

ALLAHABAD HIGH COURT

Sidhnath Mehrotra

Vs.

Board of Revenue

Civil Misc. Reference No. 213 of 1955

(O.H. Mootham, C.J. and Raghubar Dayal and A.P. Srivastava, JJ.)

20.03.1959

JUDGMENT

A.P. Srivastava, J.

1. This is a reference by the Board of Revenue under Section 57 of the Indian Stamp Act, 1899.

2. Several persons, who were carrying on business in the name of Messrs. Munna Lall and Sons, were lessees of a plot of land situated in Qasimganj, Kanpur. On a portion of that plot they had constructed an oil mill known as Sri Govind Oil Mills. In another portion they had an ice and cold storage factory in respect of which they had taken two persons Sri Shyam Sunder Gupta and Sri Satya Prakasli Gupta as their partners. The entire land as well as the constructions standing upon it were equitably mortgaged with the Chartered Bank of India, Australia and China in the year 1938.

By the year 1952 a sum of over Rs. 10,00,000/- was due to the bank in respect of the mortgage. When the bank started insisting on the repayment of its dues the mortgagors decided to sell all their rights in the Sri Govind Oil Mills as well as in the Kanpur Ice and Cold Storage Factory in favor of Messrs. Oil Corporation of India Limited. It will be convenient to refer to the mortgagors hereafter as vendors and the Oil Corporation of India Limited as vendees. The two initial obstacles to the sale were the mortgage for over Rs. 10,00,000/- which stood in favor of the Chartered Bank and the fact that Messrs. Shyam Sunder Gupta and Satya Prakash Gupta were partners in the business of the Kanpur Ice and Cold Storage Factory. Messrs. Shyam Sunder Gupta and Satya Prakash Gupta, however, agreed to consent to the sale of the Ice and Cold Storage Factory provided a sum of Rs. 60,000/- was paid to them. The bank also agreed to release the property from the charge it held over it provided a sum of Rs. 5,00,000/- was paid to it. The arrangement which was ultimately arrived at between the vendors and the vendees therefore was that the properties mentioned below should be sold to the vendees for the consideration mentioned against each of them.

(1) The plant machinery and goodwill of the Kanpur Ice and Cold Storage ... Factory	Rs. 1,12,000/- .
(2) Machinery of Sri Govind Oil Mills.	... Rs. 3,00,000/- .
(3) Stores of Sri Govind Oil Mills.	... Rs. 25,000/-
(4) Goodwill of Sri Govind Oil Mills.	... Rs. 18,000/-
(5) The vendors' rights in the buildings standing over the plot and as lessees in ... the land	Rs. 1,00,000/- .
	Rs. 5,55,000/-

Out of the amount that was to be paid by the vendees Rs. 68,000/- were to be paid to Messrs. Shyam Sunder Gupta and Satya Prakash Gupta and Rs. 4,89,000/- were to be paid to the Chartered Bank of India, Australia and China. As the bank had agreed to release the property from its charge only on payment of Rs. 5,00,000/- the vendors themselves undertook to pay the balance of Rs. 11,000/- to it. In pursuance of this contract the vendees paid to the bank a sum of Rs. 3,89,000/- and agreed to pay Rs. 66,000/- to Messrs. Shyam Sunder Gupta and Satya Prakash Gupta for which they furnished to the said persons a guarantee of the Bank of Bikaner Limited. A sale deed of the immovable property, viz. the rights of the vendors in the buildings and the land, was thereafter executed on the 15th of December 1952 by the vendors in favor of the vendees for an ostensible consideration of Rs. 1,00,000/- and a stamp duty of Rs. 4,400/- was paid in respect of it. When the deed was presented before the Sub-Registrar of Kanpur he held it to be insufficiently stamped and impounded it. He was of opinion that as the property which had been sold was subject to a remembrance in favor of the bank in respect of Rs. 10,00,000/- under Section 24 of the Indian Stamp Act, a duty of Rs. 24,000/- was payable on the sale deed. He also pointed out that under Section 107 (1) of the Cawnpore Urban Area Development Act, 1945, a further duty of Rs. 20,000/- was payable in respect of the deed. He sent the document to the Collector of Kanpur for necessary action. The Collector was of the view that the real consideration of the sale was Rs. 5,55,000/- and stamp duty was payable on that amount only. It came on calculation to Rs. 13,320/-. In regard to the duty payable under the Cawnpore Urban Area Development Act the Collector was of opinion that it was payable only on Rs. 1,00,000/- the value of the immovable property which was being transferred. He was, however, not sure about the correctness of his view and referred the whole case to the Board of Revenue under Section 56 (2) of the Stamp Act for decision. The Board at first accepted the view taken by the Collector that a sum of Rs. 13,320/- was payable as stamp duty but subsequently it was requested to revise its orders or to refer the case to this Court. The Board has therefore referred the following points for the decision of this Court;

1. Whether the documents is a sale deed for a consideration of Rs. 1,00,000/- as contended by the executants.
2. Whether in view of the provisions of Section 24 of the Stamp Act, the sale consideration shall be deemed to be Rs. 5,55,000/- and duty liable to be paid thereon as

held by the Board,

3. Whether the consideration of the sale will be deemed to be Rs. Ten Lakhs, i.e. the entire amount due to the mortgagee Bank, and duty is payable thereon.

4. On what amount is the additional stamp duty under Section 107 of the Cawnpore Development Act, 1945, livable.

3. The first three questions are inter-related and have therefore to be considered together. A copy of the sale deed in respect of which the stamp duty has to be assessed has been appended by the Board of Revenue to its order of reference and a perusal of it shows that after reciting in its preliminary clauses the facts which have already been narrated by us the terms and conditions of the sale were set forth in seven clauses. The first clause contains the details of the property which was being transferred and also mentions the consideration for which the sale was being made. The second clause declares that the property was being sold free from all encumbrances except the charge in favor of the bank which was to be paid off in the manner indicated in the preliminary clauses. The third clause contains an assurance about the vendors' title and right to transfer and the fourth contains the covenant of quiet enjoyment. The fifth clause relates to the apportionment of liability for taxes and lease rent. In the sixth clause the vendors undertake to have the mutation effected in favor of the vendees and in the seventh they guarantee the reimbursement of any loss which the vendees suffer on account of defective title or the discovery of any other encumbrance. At the end there is a description of the properties which were being conveyed.

4. It is thus clear that though in the preliminary clauses there is a recital in respect of the other properties which had also been transferred in connection with the same transaction, e.g. machinery, stores and goodwill the deed was being executed only to effect the transfer of the immovable properties described therein. In fact, a registered sale deed was required only in respect of the immovable property that was being conveyed. The other properties could be transferred even without a deed. In the first term of the deed, therefore, the vendors described in detail what they purported to "sell, transfer and assign" to the vendees and at the end of the deed they describe the properties "hereby conveyed taken as a whole".

5. What is stated in the preliminary clause No. 16 and the beginning of the first term of the deed also shows that the consideration of the immovable property which was being conveyed through the sale deed was Rs. 1,00,000/- only. The balance of Rs. 4,55,000/- which the vendees had undertaken to pay represented the consideration of the other properties which had already been transferred. The view which the Collector and the Board of Revenue appear to have taken that the entire sum of Rs. 5,55,000/- should be held to be the consideration of this sale deed alone appears to be manifestly incorrect because in that case the machinery, stores and goodwill of Sri Govind Oil Mills as well as the Kanpur Ice and Cold Storage Factory must be held to have been transferred gratis. That does not appear to have been the intention of the parties. As has been mentioned in the deed at more places than one it had been expressly agreed between the parties

that the consideration which would be paid for the immovable properties in respect of which the sale deed was being executed would be Rs. 1,00,000/- alone.

6. It was, however, urged that even if it be conceded that the consideration of the sale deed was Rs. 1,00,000/- only the immovable properties for which that consideration was being paid was admittedly subject to an encumbrance amounting to Rs. 10,00,000/-. In view of the provisions of Section 24 of the Stamp Act and particularly the Explanation appended to it therefore the amount of the encumbrance must be taken into account for correctly assessing the stamp duty payable in respect of the document.

Three alternative suggestions were put forward in this connection :

(1) The property sold being encumbered to the extent of Rs. 10,00,000/- duty should be payable ad valorem on that amount.

(2) If it be said that the bank in whose favor the encumbrance stood had agreed to release the property from all charges on payment of Rs. 5,00,000/- only duty should be payable at least on the sum of Rs. 5,00,000/-.

(3) In any case the sum of Rs. 11,000/- which would remain payable on account of the encumbrance and for which the vendors had undertaken the liability must be added to the ostensible consideration of Rs. 1,00,000/- for determining on what amount the stamp duty in respect of the sale deed was to be paid.

7. The portion of Section 24 of the Indian Stamp Act which is material for our present purposes reads as follows :-

"Where any property is transferred to any personsubject either certainly or contingently to the paymentof any money ... whether being or constituting a charge or incumbrance upon the property or not, suchmoney or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transfer is chargeable with ad valorem duty.

Explanation :- In the case of a sale of property subject in a mortgage or other incumbrance, any unpaid mortgage-money or money charged, together with the interest (if any) due on the same, shall be deemed to be part of the consideration for the sale."

8. It has been urged by the learned Junior Standing Counsel, who appeared on behalf of the Board of Revenue in the present reference, that the property which had been transferred through the deed in question was admittedly subject to an encumbrance of Rs. 10,00,000/-. The sale in favor of the vendees was subject to that encumbrance. Under the main provision of Section 24 therefore the amount of such an encumbrance is to be deemed to be the whole or a part of the consideration chargeable with ad valorem duty. He urged that the Explanation added to the section made the position quite clear.

9. The learned counsel for the vendors, however, pointed out that the main section did not apply

to the present case at all because the sale in the present case had not been made subject to any encumbrance. The property had been sold free from all encumbrances. He urged that the Explanation could not enlarge the scope of the main section and that the Explanation too could apply only if the sale was made subject to a mortgage or other encumbrance. In any case, he pointed out, under the Explanation only the unpaid part of the encumbrance could be deemed to be a part of the consideration of the sale. In the present case the bank had agreed to limit the amount of its encumbrance on the property in question to Rs. 5,00,000/-. Out of that amount Rs. 3,89,000/- had been paid before the sale deed was executed. The sum of Rupees 1,00,000/- which was the consideration of the sale deed was to go to the satisfaction of the encumbrance and as the property was being sold free from encumbrances the liability for the payment of the balance of Rs. 11,000/- had been taken by the vendors. The vendees were therefore going to get the properties free from all charges. That being so, there was no unpaid part of the mortgage-money which could be deemed to be a part of the consideration of the sale.

10. The first question that therefore arises is whether Section 24 as well as its Explanation apply to all cases where the property transferred is subject to an encumbrance or charge or whether they were intended to apply only to those cases in which the transfer is made subject to the charge. In other words, whether the clause in the main section "subject either certainly or contingently to the payment or transfer of any money or stock whether being or constituting a charge or incumbrance upon the property or not" is meant to apply to the word "property" or to the word "transferred" used at the beginning of the section.

11. Property which can be transferred may be encumbered or unencumbered. Cases of sale of unencumbered property do not present much difficulty so far as the question of stamp duty is concerned. The consideration in such cases is known and is specifically mentioned in the deed itself. For the purpose of liability to stamp duty encumbered property may be transferred either subject to the encumbrance or free from all encumbrances in the sense that the ultimate liability for the encumbrance shall not be of the transferee. If it is transferred subject to the encumbrance the transferee undertakes the liability of satisfying the encumbrance and if the encumbrance is his own its amount is set off towards, the price. A transfer free from all encumbrances may take one of three different forms. The transferor may undertake the liability of satisfying the encumbrance himself and assure the transferee that the latter will have no concern with it. A part of the consideration may be left with the transferee for satisfying the encumbrance and getting the property freed from it. It is also possible that no reference to the encumbrance may be made in the deed itself and the parties may be left to seek their rights and remedies in respect of it in the usual course.

To take a concrete instance, suppose a property is worth Rs. 10,000/- and is subject to an encumbrance of Rs. 4,000/- it may be sold for Rs. 10,000/- and the vendor may undertake to satisfy the encumbrance out of the amount he is receiving. The vendee in that case will have the property free from the charge and will have nothing to do with the encumbrance. The vendor may, however, take Rs. 6,000/- from the vendee and leave Rs. 4,000/- with him for satisfying the

encumbrance. In that case also the property will be sold free from encumbrance. The sale may, however, be made for Rs. 6,000/- without any mention of the encumbrance. In that case if the vendee wants to get the full rights in the property he will have to satisfy the encumbrance himself and if the encumbrance was concealed from him may ultimately hold the vendor liable for the amount.

12. The purpose of Section 24 appears to be to create a legal fiction so that at least for the purposes of stamp duty all transfers may stand on the same footing. If the property is sold free from the encumbrance the amount of the encumbrance is included in the price and duty is payable ad valorem on the price. If, however, the property is sold subject to the encumbrance the real price is the price paid plus the amount of the encumbrance. In such cases therefore Section 24 provides that the amount of encumbrance will have to be added to the price in order to fix the amount on which ad valorem duty will have to be paid. That being the purpose of the enactment, it becomes difficult to accept the contention that in all cases of transfer of encumbered properties even if the sale is made free from encumbrances the amount of the encumbrance should be added to the price paid for the purpose of stamp duty. If that is done, the duty payable in respect of the same property will be higher in case it is encumbered than it would be if it has no charge upon it. Thus in the case already mentioned, if the property is not encumbered duty will have to be paid on Rs. 10,000/- but if it is encumbered duty will have to be paid on Rs. 14,000/-. This in our opinion could not have been the intention of the Legislature. We are therefore unable to accept the contention that Section 24 or its Explanation applies to all cases where encumbered property is transferred whether transfer is made free from encumbrances or subject to them. We think it applies only in case where the property is sold free from encumbrances and the words "subject to...not" apply to the word "transferred" and not to the word "property" as used in the Section.

13. When the main section is applicable only to cases of transfers subject to an encumbrance the Explanation too can apply only to such cases. The Explanation could not enlarge the ambit of the section. It could only clarify its provision. The words "subject to a mortgage or other encumbrance" used in the Explanation therefore govern the words "sale of property" and not the word "property" itself.

14. There are observations in the decisions of the Bombay High Court in *Waman Martand Bhalerao v. The Commr., Central Division*¹. and of the Calcutta High Court in *U.K. Janardhan Rao v. Secy, of State for India*², which are in accord with the view we are taking.

15. Before Section 24 or its Explanation can therefore be applied to the transaction now before us it has to be seen whether the sale in the present case was made subject to the encumbrance in favor of the Chartered Bank or free from it. It is common ground that there was no other encumbrance on the property. If the sale was made free from the encumbrance the section or the Explanation will not apply at all. The amount of the encumbrance can be added to the price for

the purposes of stamp duty only if the sale was made subject to the encumbrance. This property along with some other properties was subject to a charge of the bank to the extent of Rs. 10,00,000/-.

The bank, however, agreed to limit the charge so far as this property was concerned to Rs. 5,00,000 only and was persuaded to release the property from the entire charge provided the sum of Rs. 5,00,000/- was paid to it. This is mentioned in the seventeenth preliminary clause of the sale deed. Arrangement was made for the payment of that amount to the bank because the vendees wanted to have the property free from the charge. A sum of Rs. 3,89,000/- was actually paid to the bank before the sale deed was executed and that part of the charge was therefore satisfied (vide preliminary clause No. 18) and only Rs. 1,11,000/- remained to be paid to the bank.

The arrangement for the payment of that amount was that the sum of Rs. 1,00,000/- which was the consideration of the sale in question was left with the vendee for payment to the bank (vide term No. 1 of the sale deed) and the vendors undertook to pay the balance of Rs. 11,000/- themselves (vide preliminary clause No. 17). It was

¹ ILR 49 Bom 73: AIR 1924 Bom 524

² ILR 58 Cal 33: AIR 1931 Cal 193 (FB)

therefore expressly stated in the second term of the sale deed that the property was being conveyed free from all encumbrances except the charge in favor of the bank for the satisfaction of which arrangement had already been made. There can, therefore, be no doubt that in the present case the property was being sold free from the only encumbrance that was there on it and not subject to it. That being so, if the consideration which was being paid was Rs. 1,00,000/- only (as has already been shown) stamp duty was payable on that amount only and the amount of the encumbrance whether it be considered to have been Rs. 10,00,000/- or Rs. 5,00,000/- only could not be added to the sum of Rs. 1,00,000/- for the purpose of calculating the stamp duty. That addition could be made only if the property was being subject to the encumbrance. It is in our opinion not possible for the State to take the aid of Section 24 or its Explanation to support the contention that the amount of the encumbrance should be treated as a part of the consideration of the sale.

16. It is, however, said that in any case even if it be conceded that out of the encumbrance of Rs. 5,00,000/-, Rs. 3,89,000/- had been paid prior to the sale deed and Rs. 1,00,000/- was being left with the vendees for payment to the bank the balance of Rs. 11,000/- remained and the property must therefore be held to have been sold subject to the encumbrance at least to the extent of Rs. 11,000/-. This sum of Rs. 11,000/- should therefore, it is contended, be added to Rs. 1,00,000/- and duty should be held to be payable on the total amount of Rs. 1,11,000/-. Reliance is placed in this connection on the Explanation of Section 24 and it is pointed out that Rs. 11,000/- was the unpaid money charge subject to which the sale was being, made.

17. It is true that till the date of sale the sum of Rs. 11,000/- had not been paid and there was a charge on the property in respect of that amount. The vendors themselves had, however, taken liability for that amount and had agreed to pay it. It had been expressly provided in the sale deed

that the property was being sold free from the charge. The vendees were in no way liable for the amount and had not undertaken to pay it. In these circumstances the property cannot be said to have been sold subject to the charge of Rs. 11,000/- and if it was not being sold subject to that charge the Explanation to Section 24 becomes inapplicable.

18. Sri Jagadish Swarup, learned counsel for the vendees, relied in this connection on the case of Warnan Martand Bhalerao, ILR 49 Bom 73 : AIR 1924 Bombay 524, (supra) and stressed that in that case it had been held that the Explanation could only cover cases where the purchaser had undertaken to pay the encumbrance. As the vendees in the present case had not given any such undertaking the Explanation to Section 24 did not apply to them. The interpretation put by the Bombay Court on the Explanation did not find favor with the Full Bench of the Calcutta High Court in the case of U.K. Janardhano Rao, ILR 58 Cal 33 : AIR 1931 Calcutta 193 (supra). The view taken there was that the Explanation, applied if the sale was made subject to the mortgage irrespective of the question whether the undertaking to satisfy the mortgage had been taken by the vendees or not. We do not feel called upon to resolve the conflict because whatever may be the correct interpretation of the Explanation it is obvious that it cannot apply if the sale is not made subject to the encumbrance but is made free from it. In the present case, in our view, the sale was not made subject to the encumbrance, the vendees were therefore not bound to pay stamp duty on the sum of Rs. 11,000/- in addition to the sum of Rs. 1,00,000/- on which the stamp duty was paid by them.

19. Our answer to the first three questions referred to us by the Board of Revenue therefore is that the document in question is a sale deed for a consideration of Rs. 1300,000/- only and that the stamp duty payable in respect of it was to be calculated on that amount and not on any higher amount.

20. Under Section 107 of the Cawnpore Urban Area Development Act, 1945 (Act No VI of 1945) the duty imposed by the Indian Stamp Act has to be increased in the present case by two per cent, of the value of the property transferred. In the present case the value of the property transferred being Rs. 1,00,000/- the increased duty payable was Rs. 2,000/- only. That is our answer to the fourth question referred to us.

21. The vendees are in our opinion entitled to the costs of this reference which we assess at Rs. 200/-.

Answer accordingly.