[FULL BENCH.]

1909.
February 11.

Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, Mr. Justice Wendt, and Mr. Justice Middleton.

PANDITATILLEKE *v.* THE COMMISSIONER OF STAMPS.

(*Appeal under section 38 of "The Stamp Ordinance, 1890."*)

Stamp Ordinance (No. 3 of 1890)—Lease—License—Stamp duty.

If the essential and distinguishing features of a lease are present in any instrument, such instrument is liable to stamp duty as a lease.

APPEAL from an order of the Commissioner of Stamps under section 38 of Ordinance No. 3 of 1890 as to the stamp duty payable on an instrument submitted to him by the appellant. The material parts of the instrument are contained in the judgment of the Chief Justice.

A. St. V. Jayewardane, for the appellant.

Walter Pereira, K.C., S.-G., for the Commissioner of Stamps.

Cur. adv. vult.

February 11, 1909. HUTCHINSON C.J.—

This is an appeal under section 38 of "The Stamp Ordinance, 1890," against the determination of the Commissioner of Stamps as to the duty payable on an instrument which the appellant submitted to him for his opinion.

The instrument is dated March 13, 1908. It is in Sinhalese, and I take from the translation which is filed with the petition of appeal the parts which appear to me to be material: "Contract of gemming Lease." "This contract of gemming lease made this 13th day of March, 1908, between.....hereinafter called the lessor of the one part and..... hereinafter called the lessees of the other part: Witnesseth. That three-fourths of [certain lands described,] are hereby leased by the lessor to the lessees (as being two-thirds to the first mentioned and one-third to the second mentioned), to dig for gems within five full years from the date hereof, subject to the following conditions, and are requested on lease and taken over by the lessees in terms of the said conditions, viz. :—

"(1) That the lessees shall have power to dig for gems as they choose on the soil of this share of land within the said period of five years.

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"(2) That one-tenth of the gems so dug out, or its equivalent value, shall be given to the lessor for ground share, and receipts obtained.

"(3) That the gems so dug out shall be weighed in the presence of both parties.

"(5) That the lessor shall have power to build a house on the said premises for use for such purposes as watching the gem pits, &c.

"(6) That at the expiration of the said period of five years, in case the lessees require, the lessor shall extend this lease and execute and grant a suitable deed therefor."

This document was attested by the appellant as a notary. He levied on it a duty of Rs. 2·50, treating it as an "agreement"; but the Commissioner declared his opinion that it is liable to a duty of Rs. 10 as "a bond not otherwise charged." If it is a lease, the opinion of the Commissioner is right; and in my opinion it is a lease.

The fact that the parties in the document itself call it a lease is, of course, not conclusive; and the appellant contends that it is not a lease, but only a license to dig for gems, and that it is not even a grant of an exclusive license to the grantees, but that the grantor may afterwards grant similar licenses to other persons to work the same land during the same period. I think that is not so. It is a lease of the land for a special purpose. If the purpose had been "to cultivate as a garden," "to use as a cricket field," or for any other special purpose, it would have been equally a lease.

The appeal came first before Wood Renton J., who referred it to the Full Court, because there were supposed to be two conflicting decisions on documents more or less similar to this one. The first one is 2,721, P. C. Galle, 4,471,[1] in which Burnside C.J. and Dias J. held that the document there in question was not a lease; the document is not set out, but is said to have been a contract by which the grantee, in consideration of the grantor's leave and license to him to enter upon the land and search for plumbago, agreed that if he discovered plumbago he would give the grantor a part of the value of it. The other case is recorded in Supreme Court Minutes, November 27, 1907, and there Wendt J. held that an instrument substantially in the same terms as this was a lease. It is not clear that these decisions are in conflict with each other; for the first document was perhaps merely a license recoverable at will. But if they are in conflict, I think the second is right.

The appellant says in his petition of appeal that documents of the nature of the deed in question have been treated as "agreements" during a series of years, leading to the foundation of a uniform practice throughout the Island. There is no evidence of that practice, and I doubt its existence.

I think the appeal should be dismissed.

[1] *S. C. Min. September 1. 1891.*

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The appellant contends that the instrument submitted to us is an "agreement," while the contention for the Crown is that it is a "lease." Every lease no doubt embodies an agreement between the parties, but has, in addition, the distinguishing features of a lease, one of which is that property of some kind is handed over by the lessor to the lessee for his use in return for the consideration agreed upon. If these distinguishing features exist in any instrument it must pay stamp duty as a lease, and not as an agreement. The schedule to the Stamp Ordinance imposes on a lease the same duty as on a bond, and the charge appropriate to an instrument like the present is that on a "Bond of any kind whatever not otherwise charged in this schedule, nor expressly exempted from all stamp duty." In that case the duty is Rs. 10, and that is the sum which by the Commissioner's decision under appeal was said to be payable by the appellant. The instrument in question, which is in the Sinhalese language, calls itself a "contract of a gemming lease." The grantor is called the "lessor" and the other parties the "lessees." An undivided share of land described as held and possessed by the lessor and another is "hereby leased by the said lessor to the lessees to dig for gems within full five years;" the lessees are empowered to dig for gems as they chose on the land for the five years, yielding one-tenth of the gems obtained or its value to the lessor; the lessees are empowered to build a house for the purposes of gemming, and are required to fill up the pits when exhausted; the lessor binds himself to "extend the lease" if required by the lessees, and the parties bind their respective heirs, executors, administrators, and assigns. In my opinion this is a "lease" of the land. I see no reason to think that my decision dated November 27, 1907, pronounced upon the constuction of a similar instrument, and brought to our notice by Mr. Jayewardene, was wrong. Even if the decision in the Police Court, Galle, case cited to us and said to conflict with the decision just mentioned, were not merely *obiter dictum*, it is deprived of all value as a guide in the present case by the fact that the terms of the instrument there construed are not before us.

I think the appeal fails.

MIDDLETON J.—

This is an appeal from the Commissioner of Stamps under section 38 of the Stamp Ordinance, No. 3 of 1890, who has held that the document, the subject of the appeal, is liable to the stamp duty of Rs. 10 under Schedule B, Part I., as being a lease of property, and dutiable as a "Bond of any kind whatever not otherwise charged in this schedule, nor expressly exempted from all stamp duty."

The contention of the appellant is that it is dutiable in the sum of Rs. 2·50 as an agreement, which does not bear on the face of it

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its value. We have been referred to *Carr v. Benson*;[1] *P. C., Galle. 4,471*;[2] *In re Application of C. S. Abeyaratna under section 38 of Ordinance No. 3 of 1890*;[3] *Limmer Asphalte Paving Co., Ltd. v. Commissioner of Inland Revenue*;[4] *Donogh's Indian Stamp Law, p. 135.*

The Galle case relied on by Mr. Jayewardane does not set out the terms of the document in question, but it is clear that in the case decided by my brother Wendt it was a lease of property. The proper test is the real and true meaning of the instrument which must be ascertained to determine the stamp duty payable (*Limmer Asphalte Paving Co., Ltd. v. Commissioner of Inland Revenue*).

In Stroud's Legal Dictionary (Vol. II., p. 1,069) a lease is defined to be "a demise or letting of lands, rent, common, or any hereditament unto another for a lesser time than he that doth let it hath in it" (*Touchstone, 266*).

In my opinion here the wording of the habendum and clause 8 of the contract amply indicate that the document is in fact an exclusive letting of the lands in question for the purpose of gemming and not a mere license to prospect for and take gems. In my opinion, therefore, the Commissioner was right in holding the document to be liable to a duty of Rs. 10, and I would dismiss the appeal with costs.

Appeal dismissed.

[1] *L. R. 3 Ch. App. 524.*
[2] *S. C. Min. September 1, 1891.*
[3] *S. C. Min. November 27, 1907.*
[4] *L. R. 7, Exch. Cas. 211.*