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**(2003) 12 CAL CK 0032**

**Calcutta High Court**

**Case No:** G.A. No. 4286 of 2000

Raj Kumar Rawala

APPELLANT

Vs

Manabendra Banerjee

RESPONDENT

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**Date of Decision:** Dec. 24, 2003

**Acts Referred:**

- Contract Act, 1872 - Section 25
- Limitation Act, 1963 - Article 137, 17
- Registration Act, 1908 - Section 17, 49
- Stamp Act, 1899 - Section 2(14), 2(15), 3

**Citation:** AIR 2004 Cal 294 : (2006) 2 CTLJ 92

**Hon'ble Judges:** Kalyan Jyoti Sengupta, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

Kalyan Jyoti Sengupta, J.

This application has been taken out in the aforesaid partition suit after the same being disposed of by passing a decree and order on the basis of the terms and settlement dated 11th October, 1993. The reliefs claimed herein are for setting aside of order and decree passed by the Hon'ble Mr. Justice Babulal Jain (as His Lordship then was) and for granting leave to the petitioner to file appropriate application for setting aside of the deed of conveyance dated 12th October, 1993 in respect of the premises No. 17, Loudon Street, Calcutta in appropriate form. The fact of the case in the petition runs as follows :-

The said premises No. 17 Loudon Street, Calcutta - 700017 (hereinafter referred to as the said premises) in which the defendant/petitioner was a monthly tenant in respect of the ground floor, as well as the first floor thereof, was owned absolutely

by one Smt. Pritlata Kanjilal since deceased. Before her death she made and published her last Will and testament bequeathing amongst others, her right, title and interest in respect of the aforesaid premises in favour of one Smt. Lina Mukherjee. The said Smt. Lina Mukherjee applied for grant of probate of the said will and the same was contested by one Sankar Kanjilal. The said testamentary suit. in which probate of the Will of the said testatrix was asked for, was disposed of on term of settlement. By the agreement dated 18th July, 1986 the said Smt. Lina Mukherjee and Sankar Kanjilal agreed to sell the said premises at a total consideration of Rs. 20 lacs. In terms of the said agreement a sum of Rs. 2 lacs was paid as and by way of earnest money and part payment at the instance of the petitioner. He said Sankar Kanjilal was also paid a sum of Rs. 8 lacs by the petitioner for relinquishing his claim in respect of the said premises in terms of compromise with Lina Mukherjee . In connection with probate proceedings. The petitioner having had no sufficient means and fund to develop and promote the said property asked the aforesaid plaintiff Raj Kumar Rawla to join with him for developing and promoting the premises after demolishing the structure. The said development project was assessed at Rs. 50 lacs. Thereafter, a deed of conveyance was executed by said Smt. Lina Mukherjee in favour of both the plaintiff and defendant in the suit. thus, the property was sold to them jointly. It is said that the petitioner/defendant had paid the balance consideration money of Rs. 18 lacs to the said Lina Mukherjee and the plaintiff did not contribute a single paise towards the said consideration. Thus, the plaintiffs name was mentioned in the conveyance without any payment of consideration. Therefore, the plaintiff did not acquire any right, title and interest in the suit property on the strength of the said deed of conveyance. The plaintiff in breach of the agreement failed and neglected to take any step for demolishing the building for promoting and developing thereof. Instead of discharging his obligation in terms of the development agreement the plaintiff had filed a partition suit in or about 1991. In the plaint. the plaintiff falsely stated his right, of 15th/ 16th share in the said premises, and wrongly contended that the petitioner/ defendant had 1/16th share.

2. On receipt of the writ of summons the defendant/petitioner filed written statement and stated all the aforesaid facts. The, plaintiff also made an application for interlocutory relief of the aforesaid suit for appointment of Receiver and Injunction. The said application for Interlocutory relief came to be heard before the Hon"ble Mr. Justice Babulal Jain as "New Motion" on 5th May, 1993 and an order of Injunction was passed restraining both the parties from creating any tenancy or inducing any party or for parting with possession of any portion of the said premises. Both the parties were restrained from altering status quo as on that date in respect, of the occupants or tenants in any manner whatsoever.

3. On 9th October 1993 the petitioner was called by the plaintiff through the messenger to meet the plaintiff at, his office at 75C Park Street, Calcutta. There the petitioner was compelled to sign an agreement alleged to be the terms of

settlement under threat and coercion without giving any opportunity being aware of the contents of several documents. On the very next date the said terms of settlement which was got to be signed under the circumstances as stated above, was filed In Court and on the basic of said terms of settlement a decree was passed in the preliminary form. The said terms of settlement was not a document of outcome of free-will or volition of the petitioner. On the next date, namely. 12th October 1993 the petitioner was again compelled to attend the office of the plaintiff and to sign the deed under threat and coercion. At that time .the petitioner was surrounded by the plaintiff and his associates and the petitioner was taken to the Registrar of Assurances where the said conveyance was registered. He was not aware of the contents of the said conveyance either at the time of registration thereof. After the same was done" the petitioner was paid a sum of Rs. 1 lac 90 thousand at the office of the plaintiff. It was represented that the amount of Rs. 1 lac 90 thousand was the price of the petitioner"s share of the said property. At the time of payment the petitioner was informed that he. had executed a registered deed of sale of his alleged. 1/16th share in the suit property.

4. Thus, the aforesaid preliminary decree was obtained followed by deed of conveyance being executed upon coercion and threat. The petitioner discovered fraud in or about in the month of December, 1999 when it came to the notice of the petitioner of a hoarding by the name of M/s. G. K. Shipping Company Pvt. Ltd. having been placed in the suit property. While making enquiry it was found from the balance-sheet .of the financial year 1992-93 of the said limited company that the company is said to have acquired a building during the said year at a valuation of Rs. 96 lacs. The address of the office of the said Private Limited Company is shown in the telephone directory as 17. Loudon Street, Calcutta. It was further discovered that the said property was sold to the said company by the plaintiff even during subsistence of the interim order of status quo. The plaintiff illegally transferred the said property at a sum of Rs. 96 lacs. At the time of putting the terms of settlement for obtaining decree the aforesaid fact of transfer was not mentioned nor the actual price that could be fetched from the sale. At the time of obtaining decree an impression was given as if the property was not sold to any other party. By practising fraud the plaintiff had induced the petitioner to enter into the aforesaid terms of settlement aiming at to obtain the said decree by suppressing the fact of transfer during pendency of the suit. In the terms of settlement as well as the deed of conveyance the real value of the said premises should have been Rs. 96 lacs. Therefore, the value of one an na share in the said property would be around of Rs. 6 lacs. However, the petitioner was forced to transfer his alleged share of one -anna at Rs. 1.90 lacs.

5. On the question of legality and validity of the said decree the petitioner contended that no final decree was obtained in respect of the suit. The decree was drawn up without payment of stamp duty. Unless the decree is engrossed on stamp paper the same was and is not enforceable in law. In view, unenforceability of the

said decree any subsequent act on the basis thereof is void and ineffective for all intent and purpose.

6. Mr. Bachawat learned senior counsel appearing in support of this Motion submits that the impugned decree and order dated 11th October 1993 was obtained fraudulently. Fact of such fraudulent act will appear from the fact that the plaintiff compelled the defendant/petitioner to sign terms of settlement and several other documents under threat and coercion without disclosing transaction with the said company. Plaintiff instructed his learned Advocate to have the terms of settlement signed by the defendant's Advocate and to file on the same date. The plaintiff further compelled the defendant to instruct his Id. Advocate to sign it. These things happened on 9th October 1993. On 11th October 1993 terms of settlement was filed and decree was got to be passed on the said date in terms of the terms of settlement. He also submits that there is intrinsic evidence to show that the terms of settlement was signed by practicing fraud and/or exercising undue influence. The plaintiff on the date of filing of the terms of settlement knew very well that the value of 1/16th share in the said property was much more than Rs. 1.90 lacs. This fact is substantiated by the fact that on 1st January 1993 even before the terms of settlement was filed, plaintiff had already agreed to sell and transfer his alleged 15/16 undivided share in the property to the said G.K. Shipping Company for Rs. 96 lacs and in fact a sum of Rs. 75 lacs was received. Therefore, going by the valuation as stated in the agreement between the plaintiff and the said company the value of 1/16th share would have been around Rs. 6 lacs. Therefore, the alleged consideration of Rs. 1.90 lacs for 1/16th share is manifestly unjust. So, reasonable inference is that the nature of transaction was tainted with fraud, coercion and undue influence. From the signing of the terms of settlement up to delivery of vacant possession intervened by passing decree, preparation, execution and registration of decree all happened with break neck speed in between 8th October 1993 and 12th October 1993. This fraudulent fact was discovered by the defendant only in December 1999.

7. On 24th November 2000 the defendant made this present application as such question of limitation in this case does not arise as u/s 17 of the Limitation Act 1963 read with Article 59/113/137 the period of limitation 3 years from the date of discovery of fraud for making application for setting aside of the decree. He argues further that under the law the suit is deemed to have been pending as the partition suit is not terminated till final decree is passed and engrossed on the stamp paper. Therefore, the application for setting aside the decree is not barred by limitation. In support of this legal contention he has referred to a decision reported in ILR1905 Cal 483.

8. On the question of legality and enforceability of the decree he contends, the terms of settlement on the basis of which the decree dated 11th October 1993 was passed, is not admissible in evidence and cannot be acted upon. In fact the decree is

not executable in the eye of law. The decree declares the shares of the parties for the first time as such terms of settlement is required to be assessed by the Registrar of Assurance under the Registration Act. Admittedly the terms of settlement in the decree was not stamped. In essence this decree is a final one as nothing remains for further adjudication in the matters. By virtue of the definition Clauses viz. Section 2(1), 2(14) and 2(16) of the Indian Stamp Act, 1899 the said decree together with terms are chargeable u/s 3 and Section 10 of the Indian Stamp Act, 1899. u/s 17 of the Indian Stamp Act. 1899 the instrument is to be stamped at or before execution. Consequences of not being stamped is the document being rendered inadmissible in evidence for any purpose under the provision of Section 35. The description of the instrument has been given under schedule 1 (A). Clause 5 (d) provides for agreement and memorandum. Clause 23 provides for conveyance and Clause 45 (a) (c) partition by order of Court and execution of deed of partition. He has referred in this connection to two decisions of Supreme Court reported in [Ruby Sales and Services \(P\) Ltd. and Another Vs. State of Maharashtra and Others](#), .

9. He contends that the consent decree is a conveyance and for this u/s 2(I) or as being an instrument u/s 2(14) of the Indian Stamp Act stamp duty is payable. The compromise decree also requires registration u/s 17(1)(b) of Registration Act, 1908. Section 17(2)(v) of this Act does not exempt a compromise decree if it creates right/interest of share for the first time in the property.

10. He has drawn attention of this Court on this point to the Supreme Court decision rendered in [Bhoop Singh Vs. Ram Singh Major and others](#), . The terms of settlement as being unstamped admittedly and being basis of the decree, is not legal partition and cannot be acted upon. Naturally, the Court held unstamped terms of settlement and/or the decree are (is) invalid. The decree having effect of partition, if not engrossed on a proper non-judicial stamp is not valid one under the law, even though the decree has been acted upon for a length of time. By reason of this fact of acting upon would no( preclude a person from raising question of validity thereof. In support of his contention he has relied on decisions reported in [Pandivi Satyanandam and Others Vs. Paramkusam Nammayya and Another](#), , [Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others](#), , [Dilbagh Rai v. Mt. Teka Devi and S. Noordeen Vs. S. Thiru Venkita Reddiar and others](#), .

11. His further contention is that compromise decree, if for the first time creates right to the property is compulsorily registrable if not then the decree in terms of the terms of settlement is compulsorily registrable u/s 49(1)(b) of Registration Act, 1908. In this connection he has referred to a decision of Madras High Court reported in ILR 1907 Mad 386, Jhaji Beevi v. Tirumalappa.

12. Drawing my attention to a decision of the Allahabad High Court reported in [Ram Das Vs. Inayat-Ullah and Another](#), , he submits that a document. required to be stamped under the Stamp Act, if not stamped cannot be used for any purpose at all. Even the decree cannot be signed by the learned Judge unless properly stamped. So

until the Courts sign the final decree the suit is deemed to be remaining pending. He has relied on an order of the learned single Judge of this Court dated 19th April 2001 passed on an application having Tender No, 282 of 1999 in a Civil Suit No 1161 of 1999, and another reported decision of this Court reported in Jotindra Mohan Tagore v. Bejoy Chand Mahatab ILR1905 Cal 483 .

13. Mr. Kar the learned Counsel appearing for the plaintiff while opposing this Motion submits that the present application is a frivolous if not mischievous one. He has taken a technical objection that this Court has no jurisdiction as the Court does not have any seisin over the matter by reason of the fact that the decree has already been drawn up, completed, perfected and filed. It is settled position of the law, once these are done, the trial Court cannot entertain any application in relation to the decree. He has relied on a decision of this Court reported in (1971) 75 CWN 416 on this point.

14. He further submits that the present application is not entertainable at all under the law, as It is hopelessly barred by limitation. The decree was passed to the notice and knowledge of the petitioner/defendant on 11th October 1993 and the present application has been taken out almost after 7 years that is to say beyond 3 years from the date of passing consent order, as the instant case is governed by Article 137 of the Limitation Act, 1963. The story of discovery of alleged fraud is totally unacceptable as because it was perfectly within the knowledge of the defendant, since he has factually signed the terms of settlement and is also having knowledge of passing of the decree. As far as allegation of fraud is concerned, it is totally unfounded. The petitioner/plaintiff has admittedly acted upon by signing the engrossed terms of settlement, which was filed in Court and in fact has approved the draft terms of settlement. Moreover, he has accepted consideration amount and has appropriated the same. The petitioner significantly has not expressed any intention to refund the said amount. The petitioner is thus estopped from challenging the said terms of settlement, decree and to raise the question of validity thereof. After the said decree was passed, conveyance had been executed and registered in Registrar of Assurance. On the date of registration the defendant issued a letter in favour of the plaintiff regarding surrender and transfer of vacant possession in respect of occupied portion of the said premises with effect from 9th October 1993 and further issued a letter of attornment to the said company, the tenant that he had sold his right, title and interest in the said premises.

15. On the legal argument of Mr. Bachawat he has submitted that the terms of settlement did not create any right in praesenti in the property. Furthermore u/s 17 of the Registration Act if by any document parties agreed to transfer any property by registered document in future that is exempted from the registration u/s 17 of the Registration Act.

16. He contends further that even if any right, created by any decree on the subject matter of the suit and if it. Is an immovable property, agreement u/s 17 of the

Registration Act does not require any registration for the same. He contends that the decree in the present case records agreement of the parties that in future date the defendant will convey his share of interest in the said premises in favour of the plaintiff at a consideration and cost, charges and expenses as mentioned therein. Therefore, he contends that there was no present demise of the property. He has relied on the decision of Privy Council in this question reported in 46 Ind App 240 : AIR 1919 PC 79 which was later approved by the Hon'ble Supreme Court in [V.B. Dharmyat \(Deceased\) through Lrs. Vs. Shree Jagadguru Tontadrya and Others,](#).

17. He contends that if by compromise any property is being transferred not by itself but by a future document the same does not require registration in view of Section 17(2)(vi) of the Registration Act. He has relied on a decision in this connection of a division Bench Judgment of this Court reported in [Surjya Kumar Das Vs. Sm. Maya Dutta,](#).

18. He submits that Stamp Act in this case is not applicable as it is a decree on terms of settlement. The stamp duty is payable in case of a decree for partition. He has drawn my attention to a decision of the Madras High Court reported in ILR 1884 Mad 16-wherein it was held that only Court, fees applicable in Court proceedings and not the stamp duty under Stamp Act. He has relied on a decision of this Court reported In (1908) 12 CWN 59. and another decision of Allahabad High Court reported in [Ram Saran Lal and Another Vs. Emperor,](#) , on the point that the Stamp Act is not applicable in this case.

19. Having heard the respective contention of the learned counsel in this case it appears to me the following questions are involved for decision.

(i) Whether this Court could entertain the instant application even after drawing up and completion of the order sought to be challenged.

(ii) Whether the relief claimed in the instant application is barred by limitation.

(iii) Whether the allegations and averments made in the petition constitute fraud.

(iv) Whether provision of Indian Registration Act and Stamp Act are applicable to the impugned order and terms of settlement.

20. In the affidavit in opposition as pointed out by Mr. Kar, It has been specifically stated the impugned order has been drawn up, completed and filed on 26th February 1998 and it is also apparent from the document which is annexed by the petitioner.

21. Mr. Kar relied on a judgment on this question reported in (1971) 75 CWN 416. In my view proposition laid down by the aforesaid judgment is not absolute. By the subsequent decision of Division Bench of this Court reported in [S.C. Sons \(P\) Ltd. Vs. Sm. Brahma Devi Sharma and Others,](#) it has been held amongst others that even after the order or decree being drawn up, completed, perfected and filed the Court

in certain circumstances retains jurisdiction to entertain this kind of application.

22. It has been held further by the said Judgment of this Court that the provision of the Original Side Rules cannot override the provision of the substantive law namely the provision of Section 5 of the Limitation Act. If a litigant is prevented by sufficient cause from making any application for recalling and setting aside of an ex parte order even after the same being drawn up, completed and perfected at the instance of adversary before expiry of the prescribed period of limitation for making application in ordinary course, then the aforesaid principle of law laid down earlier cannot take away substantive right of the litigants.

23. Therefore, on that ground this application cannot be dismissed without making further enquiry on factual and other aspect.

24. In this case it has been pleaded in the petition that the petitioner could not discover fraud until 1999 and this application has been made within one year from the date of discovery of the alleged fraud. Taking face value of the averment of the petition, judgment reported in (1971) 75 CWN 416, cited by Mr. Kar cannot be relied on in view of subsequent Division Bench decision of this Court as quoted above.

25. As far as the question of limitation is concerned it depends upon the findings of this Court as to whether the allegations in the petition can be considered to be of fraud or for that matter whether the fraud could have been discovered earlier than the time mentioned in the petition with reasonable diligence or not. Obviously the onus lies upon the petitioner to establish that it could not be. If the petitioner is unable to establish then certainly this matter will be barred by limitation.

26. On close scrutiny of the averment and statement made in the petition it appears to me that it is not the question of fraud, at the highest the case of undue influence or coercion having been made out. In paragraph 16 of the petition it has been alleged that the plaintiff with some of his associates pushed the petitioner in the office room and compelled him to sign an agreement alleged to be terms of settlement by use of force or coercion without giving any opportunity to understand the contents of the several documents.

27. In my view these allegations are wholly afterthought as the petitioner was neither a minor nor infirm. He was all along being represented by the learned Lawyers. It appears to me that the petitioner is an English knowing person as he has signed the instant petition in English. Moreover, there is no contemporaneous complaint to any person not to speak of to Police authority regarding such alleged threat, coercion or intimidation. Significantly, as rightly contended by Mr. Kar that the petitioner has acted upon by writing letters to the tenant in occupation, accepting the consideration money without expressing any intention to refund the same at any point of time not to speak of refunding the same. He has not only signed the draft terms of settlement but the finally engrossed document also and subsequently he executed and registered conveyance. Had it been a genuine and



valid case of threat, coercion and undue influence. he would have come to Court, as nobody prevented the petitioner from coming to the Court on any subsequent date and to submit his story.

28. On the date of filing of the terms of settlement he could have very well come to the Court and tell the learned Judge that signature had been obtained by threat and coercion. Rather his subsequent act and conduct amounts to acceptance of such transaction as being valid and lawful one. His plea of ignorance of real price of property is also unbelievable. Moreover under Explanation (2) of Section 25 of Contract Act inadequate consideration is not factor to hold the transaction being void in absence of other factors. Therefore, I hold that the petitioner has failed to establish any case of fraud or for that matter threat, coercion and undue influence. It is true by act and conduct of the parties legal provision cannot be defeated as rightly contended by Mr. Bachawat, but that does not mean that the litigant will approach Court to complain at any time whenever he likes. The litigant has to come to Court within the time prescribed by law. Naturally the petitioner cannot get any advantage of either Section 17 or any other Articles of the Limitation Act, 1963 to maintain this application since he has come after seven years. Accordingly, I hold there is no fraud, as such the application is barred by limitation.

29. Since the matter has been argued in all respects I think it ill, without parting with the matter here, to examine and consider the argument on legal aspect. It is submitted by Mr. Bachawat that the terms of settlement as well as the impugned order are hit by .the provisions of the Indian Stamp Act and Indian Registration Act. Both the sides have cited several decisions on this point. Before I go into the details as to the point of law on this subject as laid down by the decisions of Supreme Court and several High Courts It will not be inappropriate to examine the nature of the order passed accepting of the terms of settlement. Accordingly the order dated 11th October is set out hereunder.

"The Court: By consent of the parties the suit is treated as days list. There will be a decree in terms of the terms of settlement filed in Court today. Let the decree be drawn up expeditiously....."

30. It will appear from the order dated October 1993 that the Court did not pass any separate decree, the contents of the terms of settlement were made the basis of the decree only. Therefore, the relevant and salient clauses of the terms of settlement are required to be reproduced.

"2. It is decreed that as on date the plaintiff has 15/16th share or interest in premises No. 17, Loudon Street, Calcutta and the defendant has I/ 16th share in the said premises.

3. The defendant will sell his I/16th share in premises No. 17, Loudon Street, Calcutta to the plaintiff and/or his nominee or nominees at or for a sum of Rs. 1,90,000/- (Rupees one lac ninety thousand only).

4. Within a week from date hereof the defendant shall sign, execute and register necessary conveyance in favour of the plaintiff and/or his nominee or nominees in respect of 1/16th share in premises No. 17, Loudon Street, Calcutta on payment of the said sum of Rs, 1,90,000/- (Rupees one lac ninety thousand only).

5. That simultaneously with signing of these terms the said Sri Manabendra Banerjee the defendant above, shall deliver peaceful and vacant possession of the portion occupied by him in the said premises No. 17: Loudon Street, Calcutta-700 017 except the portion occupied by M/s. P. Sen and Co. to and in favour of the said Sri Raj Kumar Rawia or to his nominee or representatives without claiming any monies whatsoever.

13. In case of any failure, neglect or refusal on the part of the defendant to sign, execute and register the necessary conveyance for sale and transfer of his said 1/16th undivided share or interest in the said premises No. 17, Loudon Street, Calcutta-700 017, the plaintiff shall be entitled to execute the decree to be passed in terms of this settlement, by applying for registration of the said conveyance in respect of the said 1/16th share in the said premises by the Registrar, High Court. Original Side."

31. Effect of the decree coupled with terms of settlement appear to be that there was a declaration of shares of the parties in partition suit and recording of an agreement for sale of undivided share and interest of one party in favour of another. In essence a decree for specific performance of an agreement for sale of an undivided interest. By this decree and terms of settlement no transfer of interest of any immovable property is effected. It appears that further step is to be taken following the decree for effecting transfer of Interest. In other words there is no present demise of the proprietary interest of Manabendra in favour of Rajkumar.

32. The submission of Mr. Bachawat is that the same is not stamped as per the provision of Indian Stamp Act and therefore aforesaid decree and terms of settlement are inadmissible in evidence for any purpose is unacceptable in this case. The provision of Indian Stamp Act will be applicable as rightly submitted by Mr. Kar only in case where it is shown that the decree is for partition and stamp duty is payable as on date of partition. It is not a case of partition rather declaration of pre-existing shares of the parties. There is no scope for partition in this case. One of the co-sharers has already agreed to sell his share so concept of co-ownership is absolutely missing. If the declaration of shares in terms of the terms of settlement is treated to be a preliminary decree here then such decree is not required to be registered, nor to be stamped. The stamping under the Stamp Act is required only when the partition by the instrument as defined in Section 2(15) of this Act, is effected, meaning thereby physical demarcation and/or allotment of the respective shares of the parties. Yes had it been a case of sale of the entire property in favour of third party followed by division and distribution of sale proceeds amongst the parties the stamp duties were payable treating them to be instrument and

instrument of partition as defined in Sections 2(14) and 2(15) of this Act as per provision of Section 3. The provision thereof is set out hereunder.

"Subject to the provisions of this Act and the exemptions contained in Schedule 1. the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefore respectively, that is to say-

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed In India on or after the first day of July, 1899;

(b) every bill of exchange payable otherwise than on demand. \* \* \* or promissory note drawn or made out of India on or after that day and accepted or paid, or presented for acceptance or payment, or endorsed, transferred or otherwise negotiated, in India; and

(c) every instrument (other than a bill of exchange \* \* \* or promissory note) mentioned in that Schedule, which, not having been previously executed by any person, is executed out of India on or after that day, relates to any property situate, or to any matter or thing done or to be done, in India and is received In India:

Provided that no duty shall be chargeable in respect of-

(1) any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;

(2) any instrument for the sale, transfer or other disposition, either absolutely or by way of mortgage or otherwise, of any ship or vessel, or any part. interest, share or property of or in any ship or vessel registered under the Merchant Shipping Act. 1894, or under Act 19 of 1838, or the Indian Registration of Ships Act. 1841 as amended by subsequent Acts."

33. In my opinion neither the consent decree nor the terms of settlement comes within the purview of the chargeability of Stamp Act, In two old decisions of Allahabad High Court and Madras High Court, reported in ILR 40 All 19: (AIR 1919 All 307) and ILR 1884 Mad 16 cited by Mr. Kar, it is held that the petition of compromise do not require any stamp duly under Stamp Act. only Court-fees.

34. Similarly provisions of Indian Registration Act, 1949 has no manner of application in this case as I have already observed neither the consent decree nor the terms of settlement can be treated to be a conveyance as presently there is no transfer of interest by the aforesaid two documents. The decree provides for an agreement for sale of I/16th undivided share followed by execution and registration of conveyance within certain time, in default thereof the plaintiff has been given liberty to apply for execution. Therefore, execution and registration of conveyance were made by making payment of necessary stamp duty. as it was required to be done under the Indian Registration Act.

35. The decision cited by Mr. Bachawat, of the Supreme Court, reported In [Ruby Sales and Services \(P\) Ltd. and Another Vs. State of Maharashtra and Others](#), is absolutely inapplicable in this case. In that case factually the Supreme Court found the terms of the consent decree was an instrument under which title has been passed to the parties. It was live document of transferring the property in dispute from the defendants to the plaintiffs. In this factual background the aforesaid decision was rendered.

36. Similar was the case in case of [Bhoop Singh Vs. Ram Singh Major and others](#), . In that case the compromise decree purported to create right, title and Interest for the plaintiff for the first time and it was" not case of declaration of pre-existing right. Since it was a document creating interest in immovable property, the provision of Section 17(2)(vi) of the Registration Act was made applicable. Rather this Supreme Court judgment helps the case of the plaintiff as it has been observed in paragraph 16 that the exception under clause (vi) of Section 17(2) Is meant to cover that decree or order of a Court expressed to be made on a compromise. which declares the pre-existing right and does not by itself create new right, title or interest in praesenti in immovable property of the value of Rs. 100 or upwards. In this case I have examined and found the two documents do not create new right, title or interest in praesenti in immovable property rather the same declared the pre-existing right of the parties in the property. The judgment of the Madras High Court cited by Mr. Bachawat reported in [Pandivi Satyanandam and Others Vs. Paramkusam Nammayya and Another](#), has no manner of application as the decree in this case in substance, though a final one. is not a decree for partition as by the decree itself the petitioner/defendant has agreed to sell his share, in other words the defendant merely agreed to create interest of the plaintiff by relinquishing his interest of I/16th shares in the said property. Therefore, question of engrossing on a proper non-Judicial stamp paper did not and could not arise.

37. For the aforesaid mentioned reasons. the Judgment of this Court, reported in [Bholanath Karmakar and Others Vs. Madanmohan Karmakar and Others](#), . and the Lahore High Court, reported in AIR 1932 Lahore 249, an unreported decision of the learned single Judge of this Court rendered In C. S. No. 116 of 1999, and an old decision of this Court, reported in ILR 1905 Cal 483 have no manner of application in this case. Those cases are totally misplaced on the facts and circumstances of this case.

38. It appears from the judgment of the Privy Council reported in (1919) 46 Ind App 240 : (AIR 1919 PC 79), as approved by the Hon'ble Supreme Court in [V.B. Dharmyat \(Deceased\) through Lrs. Vs. Shree Jagadguru Tontadrya and Others](#), cited by Mr. Kar the proposition of law in this context has been settled unless it is a transfer in praesenti, a decree does not require registration under the provision of Section 17 of the Indian Registration Act. Similar view was taken by Division Bench of this Court in a case. reported in [Surjya Kumar Das Vs. Sm. Maya Dutta](#), . It has been held by

another decision of the Supreme Court, reported in [Mrs. Tehmi P. Sidhwa and Others Vs. Shib Banerjee and Sons Pvt. Ltd. and Another](#), that in case of an award, if by future document transfer of ownership is to be made in that event decree by which right has been created for a future document does not require registration.

39. In an old decision of the Calcutta High Court, reported in (1908) 12 CWN 59 the Division Bench has held amongst others that whether agreement contained in solemnname should be stamped or not under the Stamp Act the Court held the terms of settlement is similar recording of the solemnname agreement which has been entered into by the parties obviously reflected in the terms of settlement and as such it is not an agreement for sale and no stamp duty is payable under the Stamp Act.

40. As such 1 hold that the application of the petitioner is bound to fail in all respect and the same is dismissed accordingly. The defendant is also directed to pay cost of this application assessed at 200 G. Ms. to the plaintiff.