

mortgage. The onus is upon the party alleging such knowledge or notice to aver the same in his pleadings and to prove it. This the plaintiff did not do. He made no allegation in his plaint, nor at the settlement of issues, that the fourth defendant had notice of the plaintiff's mortgage and it cannot be properly presumed that fourth defendant had such notice from the fact of his not having denied in his written statement what was not alleged by the plaintiff.

We must set aside the decrees of both the Courts below with costs throughout. With the consent of the parties before us the property will be sold free from both plaintiff's and fourth defendant's mortgages and the net proceeds will be applied first towards discharge of fourth defendant's mortgage debt and the costs of the present litigation, and the balance, if any, will be applied to the discharge of the plaintiff's mortgage debt, and the surplus, if any, will be paid to defendants Nos. 1 to 3.

CHINNAPPA
REDDI
v.
MANICKA-
VASAGAM
CHETTI.

APPELLATE CIVIL.

*Before Mr. Justice Davies, Mr. Justice Bhashyam Ayyangar,
and Mr. Justice Moore.*

REFERENCE UNDER STAMP ACT, SECTION 57.*

1901.
August 9.

Stamp Act—Act II of 1899, s. 5, sched. I, art. 31—Lease for three years containing covenant by lessor to renew at option of lessee for further term of one or two years from expiration of original term—Stamp duty—Not an instrument comprising or relating to several distinct matters.

A lease for three years at a specified rent containing a covenant on the part of the lessor to renew it, at the option of the lessee, for a further period of one or two years from the expiration of the original term, is not an instrument comprising or relating to several distinct matters within the meaning of section 5 of the Stamp Act, 1899. Such an instrument contains but one contract, namely, a demise. The option to renew is ancillary to and forms part of the consideration for entering into the lease.

CASE referred under section 57 of the Stamp Act for the opinion of the High Court as to the stamp duty chargeable on a lease.

* Referred Case No. 9 of 1901, stated under section 57 of the Stamp Act, by R. A. Graham, Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Board of Revenue, Madras, in letter dated 19th July 1901.

REFERENCE
UNDER
STAMP ACT,
S. 57.

The lease was in respect of a house situated in Nungambakam, and by it the lessee agreed, among other things, to pay a monthly rent of Rs. 190 for a period of three years, in consideration of the lessor demising the premises for that period; it also contained the following covenant:—“And that, if the lessee, his heirs, executors, or assigns, shall be desirous of taking a renewed lease of the said premises for the further term of one or two years from the expiration of the said term hereby granted and of such desire shall prior to the expiration of the said last-mentioned term give to the lessor, her executors, administrators, or assigns, or her or their agents in Madras for the time being six calendar months previous notice in writing and shall pay the said rent hereby reserved and observe and perform the several covenants and agreements herein contained and on the part of the lessee, his executors, administrators, or assigns to be observed and performed up to the expiration of the said term hereby granted, she, the lessor, her heirs, executors, administrators, or assigns, will upon the request and at the expense of the lessee, his executors, administrators, or assigns, and upon his or their executing or delivering to the lessor, her executors, administrators, or assigns, a counter-part thereof, forthwith execute and deliver to the lessee, his executors, administrators, or assigns, a renewed lease of the said premises for the further term of one or two years as the lessee, his executors, administrators, or assigns, may desire, at the same yearly rent and under and subject to the same covenants, provisos and agreements as are herein contained other than this present covenant.”

The document was produced for registration impressed with a stamp of the value of Rs. 12-8-0 and was impounded as being insufficiently stamped, and forwarded to the Collector of Madras, who held that it was chargeable with an additional stamp duty of Rs. 12-8-0 as an agreement to lease under article 35 of schedule I of the Stamp Act, 1899, in respect of the covenant for renewal, and levied the deficient stamp duty, together with a penalty of Rs. 5. The Board of Revenue was appealed to and upheld the Collector's order, but, at the request of the solicitors to the lessee, referred the case to the High Court.

The Government Pleader, (Mr. E. B. Powell), for the referring officer, submitted that the document was chargeable with the

additional duty. He referred to *Hand v. Hall*(1) and *Reference under Stamp Act, s. 57*(2), and contended that the point now raised had not been expressly decided in the latter case.

REFERENCE
UNDER
STAMP ACT,
S. 57.

Mr. D. Chantier, for the lessee, was not called upon.

JUDGMENT.—The question referred for opinion is, whether an instrument of lease, for a term of three years at a monthly rent of Rs. 190, with a covenant on the part of the lessor to renew the lease at the option of the lessee for a further term of one or two years from the expiration of the said term of three years, is rightly stamped, only with the duty payable on a lease for a term of three years, or whether it should be stamped with the aggregate of the duties payable on a lease for a term of three years and on an agreement to give a lease for a term of two years.

We are clearly of opinion that the instrument has been rightly stamped as a lease for a term of three years and that the Collector was in error in levying an additional stamp calculated upon an agreement to give a lease for a term of two years at the monthly rent of Rs. 190.

Under article 35 of schedule I to the Stamp Act "lease" includes "an agreement to let" and an "agreement to let" has to be stamped with the same duty as a lease. Under section 5 of the Stamp Act, an instrument comprising or relating to several distinct matters is chargeable with the aggregate amount of the duties with which separate instruments each comprising or relating to one of such matters would be chargeable under the Act; and it is apparently under this section that the Collector has levied the additional stamp duty. It is clear that this section is inapplicable to the transaction and that the instrument in question relates only to one matter and not to two distinct matters. The lessee agrees, among other things, to pay a monthly rent of Rs. 190, for the premises in question for a period of three years in consideration of the lessor demising the premises for a period of three years and also agreeing to renew the lease, at the option of the lessee, for a further term of one or two years. If the covenant to renew were disannexed from the lease, there would be no consideration for the covenant to renew (per Maule, J.,—*Worthington v. Worthington* (3)). A covenant for renewal at the option of the-

(1) L.R., 2 Ex. D., 355.

(2) I.L.R., 24 Mad., 176.

(3) 17 L.J., (C.P.), 117 at p. 119.

REFERENCE
UNDER
STAMP ACT,
s. 57.

lessee is an ordinary covenant in a great many leases and for at least two centuries, it has been held to be a covenant running with the land (per Farwell, J., in *Muller v. Trafford*(1)). A mere agreement to lease is not a covenant which will run with the land and will not bind a transferee for valuable consideration without notice of the agreement. The transaction or matter to which the instrument in question relates is single and indivisible and cannot be treated as relating to two distinct matters within the meaning of section 5 of the Stamp Act. The instrument contains only one contract, a demise; the option of renewal of the lease is ancillary to it and forms part of the consideration for entering into the lease.

Worthington v. Warrington(2) is a clear authority for holding that the instrument in question is rightly stamped as a lease for a term of three years only. In that case, the lease was for a term of two years, at a rent of £50 a year, and the lessee also had the right of purchasing the premises at the determination of the lease or at any time during the term of the lease. It was held that a thirty-shilling stamp was sufficient and the contention that it required an additional thirty-shilling stamp for the agreement to sell the premises to the lessee at his option, was over-ruled. Creswell, J., in over-ruling the contention observed as follows in the course of the argument:—"This is not more than a covenant to renew, which is usual in leases and which does not, on that account, require two stamps. The lease and the agreement to purchase are the consideration for the rent. If the lease were forfeited, the right of purchase would be forfeited also." *Phillips v. Phillips*(3) supports the same view. In that case it was held that the agreement for a new lease which was contained in an instrument of surrender of a lease for lives was part of the contract and that the reference to it in the deed of surrender was not a "matter or thing," not "incident to the sale and conveyance," but was necessarily connected with it. In *Referred Case No. 1 of 1876*(4) on a reference by the Board of Revenue, it was held that a conveyance with the usual covenant for title, cannot be construed as constituting an indemnity bond, so as to render the document liable to stamp duty as an indemnity bond in addition to the stamp

(1) [1901] 1 Ch., 54 at p. 60.

(2) 17 L.J., (C.P.), 117 at p. 119.

(3) 11 Ad. & E., 796.

(4) I.L.R., 1 Mad., 193.

duty to which it is liable as a conveyance. It was there held that an instrument can be regarded as falling under two distinct categories, each requiring a separate stamp, only where there is what is called a "distinct consideration" for each and not where there is a unity of consideration as in the present case.

REFERENCE
UNDER
STAMP ACT,
s. 57.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Bhashyam Ayyangar.

ACHUTARAMARAJU AND ANOTHER (PLAINTIFF'S
REPRESENTATIVES), APPELLANTS,

1901.
August 8, 12

v.

SUBBARAJU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Evidence Act—Act I of 1872, s. 92—Evidence to vary written instrument—Execution of sale-deed—Subsequent redemption suit on footing that the sale was in fact a mortgage—Evidence of subsequent conduct to show collateral agreement—Inadmissibility.

On 23rd September 1876, defendant wrote to plaintiff, inviting plaintiff to execute a sale-deed of certain land in favour of defendant and promising that if plaintiff did so, defendant would discharge plaintiff's debts out of the income to be derived from the land, and would, after the debts had been discharged, or before, if so requested, restore the land to plaintiff, upon payment by plaintiff of a sum of money that had been advanced to him by defendant. This document was not registered. On 29th September 1876, plaintiff executed a deed of sale of the land in defendant's favour, which was unconditional in its terms, and which was duly registered. Plaintiff subsequently brought a redemption suit against defendant on the deed of 29th September, and he contended that though that deed was, in its terms, an absolute conveyance, he was entitled to adduce evidence of the subsequent conduct of himself and defendant, to show that the transaction was, in fact, not a sale but a mortgage:

Held, that the evidence was not admissible.

Balkishen Das v. Legge, (L.R., 27 I.A., 58; I.L.R., 22 All., 149), followed. *Khankar Abdur Rahman v. Ali Hafiz*, (I.L.R., 28 Calc., 256), and *Mahomed Ali Hossain v. Nazar Ali*, (I.L.R., 28 Calc., 289), dissented from.

Plaintiff further contended that the contract was not contained in the deed of sale alone, but must be gathered from both of the documents referred to above:

* Appeal No. 13 of 1900 against the decree of C. G. Kuppasami Ayyar, Subordinate Judge of Cocanada, in Original Suit No. 38 of 1898.