

BOMBAY HIGH COURT

The Collector

Vs.

Rambhau Tukaram Nirhali

Civil Reference No. 6

(Amberson Marten, Kt., C.J., Mirza and Broomfield, JJ.)

15.04.1930

JUDGMENT

Amberson Marten, Kt., C.J.

1. This reference raises a question about an additional four-anna stamp which was paid on a sale certificate, but not at the right time or in the right manner, so it is contended by the learned Government Pleader. The amount though trilling raises a question of some practical difficulty, which formed the subject of a lengthy correspondence between the Subordinate Judge and the Collector, and is now occupying the time of three Judges of this Court, having regard to the imperative conditions of Section 57 2) of the Indian Stamp Act.

2. The matter arose out of a sale certificate granted by the Subordinate Judge under Order XXI, Rule 94, of the Civil Procedure Code, to an auction-purchaser so long ago as July 14, 1928. This sale certificate ought to have borne a stamp of eight annas, but in fact it had only a four-anna stamp. On that we may say at once that it was the duty of the purchaser to have borne the expense of the proper stamp having regard to Section 29 (f) of the Act and Article 18 of the first schedule. Question (a) will, therefore, be answered in the affirmative.

3. What next happened is this : In accordance with Section 89 (8) of the Indian Registration Act a copy of the certificate was sent by the Judge to the Sub-Registrar. He finding the stamp to be insufficient, so informed the Judge. Then under circumstances which are not clear in the case or in the correspondence, the Judge in some way got the purchaser to hand him back the certificate and had an extra four-anna stamp put on it and subsequently informed the Sub-Registrar accordingly.

4. Thereupon objections were raised that the Subordinate Judge had no power to do this, and that he ought to have impounded the instrument and sent it to the Collector as was first alleged under

Section 41 of the Act, but as was subsequently alleged under Sections 33 and 38. The Subordinate Judge, on the other hand, took the view that Section 33 did not apply at all or if it did apply he had power to accept the document and to impose a penalty and he accordingly asked the opinion of the High Court to be taken on the questions at issue.

5. Accordingly, the second question asked is :

Whether a certificate of sale written on a stamp paper furnished by an auction-purchaser can be said to come before the Subordinate Judge ' in the performance of his functions ' when it is submitted to him for his signature and seal of the Court ?

6. The answer to that question depends on whether this document, which till signature by the Judge is in an imperfect state, is an " instrument " within the meaning of Section 33 of the Act. Turning to the definition of " instrument" in Section 2 (14), " instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. Stopping there, therefore, this unsigned document did not come within the definition of " instrument " in Sub-section (14).

7. Further, if one refers to Sub-section (2) of Section 33, it states that it is the duty of the Judge to " examine every instrument so chargeable and so produced or coming before him in order to ascertain whether it is stamped " with a proper stamp " when such instrument was executed or first executed." But this sale certificate was to be executed by the Judge himself. Nothing had been executed. Therefore, the wording of the section does not meet the present case.

8. We appreciate of course that under Section 17 of the Act all instruments are to be stamped before or at the time of execution, but we think it clear that until the Judge signed the sale certificate there was no "instrument" within the meaning of Section 33. And thereafter the instrument is handed over to the purchaser and leaves the custody of the Court. Accordingly, in our opinion, on the facts of this case, question (b) ought to be answered in the negative as regards the occasion when it was first signed by the learned Judge.

9. As regards the second occasion on which the certificate came before him, as I have already said, it is by no means clear what are the precise facts surrounding its Production and additional stamping on this second occasion. But, in our opinion, the Judge was functus officio when he signed the certificate on the first occasion and handed it to the purchaser, and therefore he was not acting judicially, when on the second occasion he attached or allowed to be attached the second four-anna stamp. Accordingly, question (b) will be answered in the negative also as regards the second occasion on which the certificate came before him.

10. Then as regards question (c):

Whether on discovering that a certificate of stile already issued to the purchaser was not

duly stamped the Subordinate Judge should not have impounded the same under of. (1) of Section 33 of the Indian Stamp Act and sent it in original to the Collector under Clause (2) of Section 38 of the Act , our answer is in the negative. The certificate having been handed over to the purchaser it was not in the possession of the Court on the date of discovery. So it could not be impounded. Further, as I have already said, the learned Judge was *functus officio* on the second occasion, and had, therefore, no power then to act under Section 33.

11. Similarly as regards question (d):

Whether on finding that certificate of sale already issued to an auction-purchaser has been engrossed on stamp of insufficient value, the Subordinate Judge had any legal authority in the exercise of his own inherent powers to recover the requisite stamp of additional value as was done in the present case, the answer must be no. The learned Judge was *functus officio* after he had signed the certificate and issued it to the auction-purchaser. The subsequent attachment of an additional four-anna stamp made no difference in law, and still left the document improperly stamped.

12. We are not asked a fifth question as to what the Subordinate Judge or the revenue authorities ought to have done. Therefore, what I am going to say must be understood, as merely throwing out suggestions that there were other methods of getting over the difficulty than those actually adopted here. In the first place, as my brother Broomfield J. suggests, all difficulties might have been avoided if a second certificate on an eight-anna stamp had been given to the purchaser without prejudice to any question as to any penalty on the first certificate. *Nandram Motiram v. Kacha Bhau*¹ no doubt decides that the Court is not obliged to grant a second certificate where the one already given is improperly stamped, but it does not say that the Court cannot grant such a certificate if it likes and provided all questions of penalty are left open. Personally, I do not see that this course would be open to any substantial objection.

13. Another course would be for the purchaser himself to apply under Section 41 to the Collector asking for the mistake-for a mistake no doubt it was-to be rectified. That course was indeed suggested in some of the earlier correspondence. That no doubt must be done within one year from the date of the original certificate as my brother Mirza J. reminds me. And that section more properly applies to the purchaser than to the Judge, because the purchaser had the custody of the document and not the Judge.

14. Then again if there are any remedies open to the Collector on finding that any document anywhere has been improperly stamped, he can take such proceedings under the Act as are open to him.

15. Another suggestion which I expressly leave open to future argument is that if it could be said

that at any time this particular sale certificate was "admitted in evidence" within the meaning of Section 36 of the Indian Stamp Act then no objection in that suit could be taken thereafter on the ground that it had not been duly stamped. The only exception would be that if the matter was taken before an appellate Court under Section 61 either on the application of the Collector or otherwise then in that case the matter could be put right and the proper penalty could be recovered As an instance of that I may refer to *Lahhmidas & Co. v. Sir Dorab Tata*² where this appellate Court on its Original Side impounded certain documents which in its opinion had been improperly admitted in

¹ ILR (1885) 9 Bom. 626

²(1926) 29 Bom. L.R. 19

evidence with an insufficient stamp in the Court of first instance, and adopted the procedure under a 61.

16. Therefore, the present case is by no means destitute of possible remedies for the difficulty which arose here, and if either of the first two suggestions had been adopted, there would probably have been no necessity for troubling this High Court with the present reference.

17. We are indebted to Mr. Limaye as amicus ounce for putting the case to us on behalf of the purchaser. As regards the: Government Pleader he has been good enough to argue the case' for the Collector. And although, in the first instance, it was apparently considered unnecessary that he should appear, we in our turn took a contrary view and asked that we should have the benefit of an argument from him.

18. In the result the questions submitted to us will be answered in the way I have already indicated.

Mirza, J.

19. I agree with the answers proposed by my Lord the Chief Justice to the four questions submitted to us on this reference, and need not express an opinion on the various useful suggestions made by him in his judgment as to how the Collector or the auction-purchaser might have acted in this matter.

Broomfield, J.

20. I agree and have nothing to add.

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