[FULL BENCH.]

1918.

Present : Ennis, Shaw, and De Sampayo JJ.

HETTIARACHY *v.* WILFRED.

363—C. R. Colombo, 59,273.

Cancellation of stamp—Name of maker—No date—Date inserted by Judge nunc pro tunc—Does appeal lie against admission of note in evidence?—Ordinance No. 22 of 1909, ss. 9 and 37.

In an action on a promissory note the defendant (maker) took the objection that the stamp on the note was not duly cancelled, inasmuch as it bore only the name of the maker and not the date. The Commissioner of Requests inserted the date himself (*nunc pro tunc*), and entered judgment for the plaintiff. The defendant appealed.

Held, that no appeal lay against the admission of the document, in view of the provisions of section 37 (1) of the Stamp Ordinance.

THE facts are set out in the judgment of the learned Commissioner of Requests (W. Wadsworth, Esq.):—

The only question in this case is, Has the stamp on the note been duly cancelled? The defence does not raise any issue on the merits, and rested the whole case on this issue as to the cancellation of the stamp. The stamp on the promissory note sued upon is cancelled by the maker signing his name across the stamp. He has not dated it, and it is contended by the defendant that the stamp is therefore not duly cancelled, and the note, therefore, is not admissible in evidence, and in support, Mr. Joseph, for defendant, cited *Nakuran v. Ranhamy.* [1]

The question raised is a very important one, and affects a large number of documents coming before our Courts. The objection to the cancellation of the stamp appears to me to be one purely of law, arising from the requirements of the Stamp Ordinance. The proper value of the revenue has been paid. It is admitted that the stamp has been cancelled by the signing of the name, and it is for the Court to see that this stamp is so cancelled as not to be used again. Their Lordships in *Nakuran v. Ranhamy* [1] had the case of *Kistnappa Chetty v. Silva* [2] before them.

The two cases appear to me to be in conflict as to the provision of sub-section (3) of section 9 of Ordinance No. 22 of 1909 being optional or imperative, Lascelles C.J. holding that the requirements of cancellation of stamp therein mentioned are only optional, Wood Renton C.J. in the Anuradhapura case appears to have held that the requirements are imperative.

Our old Stamp Ordinance, No. 3 of 1890, section 8, speaks of the mode of cancellation of stamp, and states " ..... the person required to cancel the stamp ..... cancels the same by writing or marking in

[1] *(1917) 20 N. L. R. 135.* [2] *(1911) 14 N. L. R. 458.*

1918.

Hettiarachy v. Wilfred

ink on or across the stamp his name or initials ..... together with the date of his so writing or marking." This is amended by the present Ordinance, No. 9 of 1909, which follows the provision of the English Stamp Act of 1891, section 8, sub-section (1) and section 12, sub-section (3), of the Indian Stamp Act of 1899.

In the Indian Act the words added are "*or* in any other effectual manner," and in the English Act the words added are "*or* otherwise effectively cancels the stamp and renders the same incapable of being used for any other instrument." Whereas our section 9, sub-section (3), of Ordinance No. 22 of 1909, adds the words "so as effectually to obliterate and cancel such stamp or stamps, or so as not to admit of the same being used again." It may be noted that the disjunctive "*or*" used in the Indian and English Acts does not find its proper place in our section but it is clear that the principle laid down in our law is the same as that found in the other two Acts. The English and Indian authorities will, therefore, enable us to find out how a stamp can be said to be duly cancelled. The date of the cancellation of the stamp is a necessary ingredient, and is proof that it was used at some point of time, although, as his Lordship the Chief Justice remarked in the Anuradhapura case, even if the date of cancellation were written on the stamp, it might conceivably be used again.

The real object in cancelling a stamp used on a document being that it should not be used again and nothing more, has this Court the right to see that the stamp may not be used again, and thus satisfy the real requirements of the law? Plaintiff's counsel, I might mention, applied that the stamp be cancelled now, and cited the case of *Viale v. Michael*[1] in support, where Blackburn J. said: "I can see no reason why the bills should not have been cancelled in open Court at any moment before verdict, though it is not necessary now to decide that point" (at p. 464). If, therefore, the date be placed on it now, *nunc pro tunc*, the requirement of the law will be fulfilled, and the stamp will be so effectually cancelled as not to be used again.

I am bound to follow both the rulings of the Supreme Court, and, feeling as I do, that I cannot express any opinion, or arrive at any finding contrary to or inconsistent with either of the judgments of their Lordships, I find myself free to adopt a *viâ media* in having the date of the making of the note placed on the stamp now, so that the stamp may not be used again, and then to find that the stamp is fully cancelled.

Sub-section (1) (*b*), section 9, of our Ordinance requires the person executing it to cancel the stamp at the time of executing it. He has cancelled the stamp by signing it, but has not dated it. Can he be allowed to take advantage of his own neglect, or it may be fraud in some cases, to defeat justice? It is quite conceivable that a dishonest debtor may only sign his name over the stamp and fraudulently omit to date it, with the express object of setting up a defence later as to the insufficiency of the cancellation. This will open a door to fraud, especially when the other party is ignorant or illiterate, and no law will permit a person to take advantage of his own fraud.

Both equity and justice demand that the Court should exercise its powers to see that substantial justice is done, and that the real object of the requirement of the law is in effect satisfied, in this case to see that

[1] *(1874) 30 L. T. 463.*

the stamp may not be used again without prejudice to the rights of parties. I, therefore, place on the stamp the date May 23, 1914, the date of the making of the note by defendant, *nunc pro tunc*, and enter judgment for plaintiff, with costs.

The case was reserved for argument before a Bench of three Judges by De Sampayo J.

Joseph, for the defendant, appellant.—The stamp on the note sued on was not cancelled by the maker, and the note is therefore invalid. The writing of the name over the stamp is not enough. The stamp should also bear the true date of the writing. See section 9, sub-section (3), of Ordinance No. 22 of 1909. [Ennis J.—Sub-section (3) does not say that writing the name and the date is the only way of cancelling a stamp. It gives an illustration.] It was held in *Nakuran v. Ranhamy* [1] that when the signature over the stamp is not dated there is no cancellation of the stamp. [Ennis J.—Does an appeal lie in this case? Section 37 (1) enacts that the admission of a document by a Court shall not be called in question at any stage of the suit.] That does not prevent an appeal against the order. Moreover, a promissory note cannot be stamped subsequent to the making thereof. [Ennis J. referred counsel to *Kistnappa v. Rutnam*.[2]]

In the present case the action itself is based on the note. It is not merely a document read in evidence in the course of the trial. [Ennis J.—The note has to be read in evidence.]

Balasingham (with him *Croos-Dabrera*), for the respondent (not called upon).

Cur. adv. vult.

February 21, 1918. ENNIS J.—

I would follow the decision in *Kistnappa v. Rutnam* [2] and hold that the admission of this document cannot be called in question now.

SHAW J.—I agree.

DE SAMPAYO J.—I agree.

The point in appeal is as to the admissibility of the document for want of due cancellation of the stamp, and that having been disposed of, there is no further point to be considered in the appeal. The appeal will, therefore, be dismissed, with costs.

Appeal dismissed.

[1] *(1917) 20 N. L. R. 135.* [2] *(1914) 17 N. L. R. 230.*

[See, *re cancellation of stamp: 28 Bom. 432; 71 L. J. Ch. 766; 3 All. L. J. 326.*—ED.]