

1902.
September 1.

COLURAAD v. ROGEE.

C.R., Colombo, 17,452.

Unstamped instrument—Ordinance No. 3 of 1890, s. 35—Promissory note bearing judicial stamp instead of revenue stamp—Power of Court to order the remedying of the mistake.

In an action upon a promissory note found to bear a judicial stamp instead of a revenue stamp it is open to the Court, where the revenue has not been defrauded and the mistake had occurred from inadvertence, to give him the benefit of section 35 of the Ordinance No. 3 of 1890 by granting time to the plaintiff to remedy the mistake and then receiving it in evidence.

THE facts of the case and the arguments of counsel appear in the judgment of Moncreiff, J. The appeal taken by the plaintiff was argued on 1st September, 1902.

Elliot, for appellant.

Schneider, for respondent.

1st September, 1902. MONCREIFF, J.—

This was an action upon a promissory note. On the 11th December, 1901, the plaintiff moved for judgment in the absence of the defendant. It was then found that the note bore a judicial and not a revenue stamp, but the Commissioner, considering that the revenue had not been defrauded, and that the mistake had occurred from inadvertence, granted the plaintiff two weeks' time to remedy the mistake. On the following day it was intimated that the defendant had cause to show against the order; and on the 16th December Mr. Schneider appeared on behalf of the defendant, and so far prevailed with the Commissioner as to induce him to rescind the order which he had made granting the plaintiff two weeks' time to rectify the stamping of the promissory note.

The plaintiff appeals, and refers me to section 35 of Ordinance No. 3 of 1890, which provides "that where an instrument liable to stamp duty is found to be unstamped or not duly stamped, it shall not be received in evidence until (if the instrument is one which may legally be stamped after the execution thereof) the whole or the deficiency of the stamp duty payable thereon, as the case may be, and the penalty required by this Ordinance together with an additional penalty, of Rs. 5, shall have been paid into Court." Now, the plaintiff says his case is covered by that section. The note bearing a judicial stamp instead of a revenue stamp is in my opinion not duly stamped. Mr. Schneider referred me to

the 8th section of the Ordinance. That section, however, is not a definition of instruments which are unduly stamped. It provides that in the category of unduly stamped instruments shall be included those which do not bear a stamp showing the proper amount of stamp duty, and in the case of adhesive stamps where there are certain defects with regard to the cancellation of them, unless it is otherwise proved that the stamp was affixed at the proper time; but it does not mean that an instrument may not be unduly stamped in respect of other defects. Then Mr. Schneider says that this was a case in which the instrument could not be stamped after the execution thereof; but nothing in the Ordinance is quoted to support that position, whereas, on the other hand, Mr. Elliott produced more than one authority, notably the cases of *Rosling v. Saverimuttu* (1 S. C. R. 313) and *The Chartered Mercantile Bank v. Sadayappa Chetty* (1 C. L. R. 53), in which it was distinctly stated that the Commissioner had power where an instrument unduly stamped was tendered in evidence to allow the plaintiff the benefit of section 35 of the Stamp Duties Ordinance.

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Another argument put forward by Mr. Schneider was that the plaintiff could have availed himself of section 19 of the Ordinance and brought the instrument to the Commissioner to be stamped within fourteen days of the date thereof, that that was his proper remedy, and that as he has not availed himself of it he cannot now lay claim to a remedy which is not strictly appropriate to his case. No doubt he might have proceeded under that section but in my opinion that section does not exclude him from such other relief as the Ordinance allows him.

I think the Commissioner was wrong in thinking that he had not the power to make the order of the 11th December. I think he had power to make it; and as it is the order which he desired to make which he did make, and which he only cancelled because he thought he had made it without having statutory power to do so, I think it ought to be revived and the order appealed from set aside.

The case must go back for trial upon the other issues—upon the plaintiff's satisfying the law with regard to the stamp on the note.