

BOMBAY HIGH COURT

Waman Martand Bhalerao

Vs

The Commissioner, Central

(Lallubhai Shah, Kt., C.J. Marten and Fawcett, JJ.)

04.07.1924

JUDGMENT

Lallubhai Shah, Ag. G.J.

1. This is a reference under Section 57 of the Indian Stamp Act. It relates to a sale-deed, dated February 9, 1923, executed by the vendors for a net consideration of Rs. 10,000.

2. The property sold was along with another property subject to a mortgage of Rs. 13,858-6-0 inclusive of interest at the date of the sale. The property was also subject to attachment, in respect whereof Rs. 1,500 were payable. The sale-deed makes it clear that the net consideration for the sale is Rs. 10,000. The liability for the mortgage charges and for the amount payable in respect of the attachment is accepted by the vendors under the terms of the document. The stamp duty actually paid is on Rs. 10,000. The Collector demanded the duty on that amount as well as the amount of the encumbrances. At the instance of the purchaser this reference has been made; and the question submitted for our opinion is whether in this case, in which the vendee is absolved from responsibility for removal of the encumbrances on the property, stamp duty is to be charged on the encumbrances as well as the amount paid by the vendee. I am of opinion that in such a case the duty is payable only on the amount paid by the vendee and not on the encumbrances.

3. At the outset I may mention that the learned Government Pleader has rightly conceded that in no case can duty be demanded on the amount payable in respect of the attachment as it does not constitute a charge on the property.

4. As regards the other amount of Rs. 13,858-6-0 inclusive of interest, his argument is that so far as the mortgagee is concerned the charge is not extinguished, and that therefore the property sold is subject to the charge at the time of the sale within the meaning of the explanation to Section 24 of the Indian Stamp Act whatever the contract between the vendors and purchaser may be with reference to it. He also relies upon illustration (2) as supporting that construction.

5. After a careful consideration of the arguments and the provisions of Section 24 I have come to the conclusion that it is essential for the application of the explanation that the sale must be subject to the charge either in terms or by implication as between the vendor and the purchaser. The section provides that "where any property is transferred to any person in consideration wholly or in part, of any debt due to him...or subject to the payment...of any money...being a charge upon the property...such debt or money is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the transferee is chargeable with ad valorem duty." If there was nothing more in the section, it is clear that the charge in this case could not be held to be part of the consideration for which the duty would be chargeable, for the simple reason that the transfer--as between the vendor and the purchaser--is not subject to the payment of the charge. The explanation provides that "in the case of a sale of property subject to a mortgage or other encumbrance, 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 sale." In my opinion this does not alter the meaning of the section so far as the present point is concerned. The clause "subject to a mortgage or other encumbrance" in the explanation, in my opinion, governs 'sale of property,' and not 'property.' The sale of property subject to a mortgage necessarily involves that the property is subject to a mortgage: but though the property may be subject to a charge, the sale may not be necessarily subject to it. That can form the subject-matter of an express contract to the contrary between the vendor and the purchaser: and I see nothing either in the purpose or the scheme of the section to justify the inference that the legislature meant to negative the possibility of such an express contract for the purpose of the Indian Stamp Act.

6. The proviso to the explanation does not appear to me to throw any light on this point or to suggest any inference to the contrary. In the case of a transfer to the mortgagee, the property is undoubtedly subject to the mortgage and the exemption as to the duty paid on the mortgage in his favour is allowed as it would be justly due to him whatever the form of the conveyance--whether it be merely a sale of the equity of redemption or a sale of the property for the full value of which the mortgage amount necessarily forms a part.

7. The language of illustration (2) is no doubt applicable to a case where the property is subject to a charge, and the sale is apparently silent as to the charge. It is a typical case of its kind. But I am unable to accept the view that, because the illustration refers to a case where the property is subject to a charge, there could be no case of a sale (free from the charge) of property which is subject to a charge at the date of the sale. The illustration is intended to illustrate the meaning of the explanation--but cannot be used to control or restrict the meaning of the clause intended to be illustrated. It seems to me obviously unjust that where a purchaser pays the full value of the property free from the incumbrance, he should be required to pay duty on that value plus the amount of the incumbrance, for which ex hypothesis according to the contract the property in his

hands is not intended to be rendered liable and for which personally he is not liable to the vendor or to the mortgagee. I am by no means satisfied that the language used by the legislature in the main section and the explanation compels such an inference.

8. The learned Government Pleader has not been able to cite any authority in support of his contention: and, so far as I have been able to look into the cases bearing on Section 24 as it stood in the Act of 1879 and the history of this section, I have not found anything to support the construction which has been contended for on behalf of the Crown and it is a construction which, so far as the language can permit, should be avoided. It is hardly necessary to add that the enactment is subject to the rule of strict construction, and, even if the language of the explanation be taken to be susceptible of the construction which the learned Government Pleader asks us to put upon it, it is no less susceptible of the construction I put upon it, and in such a case the construction more favourable to the subject should be preferred. See the observations of *Pollock B. in Clifford v. Commissioner of Inland Revenue*¹ While the conflict indicated by the decisions under Section 24 of the Act of 1879 of which *Sha Nagindas Jeychand v. Halalkore Nathwa Gheesa*² and Reference from the Board of Revenue (1883) I.L.R. 10 Cal. 92 may be mentioned as types, is set at rest by Section 24, as enacted in the Act of 1899, there is nothing to show that in a case of this kind where the vendor charges the full price of the property conveyed and absolves the purchaser from the incumbrances, it can be said that the legislature has provided that the sale should be treated as being subject to a mortgage or that the consideration for the conveyance must include the amount of the incumbrance contrary to the express agreement.

9. I may point out that the Commissioner, who has referred the matter to us, has not expressed any opinion on this question which he is expected to do under Section 57 of the Indian Stamp Act.

Marten, J.

10. In the present case the suit property was subject to a mortgage existing on it and other property at the date of the conveyance in question. The difficulty before us is mainly caused by the extraordinary conveyancing, which could hardly have been in the contemplation of the framers either of Section 24 of the Indian Stamp Act, 1899, or of Section 57 of the English Stamp Act 1891, from which, or from the corresponding earlier English Statutes, it is largely taken. Instead of joining the mortgagee in the conveyance and paying the whole or an agreed portion of the purchase money to the mortgagee, which would be the natural and normal course to take, the purchaser here has been content to pay or give credit for the whole of the purchase money to the mortgagor or his simple contract creditors, and to rely merely on the personal covenant of the mortgagor to pay off the mortgage and to keep the purchaser indemnified therefrom. The result is that in one sense the purchased property is still subject to the mortgage,

for the conveyance in question will in no way prevent the mortgagee from enforcing his mortgage against the suit property, though possibly under the doctrine of marshalling or otherwise the purchaser may have some remedy against the other land comprised in this mortgage, as to which I give no opinion.

11. On the other hand there will be no equity in the vendor enabling him to compel the purchaser to pay off this mortgage, for the vendor has expressly agreed to pay it himself. *Thus in Mills v. United Counties Bank, Limited*³ Lord Cozens-Hardy, Master of the Rolls, says (p. 236):--The claim is based on this ground. It is said that according to the settled law of the Court a purchaser of an equity of redemption is bound under an implied obligation, or, as it is sometimes put, an obligation of conscience, to indemnify the vendor against the liability on the mortgage debt; and in an ordinary case that is, I think, obviously according to justice and common sense. If a property is worth 10,000l. and is subject to a mortgage of 5000l. and the purchaser only pays the vendor 5000l. and gets the property, it would be almost shocking to say that in that case the vendor would be liable on the covenant to pay the full sum of 5000l. to the first mortgagee and that the purchaser was under no obligation to indemnify him. But that is a principle of law which must of course bend to the circumstances of the particular case. It is an implication and not an express obligation, and when you have to deal with an implication you must, of course, have regard to all the circumstances of the case and to all the relations between the parties as expressed in the purchase-deed; and if you find in the purchase deed something to satisfy you that it was not the real intention of the parties that the purchaser should take upon himself the liability to indemnify the vendor against the mortgage, there is nothing that binds the Court to adopt the ordinary rule.

12. Then Lord Justice Farwell says (p. 243):--Generally speaking, when A. sells and B. buys an equity of redemption i.e., in other words property subject to a charge, it is against conscience and honesty for B. to set up that he has bought the property free from the charge at A. 's expense; but this has no application to a case like the present where the deed contains dealings of a complicated nature relating to several shares and interests in a fund which is in itself contingent and reversionary, and express provision as to indemnity.

13. But is the suit property "subject to a mortgage" within the meaning of the explanation to Section 24? I think not. This explanation must be read along with the main portion of Section 24 which refers in my opinion to the consideration payable to or moving towards the vendor, and not to that payable by or moving from him. That is borne out also by Article 23 in the first schedule, which refers to the definition of conveyance in Section 2(10), and then to "the amount...of the consideration for such conveyance as set forth therein." I think, therefore, that the explanation on its true construction must be confined to cases where, as part of the consideration

which the vendor gets for his transfer, he is to be relieved expressly or impliedly from the burden of a mortgage as between himself and the purchaser. But that is not the case here, as the vendor is to pay the mortgage debt, and not the purchaser.

14. Nor do I see that the proviso to the explanation causes any difficulty. It refers to a transfer of the equity of redemption to the mortgagee. In such a case the vendor gets as consideration (a) the purchase price and (b) the release of the mortgage debt due by him. So, but for the proviso, duty would be payable on both sums, just as it would be if the transfer was to a stranger instead of to the mortgagee. The proviso only operates then as a concession to the mortgagee, viz., that he is entitled to deduct from the duty otherwise payable, the duty paid on the mortgage itself.

15. Then as regards illustration (2), I think it is sufficient to say that it aptly illustrates the normal case which the framers of Section 24 had in mind, and should not be strained to meet the present exceptional case.

16. Further, on the facts before us, I must take it that Rs 10,000 represents the full market value of the land free from incumbrances, and that the large amount of the mortgage debt is due to the fact that it is charged on other property besides the suit property. That being so, the real consideration is Rs. 10,000, and not Rs. 10,000 plus an obligation on the purchaser, express or implied, to pay the mortgage debt, which is the normal transaction aimed at by Section 24.

17. Accordingly Government are being paid stamp duty on this consideration of Rs. 10,000 just the same as if there was no mortgage, and the sale was of an ordinary unincumbered estate. The principle underlying Section 24 is, I think, that it is immaterial whether a purchaser pays Rs. 10,000 to his vendor direct, if there is no mortgage, or else pays say Rs. 4,000 to the vendor and Rs. 6,000 to the vendor's mortgagee, or alternatively pays Rs. 4,000 to the vendor and assumes an obligation, express or implied, to pay off the vendor's mortgage for Rs. 6,000. In each case the real consideration which the vendor received is substantially the same.

18. Accordingly in the present case I think the full consideration is Rs. 10,000, and that duty under Section 24 is only payable on that sum. But I wish to emphasize that it is not suggested that the land is worth more than Rs. 10,000, nor is any claim for duty advanced under any other section than Section 24.

19. I, therefore, agree that the conveyance in question is properly stamped, and that the reference should be answered accordingly.

Fawcett, J.

20. I concur. The explanation and illustration (2) to Section 24 of the Indian Stamp Act have

been rather loosely drafted. But I am satisfied that the intention is that the Explanation should only cover cases where the purchaser undertakes to pay the mortgage-debt.

Cases Referred.

1[1896] 2 Q.B. 187, 193

2(1881) I.L.R. 5 Bom. 470

3[1912] 1 Ch. 231