

The decree of the Civil Judge will be reversed. The plaintiffs' costs, both in the Lower Courts and in appeal, will be paid by 2nd and 3rd defendants.

1867.
February 14.
S. A. No. 230
of 1866.

Appeal allowed.

APPELLATE JURISDICTION (a)

Special Appeal No. 9 of 1867.

A. ADINARAYANA SETTI*Special Appellant.*

F. J. V. MINCHIN.....*Special Respondent.*

Where the objection is taken for the first time in special appeal that a document, which, according to Act X of 1862, ought to have been stamped, has been admitted by both the Lower Courts unstamped, the High Court is bound to take notice of the objection (although not one of the grounds set forth in the petition of appeal) and to require payment of the stamp duty and penalty, or to reject the document.

THIS was a special appeal from the decision of E. B. Foord, the Civil Judge of Berhampore, in Regular Appeal No. 7 of 1866, modifying the decree of the Court of the District Munsif of Berhampore, in Original Suit No. 405 of 1864.

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Sloan for the special appellant, the defendant.

Prichard for the special respondent, the plaintiff.

The facts sufficiently appear in the following

JUDGMENT :—In this case three objections have been raised on the part of the appellant. First, that the Lower Courts in holding the defendant liable proceeded on a mis-construction of the terms of the written contract A. This objection was not however persisted in, and it is enough to say that we think the defendant had clearly incurred a liability under it. The second objection is, that the defendant has been improperly decreed to pay the balance claimed by the plaintiff after deducting Rupees 76-4-0, the sum credited to the defendant in the suit, without an issue having been recorded or evidence heard on the part of the defendant as to the amount. We can give no weight to this objection. The plaintiff put in evidence an account of the sums claimed,

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and it appears to us from the record of the proceedings that the defendant did not in the first instance dispute the correctness of the balance claimed to be due from the sub-tenants if under the terms of the contract he was liable. Further, he did not offer to give any evidence as to the amount in the Lower Appellate Court, and not only this, but he applied to have the sum of Rupees 76-4-0, received by the plaintiff since the suit, deducted from the amount claimed. There has been no error in procedure, and therefore no ground for sending the case for further hearing.

The third objection, that the written contract A bears no stamp and was therefore inadmissible as evidence under the provisions of Act X of 1862, Section 14, must prevail and is fatal to the plaintiff recovering in the suit, unless the proper amounts of stamp and penalty are paid into Court under Section 17, Clause 1. The document is clearly not within Regulation I of 1820, Section 9, Clause 2, and it is one requiring a stamp under Act X, and the contention for the respondent, that the objection ought not to be heard as the appellant had not made it a ground of appeal either in the Lower Court or this Court, we cannot accede to. He appears to have objected in the District Munsif's Court, but, independently of that, we think the objection must be entertained now. The Stamp Act (X of 1862) prohibits an unstamped document from being received in evidence or acted upon in any civil proceeding in a Court of Justice, except on payment of the proper amounts of stamp duty and penalty which every Civil Court is, by Section 17, Clause 1, empowered to ascertain and receive. We think it is imperative on this Court hearing the suit on appeal as well as on the Court of First Instance to give effect to the provisions of the Act, though the objection be for the first time pointed out on the hearing of the appeal.

The instrument then is at present valueless as evidence, and the Lower Courts were wrong in acting upon it. But it may now we think be made good evidence in support of the decree by payment into Court of the stamp duty and the penalty. It appears to us to be an agreement of the nature of an obligation for the payment of an unascertained amount, and subject to an optional stamp under schedule A. The

plaintiff, therefore, to recover the amount decreed to him, must under Section 27 of Act X of 1862, pay the stamp duty of 5 Rupees, and the penalty under Section 15, Clause 2 of 20 times that amount. Subject to the payment into Court of those amounts, the decree of the Lower Appellate Court is affirmed with costs.

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APPELLATE JURISDICTION (a)

Regular Appeal No. 8 of 1867.

JESHTA RAMJI SAETT.....Appellant.
AWAKER MULLANDEAGATA KUNHI.....Respondent.

The High Court will not interfere on appeal with the decree of the Lower Court dismissing a plaintiff's suit (under Section 170, Act VIII of 1859) on the ground of his refusing to answer a question material to the case when duly required to do so.

Semble, it might be otherwise had plaintiff since decree endeavoured to purge his contempt.

THIS was a Regular Appeal from the decree of G. R. Sharpe, the Acting Civil Judge of Calicut, in Original Suit No. 14 of 1866. The suit was brought for damages sustained by defendant's not delivering goods entrusted to him by plaintiff for carriage. The defendant denied the contract and filed (No. I) a certified copy of an account of the goods shipped at Ponani by one Mavuji Kunji on the 8th February 1865. At the hearing, the Civil Judge gave judgment against the plaintiff under Section 170, Act VIII of 1859, as follows :—

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The Legislature having conferred the power of passing judgment against a party refusing, without lawful excuse, to answer questions when required by a Court to do so, I have been compelled to exercise that power in the present suit under the following circumstances. The plaintiff was under examination as a witness, and was asked by the defendant's Vakil whether the alleged shipper of the goods was appointed his agent in writing or not. The question having been twice repeated by the Vakil without eliciting an answer, I then myself put the question, but as no response was elicited, I warned the plaintiff that he would be

(a) Present : Scotland, C. J., and Holloway, J.