

Special Appeal No. 115 of 1866.

M. G. PENDSE.....*Appellant.*
 R. S. MALSE*Respondent.*

Stamp—Discretion—Appeal.

In determining the stamp required for any particular instrument, regard must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties, if the contents of the instrument show that the title is a misnomer.

The discretion vested in a Court of Justice must be exercised in a sound and reasonable manner; and a capricious and unreasonable exercise of discretion on the part of a court of first instance, is an error in law, which it is the duty of an appellate court to correct.

1866.
 July 30.
 S. A. No. 115
 of 1866.

THIS was a special appeal from the decision of R. H. Pinkey, Judge of the Konkan District, in Appeal Suit No. 51 of 1866, confirming the decree of the Munsif of Pen, in Original Suit No. 663 of 1865.

The original suit was instituted by Rámchandra Mahádev Agáshe, as agent of the appellant, Mádhavráv Ganesh Pendse; to recover from Raghunáth Sakháram Málse possession of certain landed property mortgaged by him to the plaintiff. The grounds of action set forth in the plaint were: that the defendant had mortgaged the said property for Rs. 795, under a bond dated the 7th of Bhádrapada Vadya, Shake 1784; that he subsequently borrowed more money from the plaintiff under a second bond; that on the 13th of Pausha Vadya, Shake 1785, the parties came to a settlement, and the defendant executed a bond to the plaintiff with possession; and that, although the defendant was not entitled to receive any of the proceeds of the mortgaged property until the mortgage was redeemed, he did so in breach of his agreement.

Málse's defence was that the bond on which the plaintiff sued was not sufficiently stamped, under Act X. of 1862, Schedule A, 12; that the deed for Rs. 795, although a mortgage bond, was written on a deed of sale stamp, and was attested after it had been registered; that as the plain-

tiff had not filed with his plaint the deed for Rs. 1,524-14-0, the defendant could plead nothing regarding it; that the deed was drawn up and signed, but it did not correspond with the terms agreed upon by the parties; that the deed was improperly registered at Puná, although the property mentioned therein was not situated in the Puná District; and that the plaintiff had fraudulently induced the defendant to sign the deed.

1866.
July 30.
S. A. No. 115
of 1866.

The Munsif of Pen rejected the claim, with costs, on the grounds: that the deed No. 13 produced by plaintiff, being for Rs. 1,525-14-0, and being stamped with an eight rupees' stamp, was insufficiently stamped, under the provisions of Act X. of 1862, Schedule A, 12, whereby a ten rupees' stamp was requisite; and that, although the plaintiff applied to the court to receive the amount of stamp duty that was deficient, and the usual penalty, under the provisions of Secs. 15 and 17 of the Stamp Act, the application should not be granted: as the conditions mentioned in those sections did not exist in this case.

Pendse then appealed to the District Judge on the grounds: (1) that the document No. 13 was on a proper stamp; and (2) that if the Munsif held that the document in question was insufficiently stamped, he ought to have allowed the appellant to pay the necessary stamp duty and the penalty, under Sec. xvii. of Act X. of 1862.

On the 15th of February 1866, the District Judge recorded the following judgment:—

“The issues for decision are: (1) Is the document No. 13 sufficiently stamped; and (2) If not, should plaintiff be now allowed to make up the deficiency, under the provisions of Sec. xvii. of Act X. of 1862.

“My finding on the first issue is in the negative, and for the defendant. The document No. 13 bears an eight rupees' stamp. It is contended for the plaintiff that the document No. 13 is a composition deed, and is therefore sufficiently stamped, under Act X. of 1862, Appendix A; 12. It is urged that 'composition deed' is rendered *tojodichá*

1866.
July 30.
S. A. No. 115
of 1866.

dastáivaj in the translation of the Act made by the Oriental Translator to Government; and that as the document No. 13 commences with these Maráthí words, therefore it must come under the operation of Act X. of 1862, Appendix A, 22. But in determining the nature of the document No. 13, it is not necessary for the Court to consider whether the Oriental Translator's rendering in Maráthí of the words 'composition deeds' is correct or not; nor can the insertion of the words *tojodichá dastáivaj* in the deed determine the amount of stamp duty which the deed ought to bear, unless the rest of the deed is consistent with those words.

"A composition deed such as is contemplated by Act X. of 1862, Appendix A, 22, is (speaking generally) a deed executed by one or more creditors to or in favour of a debtor, whereby the said creditors accept a composition amounting to less than their entire demand: Addison's Law of Contracts, 5th ed., p. 977; and the note to *Cumber v. Wane*, 1 Smith's L. C., 251. The document No. 13 is not a deed of this character. It is a deed of mortgage and conditional sale of property therein described, executed by the debtor to his creditor. It recites and supersedes other deeds previously executed for the amount of those deeds, *plus* some ready money advanced at the time of its execution. Therefore I am of opinion that the document No. 13 comes under the operation of Act X. of 1862, Appendix A, 46 and 12, and is insufficiently stamped.

"My finding on the second issue is also in the negative, and for the defendant. By cl. 1 of Sec. xvii. of Act X. of 1862, the Munsif was vested with a discretionary power in the matter. It was argued at the bar for the defendant that the words 'whose decision on the point shall be final,' in cl. 1 of Sec. xvii., precluded the appellate court from considering the point. But I think these words apply rather to the amount of stamp duty and penalty which a court may have ordered to be paid, than to the point now under consideration.

"I, however, refuse to overrule the Munsif's order on broader grounds. I am of opinion that when the law allows

a court the option or discretion of doing one of two things, it is improper for an appellate court to interfere with the order made by such court, in the exercise of its discretionary power, if the order made is consonant with the law. I do not wish to be understood as thinking that the Munsif exercised his discretionary power wisely, nor that, if the point had been brought before me in the first instance, I should have refused, as the Munsif did, to receive from the plaintiff in this case the proper amount of stamp duty and penalty. I merely say that in the exercise of the discretionary power with which the law clothed him, the Munsif made a perfectly legal order; and, therefore, his order is not open to appeal. It is not the duty of the appellate court to take away from the Munsif the discretionary power with which the law invests him, and order him to do that which the law says he may or may not do, according to his discretion. To adopt any other course in this case would in effect be to substitute the fancies of one Judge for the fancies of another.

1866.
July 30.
S. A. No. 115
of 1866.

“The Munsif’s order is unquestionably legal; and, therefore, were I to upset the Munsif’s order, I should do so, not because it was wrong, but because my individual opinion, on a point which might be decided either way, happened to differ from that of the Munsif. I cannot think appellate courts exist for such a purpose, or to bring about results which must be uncertain, and which would vary with the idiosyncracies of various Judges.

“I confirm the decree of the Munsif with costs.”

The grounds of objection taken to this decision in the memorandum of special appeal were as follow:—(1) that the District Judge held exhibit No. 13 insufficiently stamped, whereas it was sufficiently stamped as required by the law; (2) that the Judge has misconstrued the said exhibit, the composition deed in question, inasmuch as it has not been held to be a deed of composition within Art. 22 of Schedule A to Act X. of 1862, but a document within Art. 12 or 46 of the said Schedule; (3) that assuming the said exhibit to be insufficiently stamped, still the court of first instance having, notwithstanding the defendant’s objections, already received

1866.
July 30.
S. A. No. 115
of 1866.

it in evidence, the same court could not afterwards reject it: the District Judge was, therefore, wrong in confirming the order of rejection; (4) that supposing the court of first instance was right in questioning the admission of the document in evidence, after it had once been received by the same court, still the said court did not act properly in refusing to receive the additional stamp duty with the penalty, which were tendered by the appellant: the District Judge was, therefore, wrong in holding the order of rejection to be according to law; (5) that the exhibit having been rejected by the court of first instance, and being, therefore, out of the record for the purposes of the suit, the District Judge erred in not exercising his own discretion by allowing the document to be recorded in appeal, after receiving the stamp duty and penalty, if necessary.

The case was argued before TUCKER and GIBBS, JJ.

Shántárám. Náráyan for the appellant:—The document did not require a stamp: it was a composition deed, and its object was to settle some old debts secured by mortgages and to define the respondent's liabilities; and it was none the less a composition deed, because it purported to keep alive a claim against the respondent secured by a mortgage; as such the stamp upon it of eight rupees was quite sufficient, under Act X. of 1862, Schedule A, Art. 22. Even if the document required a stamp, still the procedure of the court of first instance was illegal: because it assumed that the intention was to defraud the revenue; and it was not discretionary, as held by the District Judge, with the Munsif to receive or not to receive the deficiency of the stamp duty and the penalty: he was bound to receive them, unless it could be shown to his satisfaction that there had been an intention to defraud the revenue. Supposing that, under the circumstances, the Munsif had a discretion in the matter, and that his order was legal in itself, still the Judge erred in considering that he had no power to interfere with the exercise by the Munsif of his discretion, when he himself was not satisfied that there had been a sound and reasonable exercise of that discretion. Even the High Court, in special appeal,

has so interfered in S. A. No. 211 of 1864. *A fortiori* could the District Court interfere in regular appeal, when it was invested with such a power as that given by Sec. 363 of Act VIII. of 1859, which provides a remedy on appeal for any error, affecting the merits, in an order passed in the course of the suit. Even if the Judge would not interfere with the Munsif's discretion, still he should have himself received the document with the deficiency of the stamp duty and the penalty, under Sec. 355 of the code,—the document being for that purpose not on the record. The Judge supposed that "discretion" was synonymous with "fancy," and overlooked Lord Coke's definition: *discretio est discernere per legem quid sit justum*, 4 Inst. 41; and also the language of Lord Mansfield in *R. v. Wilkes* (b).

1866.
July 30.
S. A. No. 115
of 1866.

Vishvanáth Náráyan Mandlik for the respondent.—The document had been put in long before it was declared inadmissible by the Munsif. The plaintiff was bound to know the law; he should not have waited till the Munsif declared that the document required a stamp; it was then too late to offer the deficiency of the stamp duty and the penalty; he should have offered it when he brought the document into court—especially as the respondent had from the first, even before the document was recorded, taken the objection that it required a stamp.

Shántárám, in reply.—The plaintiff had a right to have the question decided, whether or not the document required a stamp; he offered the deficiency of the stamp duty and the penalty when that question was decided. Where the High Court, in S. A. No. 967 of 1864, decided that a document required a stamp, and that it had been improperly received in evidence in the lower court, it remanded the case in order that the stamp and the penalty might be received.

TUCKER, J., in delivering the judgment of the Court, said:—Two points arise for consideration in this special appeal: 1st, whether it has been rightly held that the document (exhibit No. 13) was insufficiently stamped; and 2ndly, whether

(b) 2 Burr. 25, 39.

1866.
July 30.
S. A. No. 115
of 1866.

the District Judge committed an error in law in ruling, that in matters in which the statute law has left a discretion to a court of first instance, an appellate court ought not to interfere with the order passed, although it may consider that the discretion exercised was neither reasonable nor just.

On the first point we concur with the District Judge and the Munsif. The deed in question, though erroneously styled a composition deed, is in reality a deed of mortgage; and the stamp which it required is regulated by clauses 46 and 12, Schedule A of Act X. of 1862, and not by cl. 22, Schedule A of the said Act.

In determining what provision of the stamp laws is applicable to a particular instrument, regard must be had to the real nature of the instrument, and not to the title which may have been given to it by the parties, if the contents of the instrument show that the title was a misnomer.

On the second point we consider the ruling of the District Judge to have been incorrect.

When the Legislature has not made any particular rule of conduct imperative, but leaves the procedure to be followed under particular circumstances within the discretion of a Court or Judge, it is intended that a sound and reasonable discretion should be exercised, and not that the matter should depend on the caprice or fancy of the court or individual in whom the discretion may be vested. "Discretion," to use the words of Lord *Mansfield* in the well-known case cited at the bar, "when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful; but legal and regular."

We hold that when a court of original jurisdiction exercises the discretion vested in it in an irregular and unreasonable manner, it is the duty of an appellate court to rectify its erroneous procedure. This point has already been decided in more than one case; and in S. A. No. 211 of 1864 it was ruled that an unreasonable order of an appellate court with respect to the apportionment of costs was an error in law, which could be corrected in special appeal.

In the present instance, we concur with the District Judge that there was no good reason for the refusal of the Munsif to allow the plaintiff to pay into court the sum which the Munsif held to be deficient in the value of the stamp together with the prescribed penalty. The Munsif has not found that the neglect or omission to execute the instrument on the proper stamp arose from any intention to evade the payment of the stamp duty fixed by the Stamp Act; nor does there appear to be any ground for supposing that the plaintiff was actuated by any such motive.

1866.
July 30.
S. A. No. 115
of 1866.

We consider that, as a general rule, a Civil Court is bound to allow the defects in an insufficiently stamped deed to be made good in the manner which the law has provided, when there is no reason to suspect any design on the part of the holder to defraud the revenue; and that if it refuse the relief which it has power to grant, arbitrarily, and without assigning any good reason, as has been done in this case, it is the duty of the court to which an appeal lies from its decision to correct the error which has been committed.

It should be understood that we by no means wish to encourage a capricious and fanciful interference by superior courts in the acts of inferior tribunals, with respect to matters in which the law has left to the courts last named a discretionary power; but we consider that the District Judge has ruled erroneously in holding that it was incompetent to him, under any circumstances, to exercise any supervision in such matters, and that he was unable to afford a remedy, when the plain requirements of justice had been departed from, and no good reason had been stated for the deviation.

We, therefore, make the following decree:—

The Court reverses the decrees of the District Judge and of the Munsif; and returns the cause to the court of first instance. Let the Munsif receive the amount of stamp duty which is required to make the document (exhibit No. 13) valid, namely, two rupees *plus* the penalty of forty rupees, in all forty-two rupees; and proceed to decide the suit on its merits. Costs to be apportioned at the final decision.