

[APPELLATE CIVIL JURISDICTION.]

*Special Appeal No. 401 of 1872.*1873.
October 13.RA'MKRISHNA GOPA'L *Appellant.*VITHU SHIVA'JI and another *Respondents.**Stamp—Mortgage—Lease—Counterpart of Lease—Reg. XVIII. of 1827, Sec. 10, cl. 3—Tender of payment of Stamp duty and penalty on special appeal.*

Where an agreement between a mortgagor and mortgagee contains a stipulation that the mortgagor should, at the time of redemption, make good the losses arising to the mortgagee from the default of tenants, which it had been agreed the mortgagee might put in, in case the mortgagor made default in payment of the rent agreed upon for the term of the mortgage ; such an agreement is not a lease, or the counterpart of a lease, within the meaning of Reg. XVIII. of 1827, Sec. 10, cl. 3, but is a contract of indemnity against losses to be incurred after the determination of the lease, which, not having any operation so long as the lease is in existence, is, therefore, not exempt from stamp duty under that Regulation

Where an appellant has not tendered the stamp duty and penalty on a document which the Courts below have held to be insufficiently stamped, the High Court will not allow him to do so in special appeal.

THIS was a special appeal from the decision of E. Candy, Extra Assistant Judge of Ratnagiri, amending the decree of the Subordinate Judge of Malwan.

The appeal was argued before MELVILL and PINHEY, JJ., on the 13th October 1873.

Shántáram Náráyan for the appellant.

Ghanashám Nilkant contra.

MELVILL, J. :—It is admitted that the decision of the Extra Assistant Judge is correct, as being in accordance with the principle laid down in *Vithal Mahádev v. Dáud (a)*, unless the effect of the two agreements passed by Raghoji, one of

(a) 6 Bom. H. C. Rep. A. C. J. 90.

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the mortgagors to the mortgagee, is to necessitate an account of principal and interest on the one side, and of rents and profits on the other.

By the terms of the original mortgage, the mortgagee was to take the rents and profits in lieu of interest; and unless those terms were modified, no account would be necessary. But on the same date on which the mortgage was executed, one of the mortgagors, Raghoji, passed the agreement, the first of these two agreements to the mortgagee; and some years afterwards a nearly similar agreement was executed between the same parties.

Both these agreements have been rejected by the Courts below, on the ground that they are invalid from the want of a stamp. The special appellant contends that they are leases, or counterparts of leases, and as such, exempt from stamp duty, under the provisions of Regulation XVIII. of 1827, Sec. 10, cl. 3.

The terms of these agreements, so far as they are material, are the following, viz., 1st, that the mortgagor should hold the estate for the term of the mortgage at a certain rent, any arrears of which should be payable with interest at the time of redemption of the mortgage; and that on default of payment of rent, the mortgagee might re-enter, and let the land to other tenants; and 2nd, that the mortgagor should make good any losses arising from the default of such subsequent tenants, the amount with interest being also recoverable at the time of redemption.

It is the second of these two stipulations which the mortgagee now seeks to enforce. He asks that the mortgagor may be held liable for the losses incurred after his tenancy was determined, and that the amount may be made a charge upon the mortgaged property:

The first of the two stipulations constitutes *prima facie* nothing more than a lease, though it might be a question whether the introduction of the provision, making arrears of

rent a further charge on the mortgaged property, does not render it liable to stamp duty. It is not necessary to consider this point, as no claim is made in respect of any breach of this stipulation. But the second portion of the agreement cannot possibly, in our opinion, be construed as being, according to the words of the Regulation, a lease or its counterpart, or other engagement of a similar nature, relating to the rent of land passed between a landholder and his tenant. It is not an engagement for the payment of rent during the continuance of the lease, or for the performance of any other condition on which the continuance of the lease depends; but it is a contract of indemnity against losses to be incurred after the determination of the lease, and could have no operation so long as the lease was in existence. We think that the Courts below have rightly held that such an agreement was not exempt from stamp duty under the provision of the Regulation applicable to leases and their counterparts.

We are now asked to allow the appellant to pay the stamp duty and the prescribed penalty. We do not think that we can do this in special appeal. Both the Courts below held that the instruments in question were invalid from want of a stamp. In either Court, the appellant might have supplied the defect. Instead of doing this, he has brought a special appeal, on the ground that the decisions of the Lower Courts as to the question of stamp are wrong in law; and we have held that they are right in law. What we are in effect asked to do is to admit fresh evidence in special appeal, which the party offering it might have given in the Courts below if he had not persisted in taking a wrong view of the law. This Court may, no doubt, when sitting in special appeal, order the stamp duty and penalty to be received in cases in which they have been tendered and improperly refused by the Court below; but we do not think that it can allow a party to remedy his own wilful omission to render his evidence admissible.*

Decree confirmed with costs.

*NOTE.—See *Gambhirmal v. Chejmal*, ante. p. 406—ED.

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