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 18 B. 734.

suit, by which they asked for a declaration that the land in question was their property, and for an injunction to restrain the present applicant from obstructing them, and left matters altogether as they were under the Mamlatdar's order. That order, therefore, remains to be executed, unless barred by art. 179 of the Limitation Act. If the periods during which the interlocutory judgment of the Subordinate Judge passed on 17th January, 1885, and the decree of the District Court on 22nd December, 1887, were in force be omitted, the order would have been in force for less than three years when the application to the Mamlatdar to enforce his order for possession was actually made. See s. 14 of the Statute of Limitation and *Hira Lall v. Budri Dass* (1) which makes it applicable to proceedings in execution.

We must, therefore, in the exercise of our extraordinary jurisdiction, discharge the order of the Mamlatdar and direct him to execute his order of 17th December, 1884, by putting the applicant in possession.

*Order discharged.*

18 B. 737.

[737] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.*

SHIDDAPA (*Original Plaintiff*), Applicant v. IRAVA AND ANOTHER  
 (*Original Defendants*), Opponents.\* [21st November, 1893.]

*Practice—Procedure—Stamp—Evidence—Document not sufficiently stamped admitted in evidence by lower Court—Appeal Court cannot exclude it—Stamp Act (I of 1879), s. 4, cl. 3.*

A Court of first instance having admitted in evidence a document improperly stamped, the appellate Court cannot question its admissibility.

[F., 8 M.L.J. 66 (68); 15 M.C.C.R. 24 (25); R., U.B.R. (1897—1901) 559.]

APPLICATION under the extraordinary jurisdiction of the High Court (s. 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of J. L. Johnston, District Judge of Dharwar,

Suit for damages for breach of contract.

The plaintiff alleged that under a written contract he lent Rs. 350 to the defendant, and the latter in return agreed to supply him with wheat, at eighteen seers per rupee. The defendant failed to supply the wheat, and the plaintiff brought this suit.

At the hearing the contract was put in evidence. It bore a one-anna stamp and was attested by witnesses.

The Subordinate Judge found the execution of the contract proved, and ordered the defendants to give to the plaintiff 4,200 seers of wheat, or Rs. 350 with costs.

In appeal by defendant No. 2 the Judge held that the contract was inadmissible in evidence, on the ground that it was insufficiently stamped (s. 4, cl. (c) of the Stamp Act I of 1879), and as the plaintiff declined to pay the stamp penalty, he reversed the decree and dismissed the suit.

The suit being of a small cause nature, in which no second appeal is allowed, the plaintiff applied to the High Court under its extraordinary

\* Application No. 105 of 1893 under the Extraordinary Jurisdiction.

(1) 7 I.A. 167.

jurisdiction, on the ground (*inter alia*) that the contract having been once admitted in evidence without any objection either by the Court of first instance or by the defendant, and no point with regard to the stamp having been raised in the memorandum of appeal, the Judge, in appeal, erred in excluding it from evidence. He obtained a rule *nisi* calling upon the defendant to show cause why the decree of the appeal Court should not be reversed.

[738] *Shivram V. Bhandarkar* appeared for the applicant in support of the rule :—The point as to the sufficiency of the stamp was not in any way raised in the first Court. The document was there admitted in evidence, and the Judge allowed the claim based upon it. Nor in appeal was the point taken by the defendant. Nevertheless the Judge refused to go into the merits of the case on the ground that the document was inadmissible not being properly stamped. It has been held that when a document is once admitted in evidence without any objection as to the stamp in the first Court, the appellate Court cannot exclude it—*Devachand v. Hirachand* (1); *Gurpadapa v. Naro* (2); *Bhaskar v. Prabhakar* (3), and *The Secretary of State for India in Council v. Byramji* (4).

*Vishnu K. Bhatavdekar*, for the opponents (defendants), showed cause :—On the merits the Judge has expressed an opinion adverse to the plaintiff. He framed two issues, *viz.* (1) whether the contract was made by defendants Nos. 1 and 2, and (2) what amount should be awarded to the plaintiff, and from which of the defendants? On both these issues the Judge found in the negative. The finding of the Judge that the document sued upon was not proved, is a finding on the merits. The Full Bench ruling in *Devachand v. Hirachand* (1) is not applicable.

#### JUDGMENT.

SARGENT, C. J.—The District Judge, in holding that he could refuse to admit the document sued on in evidence as being improperly stamped, has omitted to notice cl. 3 of s. 34 of the Stamp Act and the decisions in *Devachand v. Hirachand* (1), *Gurpadapa v. Naro* (2), also *Bhaskar v. Prabhakar* (3) and *The Secretary of State for India in Council v. Byramji* (4) to the effect that the Subordinate Judge having admitted the document in evidence, the Court of appeal cannot question its admissibility.

We must, therefore, reverse the decree and send back the case for decision on the merits, as we cannot accept the mere opinion expressed by the District Judge on the first issue as a valid finding. Costs to abide the result.

*Decree reversed and case sent back.*

(1) 13 B. 449. (2) *Ibid*, 493. (3) P. J. (1889), 265. (4) P. J. (1892), 245.