provisions of section 27.

"If any duty were payable the Board think that the party from whom it should be levied would be the executant, the donor, as the donee who produced the instrument and would be benefited by it has refused to pay the duty and the penalty.

"The decision of the Hon'ble the High Court is solicited on the following three points:—

(1) Whether the instrument requires any stamp under the Stamp Act?

(2) If it does, what is the amount of stamp duty with which it is chargeable? Can the duty be calculated on the value of the property as estimated by the Deputy Commissioner?

(3) By whom is the duty payable?"

PIGGOTT, LINDSAY and GOKUL PRASAD, JJ.:—This is a reference from the Chief Controlling Revenue Authority under section 57, clause (1), of the Indian Stamp Act, No. II of 1899 The point referred is a simple one. A deed of gift was executed which contains no statement of the value of the property thereby conveyed. The officer before whom the document was produced impounded it and referred it to the Deputy Commissioner of Bahraich, as Collector of the district, for necessary action The question referred to us is, first of all, whether this instrument requires any stamp under the Indian Stamp Act. According to article 33 of the schedule an instrument of gift, such as the before us, should be stamped with the same duty as a conveyance, for a consideration equal to the value of the property set forth in such instrument. We are satisfied that the words "as set forth in such instrument" refer back to the word "value,"

and not to the word "property." We are confirmed in this view by the authority quoted in the reference before us, reported in Indian Law Reports, 8 Madras, 453. In the present instance there is no "value" set forth in the said instrument. No doubt this is a contravention of section 27 of the Indian Stamp Act, and, if it be found that the omission to state the value of the property conveyed was done with intent to defraud the Government, a prosecution will lie against the person who executed the instrument, under section 64 of the Indian Stamp Act. The case seems to us strictly analogous to one which would arise if the executant of a deed of gift chose to set a purely nominal value on the property conveyed and to stamp the instrument accordingly. For the purposes of the Stamp Law the valuation given in the instrument would have to be accepted. If there was an intentional under-valuation, then a prosecution would protect the Government against the attempted fraud. There is no provision in the law authorizing the Collector to do what he has done in the present instance, namely, to ascertain the value of the property with a view to causing the instrument to be stamped with reference to the value thus ascertained. Our answer, therefore, to the first question referred to us is that the instrument as it stands does not require any stamp under the Stamp Act. The second question, except in so far as it has been incidentally answered, does not arise, and the third question does not arise at all. Let this answer be returned accordingly.

Reference answered.

APPELLATE CIVIL.

1922
January, 20.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

RAMESHWAR DAYAL (PLAINTIFF) *v.* MAHARAJ CHARAN AND ANOTHER (DEFENDANTS).*

Act No. V of 1882 (Indian Easements Act), section 43—Easement—Burden on servient owner increased by action of dominant owner—Remedy of servient owner—Easement not necessarily extinguished.

A, the owner of two adjoining houses, had a privy in one, the water from which flowed into the land of *B*, and as to this there existed an easement in favour of *A*. But *A* built a new privy in the second house, and connected the

* Appeal No. 61 of 1920, under section 10 of the Letters Patent.