

It is still, we think, open to the defendant to prove by measurement that he is entitled to a reduction of rent under section 52 (B) of the Tenancy Act, and if that question is open, it cannot be said that the area of his holding or tenure has been determined.

The case of *Roghoonath Mundul v. Juggut Bundhoo Bose* (1) seems to us to be more in point than the cases cited on the other side and referred to above.

We would also notice that the decree leaves it undecided whether certain of the plots for which rent is now claimed are correctly described in the plaint and are the same as those for which rent was claimed in the suit of 1888. The defendant is clearly entitled to have this point decided in the present case.

We set aside the decrees of both the Courts. The case must go back to the Court of first instance in order that all the other questions which arise may be disposed of.

The appellant will get his cost in this Court. The costs incurred in the Lower Courts will abide the result.

Appeal allowed and case remanded.

C. S.

REFERENCE UNDER STAMP ACT.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Norris, and Mr. Justice Pigot.

IN THE MATTER OF KO SHWAY AUNG AND OTHERS, v. STRANG STEEL AND Co.

1893
July 20.

Stamp Act I of 1879, Schedule I, Arts. 29 and 41 (b)—Mortgage advance payable on demand—Power of sale in default of repayment of advance.

In consideration of an advance of Rs 1,450, on interest, repayable on demand, certain boat-owners assigned to S. and Co. their paddy boats, the boat-owners retaining, working, and being responsible for the safety of, the boats, and agreeing, so long as the sum advanced with interest should remain unpaid, to use their boats for the sole purpose of supplying paddy to S. and Co., and to deliver such paddy (which was to be paid for at the market rate) at the end of each trip as directed by S. and Co. On failure to make repayment on demand, S. and Co. were empowered to take

* Stamp reference No. 2 of 1892, made by W. F. Noyce, Esquire, Secretary to the Financial Commissioner, Burma, dated the 11th October 1892.

(1) I. L. R., 7 Calc., 214.

1893

IN THE
MATTER OF
KO SHWAY
AUNG
v.
STRANG
STEEL
AND CO.

possession of and to sell the boats. *Held*, that the document was a mortgage and not a pledge, and as such should be stamped under article 44 (b) of Schedule I of the Stamp Act of 1879.

THIS was a reference under section 46 of the Stamp Act of 1879, made by the Financial Commissioner of Burmah, as to the duty payable on the document hereinafter set out, that officer being of opinion that the document was a mortgage, and as such liable to duty under article 44 (b), and not under article 29 of schedule I to the Act, as contended by Messrs. Steel and Co.

"This agreement made the 18th day of October 1890, between Ko Shway Aung, Ko Kyah Khine, and Ko Phoo Htaintabin (hereinafter called the boat-owner or boat-owners) and Messrs. H. Strang, Steel and Co. (hereinafter called the Company).

"In consideration of the sum of Rupees one thousand four hundred and fifty only advanced by the said Company to Ko Shway Aung, Ko Kyah Khine, and Ko Phoo, he or they, the said Ko Shway Aung, Ko Kyah Khine and Ko Phoo, do hereby assign unto the said Company his or their paddy-boat or boats and all the property specifically described in the list hereto annexed, the said boat-owner or boat-owners covenanting that the said boat or boats and other property are his or their own absolutely, free from all incumbrances.

"2. The said boat-owner or boat-owners agree to apply the said sum of rupees one thousand four hundred and fifty solely to the purpose of supplying paddy to the said Company.

"3. The said boat-owner or boat-owners agree to pay interest on the said sum of rupees one thousand four hundred and fifty, or so much thereof as may be due from time to time, at the rate of one per cent. per mensem.

"4. The said boat owner or boat-owners shall remain in possession of the said boat or boats and the said property subject to the conditions hereinafter contained. While the said boat-owner or boat-owners continue in possession of the said boat or boats, he or they shall be liable for any damages the said boat or boats may sustain, and he or they shall be responsible for the safe keeping of same.

"5. While and so long as the said sum of rupees one thousand four hundred and fifty only, or any part thereof or any part of the interest thereon remains unpaid, the said boat-owner or boat-owners shall not be at liberty to hire or let out the said boat or boats to any person for any purpose whatever, but agree to use the said boat or boats solely for the purpose of supplying paddy to the said Company under this present agreement, and to make not less than six trips for that purpose every month, and at the end of every trip to deliver his or their paddy, without delay at the godowns of the said Company or at any place in Kewendine where he or they

shall be directed by the Agents or Managers of the said Company so to deliver it.

"6. All paddy delivered under this agreement to be paid for at the market rate for advance paddy on the date of the arrival in Kewendine of the said boat or boats.

"7. The said boat-owner or boat-owners further agree on demand to pay to the said Company, at the head office thereof in Rangoon, the said sum of rupees one thousand four hundred and fifty with interest as aforesaid, or any sum then remaining due on the security of these presents.

"8. On payment as aforesaid of all sums due on the security of these presents, the said Company shall have no further lien on or claim to the boat or boats or property as aforesaid.

"9. If the said boat-owner or boat-owners fail to repay on demand the said sum of rupees one thousand four hundred and fifty, together with interest thereon and all moneys at any time due on the security of these presents, the said Company shall be entitled to take immediate possession of the boat or boats and property aforesaid, and to sell the same in any way that shall to the said Company seem fit, and to apply the proceeds of such sale firstly in paying their expenses incurred in and about such sale, and next towards the payment of any sum then remaining due on the security of these presents, and shall pay the surplus, if any, to the said Ko Shway Aung, Ko Kyah Khine, and Ko Phoo.

"10. If the said proceeds are not sufficient for the payment in full of the said expenses and of all sums so remaining due as aforesaid, the said boat-owner or boat-owners binds himself or themselves to make good the deficiency.

(Sd.) W. STRANG STEEL.

B. NYWAY."

The *Advocate-General* (Sir Charles Paul) for the Crown, contended that duty was leviable under article 44, referring to Fisher on Mortgage, art. 22.

No one appeared on the other side.

The opinion of the Court (PETHERAM, C.J., NORRIS and FIGOR, JJ.) was as follows:—

This reference has been already twice before the Court, but could not be disposed of, as on neither occasion was the document in respect of which it is made or a copy of it produced. This has now been done. We think the instrument is a mortgage. The interest in the subject matter of it, the boats, etc., is by the terms of the instrument assigned to the mortgagees with a provision allowing the mortgagors to remain in possession on

1893

IN THE
MATTER OF
KO SHWAY
AUNG
v.
STRANG
STEEL
AND CO.

1898
 IN THE
 MATTER OF
 KO SHWAY
 AUNG
 v.
 STRANG
 STEEL
 AND Co.

certain conditions: and the mortgagees are given a power of sale. No doubt a special agreement giving a power of sale does not necessarily operate so as to show that the transaction is not a pledge, but must be construed to be a mortgage: (Fisher on Mortgage, article 22.) But here we think the whole character of the instrument points one way, and that it is a mortgage; there is no provision for anything in the nature of a delivery actual or constructive; there is no pledge.

That being so, article 44 applies. We think the distinction between articles 29 and 44 is correctly stated by Mr. Donogh in his book on the Stamp Act, in the note to article 44, "*Article 44 distinguished from art. 29.*" "Article 44 deals with cases in which the interest in, or right over, property is transferred whether possession is given or not, for the purposes of the mortgage; art. 29 is limited to cases where moveable property only is given in pledge, coupled with an agreement securing the repayment of a loan."

The Government notification of 5th June 1885, referred to in the note to article 29 in that book, is worth noticing; but as to this, it need only be observed that in professed exercise of the powers conferred by the Act, Government permitted the levy of a stamp of the value required under article 29, upon this particular sort of mortgage referred to in the notification.

T. A. P.

APPELLATE CIVIL.

Before Mr. Justice Banerjee and Mr. Justice Rampini.

1898.
 December 13.

LEP SINGH KHASIA AND OTHERS (DEFENDANTS) v. NIMAR
 KHASIA AND OTHERS (PLAINTIFFS).*

Possession—Proof of possession—Title, proof of—Suit for damages for value of fruit taken from garden—Right of suit.

A suit for damages for the value of fruit crops taken away by the defendant from a garden alleged to be in the plaintiff's possession, can be sustained on the finding that the plaintiff was in possession up to the date

* Appeal from Appellate Decree, No. 781 of 1892, against the decree of R. H. Greaves, Esq., District Judge of Sylhet, dated the 2nd of February 1892, affirming the decree of Babu Atool Chander Ghose, Subordinate Judge of that district, dated the 17th of February 1891.