

three cases which we have last quoted support the view which we have ourselves expressed that the proper article of schedule I of the Stamp Act was article 5(c) and that the plaintiff was entitled to rely upon section 25 of the Contract Act.

The result is that, allowing the appeal, we set aside the decree of the lower appellate court and restore that of the trial court, subject to the appellant affixing stamps to the value of Rs. 5-8-0 to the document Ex. 2, numbered 37B, in accordance with the provisions of section 35 of the Stamp Act. The appellant will have his costs in this Court and the court below.

Appeal allowed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

RAM SINGH (DEFENDANT) *v.* MAN SINGH (PLAINTIFF). *
Act No. II of 1899 (Indian Stamp Act), section 44, sub-section (3)—Stamp—Deficiency in stamp discovered in pending suit and made good, but not entered in costs—Suit to recover amount so paid barred.

1927
January,
20.

In the course of a suit on a mortgage it was discovered that the mortgage sued on was insufficiently stamped. The deficiency was made good by the plaintiff, although the liability was really on the defendant; but the payment so made was not included in the costs of the suit in the decree which was made in the plaintiff's favour.

Held, that the plaintiff could not thereafter sue to recover the amount which he had paid on account of the deficiency in stamp duty from the defendant.

THIS was an application in revision against a decree of the Court of Small Causes at Chandausi. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

* Civil Revision No. 182 of 1926.

1927

RAM
SINGH
v.
MAN
SINGH.

Mr. *P. N. Sapru*, for the applicant.

Munshi *Panna Lal*, for the opposite party.

LINDSAY, J. :—The question in this case is the correct interpretation of section 44, sub-section (3) of the Indian Stamp Act, 1899. This sub-section was pleaded as a bar to the suit in the court below. The Judge of the Small Cause Court overruled the objection and held that sub-section (3) to section 44 was not a bar. In my opinion the decision is erroneous. The section has not been correctly interpreted by the court below. The facts are quite clear. The plaintiff Man Singh held a mortgage from the defendant Ram Singh, dated the 11th of November, 1922. He put that mortgage in suit, and while the case was pending it was discovered that there was a deficiency of stamp duty. Nobody denies that Ram Singh, the mortgagor, was the person who was liable for this deficiency.

The plaintiff, having paid the deficiency in order to make the instrument regular and in order to get a decree, has brought this suit for the recovery of the money paid by him. He apparently did not make any application to the court which was trying the mortgage suit to include the amount so paid in the costs of the suit.

The terms of section 44 (3) provide :

“ Such amount may, if the court thinks fit, be included in any order as to costs in any suit or proceeding to which such persons are parties and in which such instrument has been tendered in evidence.”

Here the plaintiff and defendant were parties to the mortgage suit and the mortgage was tendered in evidence. The sub-section then goes on to say :

“ If the court does not include the amount in such order, no further proceedings for the recovery of the amount shall be maintainable.”

These last words are as precise as can be, and in my opinion they indicate clearly that a suit for the recovery of deficiency in stamp duty cannot be entertained if the case falls within the provisions of sub-section (3) of section 44.

1927

RAM
SINGH
C.
MAN
SINGH.

I allow the application, set aside the decree of the court below and dismiss the plaintiff's claim. Parties will bear their own costs in both courts.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Dalal and Mr. Justice Pullan.

AHMADI BEGAM (PLAINTIFF) v. ABDUL AZIZ AND OTHERS (DEFENDANTS).*

1927
January,
21.

Muhammadian law—Gift of undivided share of joint property—Donor not in possession at time of making—“ Musha.”

A Muhammadian father, who was not in possession at the time, made a gift of an undivided share of joint property to his daughter, but he did all that was possible for him to do to put his daughter in the same position in which he himself was, and he and his daughter subsequently jointly sued the other co-owners of the property and obtained a decree. *Held*, that the gift was not invalid for want of the donor's possession, or by the doctrine of *musha*; and in the circumstances of the case the doctrine of *musha* did not apply, as the donor had ostensibly sold the property first at a fixed price and then absolved the debtor of the debt which was the price. *Mohamed Buksh Khan v. Hosseini Bibi* (1), *Mohibullah v. Abdul Khalik* (2) and *Sheikh Muhammad Mumtaz Ahmad v. Zubaida Jan* (3), referred to.

THE facts of this case were as follows:—

The plaintiff, Musammat Ahmadi Begam, sued for partition of her share of eight shops and a yard

* Second Appeal No. 1381 of 1924, from a decree of Aghor Nath Mukerji, District Judge of Bareilly, dated the 6th of August, 1924, confirming a decree of Preo Nath Ghose, Subordinate Judge of Bareilly, dated the 22nd of December, 1923.

(1) (1888) I.L.R., 15 Calc., 684. (2) (1908) I.L.R., 30 All., 250.
(3) (1889) L.R., 16 I.A., 205.