

YOUSOOF MOHAMED AND ANOTHER
v.
INDIAN OVERSEAS BANK

COURT OF APPEAL
EDUSSURIYA, J.,
JAYASINGHE, J.
C.A. NO. 378/94 (F)
D.C. COLOMBO NO. 6346/M/1
JUNE 18, 1998

Civil Procedure Code, s. 39, s. 46, s. 46 (2)h – Stamp Duty Act, No. 43 of 1982, S. 33 (1), 33 (2) – Plaintiff not duly stamped.

It was contended by the defendant-appellant that the annexures which were filed with the plaintiff has not been stamped, and as such the plaintiff should have been rejected.

Held:

1. There is no provision which directs the rejection of a plaintiff which is not duly stamped or a dismissal of an action on that basis;
2. Where a plaintiff is insufficiently stamped due to any annexures which have been filed as part and parcel of the plaintiff, not being duly stamped, the Court cannot reject or refuse to entertain the plaintiff or dismiss the action, but must necessarily call for the deficiency in stamps.
3. If the plaintiff fails to supply the deficiency in stamps within a time fixed by Court, the plaintiff may be rejected.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:

1. *Kishnappa v. Rutnam* – 17 NLR 230.
2. *Adilappa Chettiar v. Thomas Cook & Sons* – 31 NLR 385 at 404.

A. P. Niles with Arjuna Kurukulasuriya for defendant-appellant.

Prasanna Jayawardena for the plaintiff-respondent.

Cur. adv. vult.

July 17, 1998.

EDUSSURIYA, J.

This is an appeal from the judgment of the learned Additional District Judge of Colombo in an action instituted by the plaintiff-respondent to recover two sums of money as prayed for in the plaint with interest.

The only contention of the appellant's counsel at the hearing of this appeal was that the annexures A1 to A5 which were filed with the plaint have not been stamped and as such the plaint should have been rejected. It was not counsel's contention that A1 to A5 alone should have been rejected.

Issue No. 10 had been raised at the trial on the basis that the action should be dismissed as A1 to A5 annexed to the plaint have not been stamped.

In the written submissions tendered on 10th July, 1998, counsel for the appellant has with reference to the Stamp Duty Act, No. 43 of 1982, drawn a distinction between documents and instruments and submitted that A1 to A5 were instruments and as such sections 33 (1) and 33 (2) were applicable to their admissibility in evidence, it must be borne in mind that counsel's contention at the hearing of the appeal on 18th June, 1998, was in fact *that the plaint was insufficiently stamped* as the annexures A1 to A5 which were part and parcel of the plaint were not duly stamped and as such should have been rejected and the plaintiff-respondent's action dismissed.

Section 39 of the Civil Procedure Code sets out that every action shall be instituted by presenting a duly stamped plaint. However, there is no provision which directs the rejection of a plaint which is not duly stamped or a dismissal of an action on that basis. Section

46 (2) sets out the circumstances under which a Court may refuse to entertain a plaint or reject a plaint but section 46 (2) does not set out that a Court shall refuse to entertain or reject a plaint when it is not duly stamped.

Thus, where a plaint is insufficiently stamped due to any annexures which have been filed as *part and parcel* of the plaint not being duly stamped, the Court cannot reject or refuse to entertain the plaint or dismiss the action but must necessarily call for the deficiency in stamps, and this happens regularly in the original courts and summons are not issued until the deficiency is supplied. However, where a plaintiff fails to supply the deficiency in stamps within a time fixed by Court, the plaint may be rejected (Section 46 (2) (h)). In this instance, Court has not called upon the plaintiff to supply any deficiency in stamps. It is, therefore, my considered view that if there was a deficiency the defendant could have asked for a stay of proceedings until the deficiency in stamps is supplied. This, the defendant had failed to do, and I am, therefore, of the view that it is now too late in the day to canvass that question. It was never the appellant's counsel's contention that the annexures A1 to A5 were wrongly admitted in evidence at the trial. However, as there is a hint of such a suggestion in his written submissions it is appropriate to mention that A1 to A5 were marked in evidence at the trial as P4, P5, P6, P10 and P12 respectively, and that no objection was taken to their production. Nor was there such an objection taken when the plaintiff's counsel closed the plaintiff's case reading in evidence P4, P5, P6, P10 and P12. Therefore, the appellant's counsel cannot now canvass the admissibility of the said documents in evidence at the trial *vide Kishnappa v. Rutnam*⁽¹⁾, *Adilappa Chetti v. Thomas Cook and Sons*⁽²⁾.

For the above-mentioned reasons, the appeal is dismissed with costs fixed at Rs. 4,200.

JAYASINGHE, J. – I agree.

Appeal dismissed.