

Before Sir John Thom, Chief Justice, and Mr. Justice Ganga Nath

1939  
January, 31

SHIVA PRASAD AND ANOTHER (PLAINTIFFS) v. SHAMBHU  
NATH (DEFENDANT)\*

*Stamp Act (II of 1899), sections 35 proviso (a); 42(2)—Insufficiently stamped document—Admissibility in evidence upon payment of deficiency and penalty—Not discretionary but mandatory.*

Under section 35, proviso (a) and section 42(2) of the Stamp Act an insufficiently stamped document which has been tendered in evidence becomes, on payment of the deficiency and penalty in accordance with section 35, proviso (a), admissible in evidence as a matter of law and not at the discretion of the court. The words, "subject to all just exceptions", in the proviso do not give any general discretion to the court as to the admission of a document, but mean those exceptions in which a document is rendered inadmissible by the provisions of any other statute for the time being in force.

Mr. G. S. Pathak, for the appellants.

Mr. Bankey Behari, for the respondent.

THOM, C.J., and GANGA NATH, J.:—This is a plaintiffs' appeal and arises out of a suit brought by them against the defendant respondent for specific performance of a contract of sale and to recover Rs.1,000 as damages. The plaintiffs' case was that on the 27th of June, 1936, the defendant entered into an agreement with them to sell a piece of land and received Rs.500 as earnest money for which he gave a receipt. A draft agreement of sale was also written and signed by both the parties. The defendant subsequently wanted to resile from his contract and to sell the land to somebody else, so the present suit was brought. The defendant contended that certain terms and conditions were left over to be settled which had not been settled and that he was always ready to sell the property after settling certain necessary conditions. He further contended that specific performance should not be allowed as the

\*First Appeal No. 337 of 1937, from a decree of K. K. K. Nayar, Civil Judge of Dehra Dun, dated the 25th of May, 1937.

plaintiffs had obtained the agreement on misrepresentation.

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Several issues were framed by the learned Civil Judge. The plaintiffs tendered in evidence the receipt and the draft agreement referred to above. The munsarim reported that both these documents were insufficiently stamped. The plaintiffs thereafter deposited in the treasury the deficiency and the penalty of their own accord. When the case came up for final hearing before the learned Civil Judge he rejected both these documents on the ground that they had been insufficiently stamped. He observed: "The admission of an unstamped instrument in evidence on payment of duty and penalty is a matter in the discretion of the court. This discretion is to be exercised by the court and not by the parties to litigation, nor is it to be exercised indiscriminately in favour of all persons. The plaintiffs themselves have called this 'agreement' a draft. The defendant denies that it was a final agreement. The equities of the case demand that in each case the plaintiffs should not be put in a privileged position and be allowed to prove an invalid document. I have therefore refused to admit in evidence either of the two documents." These observations of the learned Judge are based on a misconception of law. The proviso (a) to section 35 of the Stamp Act provides: "Any such instrument not being an instrument chargeable with a duty of one anna or half an anna only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion."

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The words "subject to all just exceptions" in this proviso do not give any general discretion to the court as to the admission of a document, but mean those exceptions in which a document is rendered inadmissible by the provisions of any other statute for the time being in force.

The plaintiffs ought not to have gone to the treasury to deposit the deficiency and penalty. The proper procedure to be followed was the one prescribed by section 38. Under it, it was the duty of the learned Judge to receive the deficiency and the penalty and admit the documents in evidence. Instead of doing so, he refused to admit them in evidence, and impounding them ordered them to be sent to the Collector.

Section 38 provides: "(1) When the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by section 35 or of duty as provided by section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf.

"(2) In every other case, the person so impounding an instrument shall send it in original to the Collector."

Under section 42, clause (2), when a document is sent to the Collector after being impounded and the Collector has received the stamp duty or the deficiency therein and the penalty under section 40 and the payment has been certified by an endorsement on the document, it shall be admissible in evidence. Clause (2), section 42, lays down: "Every instrument so endorsed shall thereupon be admissible in evidence, and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered

on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct."

In *Lachmi Narayan Agarwalla v. Braja Mohan Singh* (1) their Lordships observed: "It is clear to their Lordships that the proviso (a) of section 35 of the Indian Stamp Act, 1899, is of equal ambit with the body of the section, and that just as an instrument cannot be acted upon, that is to say, nothing can be recovered under it unless it has a proper stamp, so the proviso provides that if there is not a proper stamp it may be put on afterwards on payment of a penalty and the instrument then becomes effective."

It was the duty of the learned Judge to have received these documents in evidence after the deficiency in the stamp duty and the penalty had been paid up. It is therefore ordered that the appeal be allowed with costs, the decree of the lower court be set aside, the documents be admitted in evidence and the case be sent back to the lower court to admit it under its original number and to dispose of it in accordance with law.

### FULL BENCH

*Before Sir John Thom, Chief Justice, Mr. Justice Rachhpal Singh, Mr. Justice Collister, Mr. Justice Allsop and Mr. Justice Ganga Nath*

BISHNATH SINGH AND OTHERS (DEFENDANTS) *v.* BALWANT RAO NAIK KALIA AND OTHERS (PLAINTIFFS)\*

*Civil Procedure Code, order XLV, rule 7—Privy Council Rules, 1920, rule 9—Security and deposit for costs and expenses of appeal to Privy Council—Power to extend time beyond the statutory period for such security and deposit—Jurisdiction—Discretion of court—Civil Procedure Code, section 112(1)(b).*

The High Court has power under rule 9 of the Privy Council Rules, 1920, to extend the period allowed for furnishing the security and making the deposit required by

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\*Application No. 4 of 1937, for leave to appeal to His Majesty in Council.

(1) (1924) I.L.R. 4 Pat. 34(37).