

(1907) 07 BOM CK 0022
In the Bombay High Court
Case No : Original Suit No. 92 of 1905

R.D. Sethna

APPELLANT

Vs

Mirza Mahomed Shirazi (No. 1)

RESPONDENT

Date of Decision : 11-07-1907

Acts Referred:

Citation : (1907) 9 BOMLR 1034

Hon'ble Judges : Beaman, J

Bench : Single Bench

Judgement

Beaman, J.—It will be convenient to descend from the general to the particular. As to the arguments founded on the maxim omnia prcesumuntur etc., it is to be observed that so far it cannot be said with certainty that there has been any spoliation. Should the explanation offered by the defendant prevail, it might be difficult for the plaintiff to rest anything on this ground. But taking it for the moment to be as the plaintiff alleges, nothing material to the present purpose follows. The English Courts have gone a great way notably in such cases as Anneelsy v. Anglesea and Wardour v. Beresford : but in this case there is really no room for any presumption at all. I mean of course upon any fact relating to the stamp objection. Asking the Court to presume, (d) that the papers were stamped or (b) that they contained matter which might have refuted the objections, is asking the Court to presume that which, it knows, as far as in these circumstances it is safe to say that anything can be certainly known, is not true. The official translations, the photographs, the record of the suit in which the missing papers were produced, put it beyond all fair argument that they were not stamped and that as to their contents, where we have had the official translations we have exactly what we should have had they not been destroyed. To ask the Court to presume then anything to the contrary would be to bring the law into ridicule and carry a salutary principle to the length of absurdity.

2. Next of the argument founded upon the ordinary canons of interpretation, referable generally to the maxim ut magia valeat etc. and the like. That is well

enough and I entirely agree that effect should be given to the maxim in any difficulty under the Stamp Act, so that where there is a reasonable doubt whether a paper is subject to stamp at all, the Courts should decide strictly against the Exchequer and beneficently in favour of the subject. The principle loses force where the question is not so much whether a paper is liable to stamp, as whether it is liable to stamp in one character or another and it has no application at all, where the words of the statute directly cover the case. The degree of doubt whether they do or not, brings us back to the first or second position, but no further. And in strictness Courts ought not to have any doubt whether a paper is of a denominated kind, such as, e. g. a promissory note. It either is or it is not. It seems to me that the sphere within which this maxim can be usefully applied under the stamp law is limited to cases of general expression, rather than to such a point as I am now to consider.

3. One other trifling question, which was, however, frequently raised and reverted to, may be summarily dismissed. Stamp objections are the care of the Court and when they are raised it is for the Court to decide whether they ought to be sustained, without any regard to the ground, as being the sole and only possible ground, upon which the objection may have been taken. If the Court should hold that for any reason there is a good stamp objection, it matters not in the least, whether this stands upon ground taken by counsel, or not. Whether counsel hit upon the right reason or not is of no importance, provided there is a right reason.

4. The first paper to which objection is taken is Ex, N. It runs as follows : " The sum of one lac and eighty thousand coined rupees a moiety whereof is Rs. 90,000 appertaining to the personal account of his Honour Haji Mahomed Nabi Saheb Shirazi, a merchant, is payable by me and is to be paid on demand." It is attested and is dated September-October 1862, Now, apart from the attestation, that is clearly a promissory note. See *Casborne v. Button*, cited in *Selwyn on Nisi Prius*, Vol. I, p. 329. "So, where, the note set forth in the declaration was: "I do acknowledge myself to be indebted to A in ?...to be paid on demand, for value received." On demurrer to the declaration the Court after argument held that this was a good note within the Statute, the words "to be paid" amounting to a promise to pay; observing, that the same words in a lease, would amount to a covenant to pay rent. Of course a mere acknowledgment of indebtedness without any promise to pay is not a promissory note, but a promise to pay makes it so and may be implied from such words as appear in this paper and as far as I can see after examining a great number of cases always is implied. But it has been strenuously argued for the plaintiff that Article 10 of the Act of 1862 expressly excludes from the category of promissory notes any instrument or writing attested by one Or more, witnesses. I think that argument has been demolished by the judgment of the Calcutta High Court in *Gladstom v. Sadoochurn Dutt* (1876) 2 Ind. Jur. N.S. 203. I entirely agree with the reasoning of the learned Chief Justice and if I am wrong I am quite content to err in the good company of so eminent a Judge as Sir Barnes Peacock. I have not been

able to discover any cases in the Bombay law reports before 1879 in which year further definitions were introduced into the Stamp Act which did undoubtedly give rise to a distinction which appears to have been uniformly taken since that time in this High Court. According to the law after the passing of the Act of 1879 a promissory note, unless it was payable to order or bearer, seems to have been deemed to be a bond if attested. But the cases usually turn upon discriminating between acknowledgments and bonds and the criterion appears, although the decisions of the Court seldom give any reasons, to have been whether the acknowledgment was attested. This Court seldom seems to have paid any attention to the words "whereby a person obliges himself to pay money to another" with special reference to which the Calcutta High Court decided in *Hira Lal Sircar v. Queen Empress* ILR (1895) Cal. 757 that to be a bond the instrument must oblige the obligor, in other words, it went back to the English definition, which was incorporated, it may be noted, as the sole definition of a bond, in the Act of 1869. It may also be noted in passing that in that Act, the words "or other obligation for the payment either absolutely or condition, ally etc." disappeared. While the learned and Hon^{ble} the Advocate General submitted that the decision in *Gladstone v. Sadoochurn Dutt* (1876) 2 Ind. Jur. N.S. 203 was wrong; he went further and said that whether that were so or not, it did not apply because in this case the paper was not a promissory note. I understood him to mean that a promissory note differs from an acknowledgment in these two essential characteristics, (1) that it is contemporaneous with the origin of the liability, to that extent creating it and (2) that it must contain a promise to pay. Logically I should be inclined to say that is correct. But the cases do not bear him out. Nor does the definition of promissory note, as soon as we get a definition, in the Act of 1869. In my opinion then it is plain that this paper N is a promissory note and that the fact that it is attested does not alter its character as the law then stood, Under the existing law, no doubt it would apparently become a bond, or at any rate something else than a promissory note, since it is not payable to bearer or order.

5. But I must look at what the law was when it was made, I may add that had it not fallen plainly within the definition of Article 10 I do not see how it could have escaped Article 12. It was strongly argued that the words "or other obligation" etc. must be read as *ejusdem generis*. But *ejusdem generis* does not mean, as that argument would almost have made it mean, identical with. Assuming for the moment that the Calcutta Court was wrong and that the words "bearing the attestation of one or more witness " applied to the whole of Article 10, then this would as it seems to me fall within the meaning of the words "or other obligation for the payment etc." and to be exactly what the legislature meant to hit. For if not a bond, by reason of the technical meaning of that term in English law, and if not a promissory note because attested, what is it but another sort of writing or instrument attested and thereby an obligation to pay etc. ? And for that very reason, to avert the difficulty which might arise in this country of bringing all these amorphous obligations, neither precisely bonds nor promissory notes nor

any other of the obligations specified nominatim, within the reach of the stamp law although in their effects and legal consequences closely resembling a bond, the words after bond, " or other obligation etc." were inserted. Exhibit P is dated February 1869 and as the Act of 1869 received the assent of the Governor General in August 1869 this paper is governed by the same considerations as the preceding and being in virtually the same terms, must be decided upon in the same way. Exhibit V is to the same general effect as the two preceding and is dated 28th September 1875. It is governed by the Stamp Act of 1869. And this gives rise to a fresh point u/s 15 clause 2, which exempts certain documents from all stamp duty. The words are " Receipt given for money or securities for money deposited in any bank or in the hands of any banker or person acting as a banker to be accounted for." In my opinion the papers gain no exemption on that ground. It is only by a strained construction of language and no doubt partly with an eye to the effect on the mind of the Court of the maxim omnia prosumuntur etc; that it can I think be seriously contended that this or the preceding papers are of the kind to which the exemption was intended to apply. I may also observe in this connection that this paper is not attested. The next paper at present marked Ex. 7 for identification, falls under the Stamp Act of 1879. It is dated 15th October 1879. It is not payable to order or bearer and it is attested. In view then of the definition in Clause (b) of Section 4 I find it difficult to say that this is a promissory note. And against the view that it is a bond there is the ruling of the Calcutta High Court which I understand was followed by my learned predecessor on this Bench and in dealing with this very paper in the previous suit. It certainly cannot however be a mere acknowledgment for in the first place, what decisions of this Court there are, are consistently against holding any attested instrument of this kind to be an acknowledgment. In the next it certainly does contain a promise to pay, that is to say the maker declares that he will pay on demand. Either then it is a bond or a promissory note. Owing to the confusion introduced by the rather loose definitions and the recent decision of the Calcutta High Court in Hira Lal Sircar v. Queen Empress ILR (1895) Cal. 757 it is not as easy as it ought to be to say which. In my opinion, however, it would be liable under the law as it now stands to be stamped as a bond. I mean with special reference to the decisions of this High Court, which have always I think quite clearly implied, although nowhere as clearly expressed, that an attested promissory note not payable to bearer or order falls within Clause (b) of Section 4. All four documents are inadmissible. But as this case is almost sure to be carried further and there might be difficulties later on, should higher authority take a different view, in proving the documents thus objected to, I have thought it safer in the interests of justice and really of the parties themselves, to allow the proof to be given now while it is still available. It is however to be clearly understood that for the purpose of any decision I may come to on the case, I shall treat these papers as not on the record, for any purpose other than as evidence of conduct.