1884

NOBIN KRISTO MOOKERJEE v. RUSSICK LALL LAHA.

which was followed immediately by a warrant issued for his arrest. But, as I have already said, inasmuch as the present case can be sufficiently disposed of upon the first point, we think it unnecessary to come to any definite conclusion upon the second point.

It appears to us that, for the reasons which I have stated, the Magistrate of the 24-Pergunnahs had no jurisdiction to make the order of the 5th December 1883 complained of, and we must therefore set aside that order. We were asked by Mr. Allen, the learned Counsel for the opposite party, to take up this case under s. 429, and proceed to exercise our revisional jurisdiction after entering into the merits. We have considered this application, and we think that it is not one with which we can comply. The accused person has had no notice of such an application; and has not come here prepared to meet such a case. If we thought that we ought to exercise our revisional jurisdiction, it would be necessary to issue a fresh notice, and appoint a further day for the hearing of the case upon its merits. But having regard to the fact that if the prosecutor desires to proceed further, the Court of the Sessions Judge of the 24-Pergunnahs, which has jurisdiction, is close at hand, we think it unnecessary that the time of the High Court should be taken up in disposing of a matter which can be dealt with by that tribunal.

The rule will be made absolute.

Rule absolute.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter and Mr. Justice Field.

1884

January 17.

ANONYMOUS CASE.*

Stamp Act (I of 1879), Schedule I, Art. 44 (clauses a and b)—Mortgage-Deeds.

Per Curiam—Clause (a) of Art. 44 of Schedule I of the Stamp Act, 1879, applies only to those deeds in which possession of the mortgaged property is given, or agreed to be given at the time of the execution of the deed, or in other words where immediate possession of the property is given or agreed to be given by the terms of the deed to the mortgagees.

Reference No. 7 of 1883 from the Board of Revenue.

1884

ANONYMOUS CASE.

Per GARTH, C.J.—The principle of the distinction between the two classes of mortgages named in Art. 44 is, that where the title to the land and the possession or immediate right to possession both pass to the mortgagee, the same duty is charged as upon a conveyance by way of sale; but when the title only passes, and possession, or the right to possession, does not, the lower duty is chargeable.

Per MITTER, J.—The word "given" in clause (*a*) of Art. 44 points out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security for the mortgage money; but where the mortgagee becomes entitled to enter upon possession irrespective of the consent of the mortgagor to make over possession, clause (*a*) will not apply.

Per FIELD, J.—The Stamp Act is a Revenue Act, and the rule of construction of such Acts is, that in case of a doubt, the construction most beneficial to the subject is to be adopted. The words "agreed to be given" in Art. 44 clause (*a*) can only apply where there is an express or implied agreement to give possession; they will not apply where there is no such agreement express or implied, but the effect of the document is such that a mortgagee has merely a right which he can enforce in a Court of law to obtain possession.

THIS was a reference by the Board of Revenue to the High Court under s. 46 of the Stamp Act. The question referred was, whether all or any of the mortgage deeds (the necessary clauses of which are hereinafter set out) were liable to pay duty under clause *(a)* or clause *(b)* of Art. 44 of Schedule I of the Stamp Act. The question depended mainly on the effect and construction of certain covenants for quiet enjoyment such as are usually inserted in English mortgages.

Document No. 1 granted and assigned unto the Alliance Bank of Simla, Limited, and its assigns, certain premises with the buildings, &c., thereon and all the estate, right, title and interest of the mortgagor in the said premises, to hold the said premises, &c., unto and to the use of the Bank and its assigns subject to a proviso for redemption, and empowered the Bank to sell the mortgaged premises or any part thereof without the consent of the mortgagor, and to execute and do all such assurances for effectuating a sale as the Bank should think proper, and contained the following covenant for quiet enjoyment, *viz.*, "and that all the said premises may be quietly entered into, held and enjoyed by the

1884

ANONYMOUS CASE.

Bank and its assigns without any interruption by any person." The deed contained no actual clause giving possession or agreeing to give possession to the mortgagee.

Document No. 1*a* was a mortgage of certain premises to the Alliance Bank of Simla, Limited, of the same description as Document No. 1, save that it contained no covenant for quiet enjoyment.

Document No. 2 was a trust deed to secure mortgage debentures issued or to be issued by the Assam Railways and Trading Company, Limited, and mortgaged the concessions and railways, &c., of the Company in Assam to two persons as trustees for the whole body of the debenture-holders. The properties were conveyed, granted and assigned unto and to the use of the trustees, but upon and for the trusts and purposes therein mentioned declaring the same; and provided that the trustees should stand seized and possessed of the mortgaged premises upon trust to permit the Company to hold and enjoy the same premises, and to carry on thereon and therewith any of the business authorized by the Memorandum of Association until default in payment of any of the principal monies secured by the debentures, or of any interest for the period of one month after due date thereof, or until the winding up of the Company; and after any such default, empowered the trustees in their discretion, or at the request of holders of one-half the debentures, to enter upon and take possession of the mortgaged premises and sell, call in, collect or convert into money the same; and contained the following covenant for quiet enjoyment, *viz.*, "and that all the said premises may be quietly entered into and enjoyed by the trustees or trustee without any interruption by any person;" there were further clauses providing that in the case of the Company being wound up, the trustees before making entry or sale should give three months' notice of their intention to do so; and providing that the Company should, until the trustees should take possession in pursuance of the trust, deal with the mortgaged properties in the ordinary course of business in such manner as they might think fit.

Document No. 3 was an ordinary mortgage of an indigo concern in the English form to the Agra Bank; it contained a power of sale authorizing the Bank after default to enter into and upon and to sell and absolutely dispose of the mortgaged premises; and a

power of entry, and a power, if the indigo should not be consigned to the Bank, to seize the indigo; also the following covenant for quiet enjoyment after default, *viz.*, "and also that if default shall be made in payment of the monies hereby secured or intended so to be, or the interest on the same or any part thereof respectively, or in the event of the breach or non-performance of any of the covenants herein contained, and on the part of the mortgagors, their heirs, executors or administrators to be observed and performed contrary to the true intent and meaning of these presents, it shall be lawful for the Bank, their successors or assigns at any time or times thereafter to enter into and upon the said mortgaged premises, or any part or parts thereof, and the same thenceforth to hold and enjoy and to recover the rents and profits thereof without any lawful interruption or disturbance by the said mortgagors or either of them, their or either of their heirs, executors, administrator, or assigns or any other person or persons claiming or to claim through, under, or in trust for him or them"; and also a further covenant by the Bank that until default the mortgagors might hold and enjoy and take the rents, issues and profits of the mortgaged premises.

The *Advocate-General* (Mr. *Paul*) appeared for the Crown.

Although in the first document there is no actual covenant for possession, there is a covenant to pay the mortgage money on demand, and although the mortgage money may not be due yet the mortgagee might take possession. A Court of Equity would not restrain such a mortgagee from taking possession. The present Stamp Act I consider was not intended to cover the present case, but it has actually done so in using the words "possession agreed to be given" in Art. 44, Schedule 1. Where possession is given, there is a larger duty payable than in cases where possession is not given. [FIELD, J.—Does the word "agreed" refer to an express or an implied agreement, or both?] Both; in this case there is an implied agreement. The covenant to enter into possession and the covenant for quiet enjoyment mean really that the mortgagee should have possession without opposition.

The second mortgage, No. 1*a*, does not contain the words giving quiet possession, and it therefore appears that the mortgage stands on a different footing.

1884

ANONYMOUS CASE.

The third mortgage, No. 2, permits the Company to hold and enjoy the premises until default, and I therefore apprehend a Court of Equity would not allow a mortgagee to enter into possession under such a covenant.

The fourth mortgage, No. 3, is practically the same as No. 2. There the Bank covenants with the mortgagor that until default shall be made the mortgagor shall hold possession. Therefore these two deeds do not fall under clause *(a)* of Schedule I of the Stamp Act. [FIELD, J.—In the second mortgage does not the clause, which gives power to the Bank to do all such things as may be necessary for effectuating a sale, allow a power to put the mortgagee in possession in order to effectuate the sale?] I think not; the power of sale can be exercised wholly irrespective of the question of putting the mortgagee into possession.

No one appeared on the other side.

The Opinions of the High Court were as follows:

GARTH, C.J.—I am of opinion that each of the deeds submitted for our consideration comes under clause *(b)* of the Art. 44 of the Stamp Act, and should be stamped accordingly.

I consider that clause *(a)* applies only to those deeds, in which possession of the mortgaged property is given, or agreed to be given, at the time of the execution of the deed; or, in other words, where immediate possession of the property is given, or agreed to be given, by the terms of the deed to the mortgagee.

It seems to me that this is the only construction of clause *(a)* by which any meaning can be given to the words "*at the time of execution*," because the agreement to give possession must of course be made in and by the deed itself; and therefore if clause *(a)* is to be read, as the learned Advocate-General contends, the clause would mean the same without the words "*at the time of execution*" as with them. Again, if the Advocate-General's view were correct, clause *(a)* would be applicable in all cases where possession of the property is agreed to be given at any distance of time, or under any conditions, even temporarily for non-payment of interest. I cannot think that the Legislature meant to extend so largely, or so unreasonably, the class of mortgages which are to be chargeable with the higher duty.

Under Act XVIII of 1869 those deeds only were so chargeable where possession was *actually given* at the time of the mortgage; and the spirit of this rule might have been, and probably was, evaded by possession not being taken for some time after the execution of the deed, although an agreement for immediate possession was contained in the deed itself.

I think that the change in the language of the Act was merely intended to prevent any such evasion of the law, and not to make the higher duty chargeable upon a large class of mortgages of a totally different character.

The principle of the distinction between the two classes of mortgages was clear enough under the Act of 1869; namely, 1st, those which were accompanied by possession; and, 2ndly, those which were not. According to the construction which I would put upon the present Act, the same distinction is maintained, but only with a safeguard against the evasion of the higher duty; whereas, according to the other construction, the distinction is altogether lost sight of; and the principle of this distinction, as I understand it, appears to me to be founded on good sense. Where the title to the land, and the possession or immediate right to the possession of it, both pass to the mortgagee by virtue of the deed, the same duty is charged as upon a conveyance by way of sale, because in that case the mortgagee gets the same potentiary interest in the land, which a sale would give him; but when the title only passes, and possession or the right to the possession does not, the interest which he gets is not necessarily a potentiary interest at all, and possibly may never become so. In such a case the lower duty is chargeable.

It seems to me that this is an easy and reasonable solution of the doubt which has arisen; and, as I consider that immediate possession of the mortgaged property is not given, or agreed or intended to be given, in any of the cases submitted to us, I am of opinion that the lower duty [under clause (*b*)] is chargeable in each of those cases.

I would add that I consider my views upon this subject are strongly confirmed by the fact, which appears to be admitted that, since the passing of the last Stamp Act in 1879, it has been the constant practice to stamp deeds of the nature of those sub-

1884

ANONYMOUS CASE.

mitted to us with the lower duty under clause *(b)*. When a particular construction has for some years been put upon a fiscal enactment *in favor of the public*, and that construction has been generally acted upon and acquiesced in by the Government, I think that a strong presumption arises in favor of that construction; and I consider, moreover, that no other construction, unfavorable to the public, should afterwards be put upon the enactment, except for some very cogent reason indeed.

This principle has been acted upon by the High Court on more than one occasion; and notably in the late case of *Kishori Lal Roy* v. *Sharut Chunder Mozoomdar* (1).

MITTER, J.—I am of opinion that clause (*a*) of Art. 44 of Schedule I of the Stamp Act of 1879, covers only those mortgage deeds in which as security for the money advanced on mortgage, possession of the property, or any part of the property mortgaged is actually given or agreed to be given. But it does not include mortgage deeds in which it is stipulated that the mortgagee *would be entitled* to take possession of the property, or any portion of the property mortgaged in case there should be any breach of the covenants of the deed. The word "given" in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the *agreement on the part of the mortgagor to deliver over* possession as part of the security of the mortgage money. But where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply, because there it cannot be said that the mortgagor consents to give possession.

If this construction of the clause in question is correct, none of the documents referred to us falls under it. It is true that under the first two deeds the mortgagee may exercise his right of entry upon possession immediately in consequence of the form in which they are executed, but there is no agreement on the part of the mortgagor to *give* possession of the mortgaged premises as part of the security. Such agreement exists only

(1) I. L. R., 8 Calc. 593.

in those cases where it is agreed that the rents and profits of the mortgaged premises are to be enjoyed by the mortgagee; or taken by him in satisfaction of his debt. There is no such agreement to be found in these deeds. As regards the other two deeds, it is clear from their terms that the mortgagee would be entitled to enter upon possession in case of default in payment.

FIELD, J.—This is a reference under s. 46 of the Indian Stamp Act (Act I of 1879). The question referred to us is, whether four deeds of mortgage ought to be stamped under clause (*a*) or under clause (*b*) of Art. 44 of the first schedule to the Act. Clause (*a*) is as follows:—"When at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given"—and the stamp duty upon the mortgage deed in this case is the same as for a conveyance for a consideration equal to the amount secured by the mortgage deed. Clause (*b*) is as follows:—"When at the time of execution possession is not given or agreed to be given as aforesaid." In this case the duty is the same as on a bond for the amount secured by the mortgage deed.

In the second case the stamp duty is very much less than in the first case, and in this consists the interest which the matter has for the public generally. A large number of mortgage deeds similar to those which form the subject of this reference have been stamped under clause (*b*), and these deeds will have been insufficiently stamped if we hold that clause (*a*) applies.

Clause (*a*) is divisible into two propositions which are as follow:—First, "*when at the time of execution possession of the property, or any part of the property comprised in such deed is given by the mortgagor.*" I may at once say that this proposition is not applicable in the present case, there being no suggestion that possession of the property or any portion of it has been given. The second proposition is: "*when at the time of execution possession of the property, or any part of the property comprised in such deed, is agreed to be given.*" The point to be determined really comes to this, whether by the mortgage deeds which form the subject of the reference, or any of them, it was at the time of execution agreed that possession of the property

1884

ANONYMOUS CASE.

should be given. I understand this to mean *given at any time.* I take it that the words "at the time of execution" must be construed with "agreed" and not with "given." Now the Stamp Act is a Revenue Act, an Act which imposes pecuniary burdens; and the rule of construction in respect of such Acts is, that in case of a doubt the construction most beneficial to the subject is to be adopted. The subject is not to be taxed, and therefore not to be compelled in this case to pay the higher duty, unless the language is clear and unambiguous. I am of opinion that the words "agreed to be given" can only apply where there is an express agreement to give possession—an agreement, that is, in so many words—or an agreement to be gathered by necessary implication from the whole contents of the documents. I think that clause *(a)* of Art. 44 does not apply when there is no such agreement, express or implied, but the effect of the document between the parties is such that the mortgagee would have a right, that is a right which he could enforce in a Court of law, to obtain possession if he desired to have possession.

Applying this principle to the four deeds in question, I come then to the following conclusion as regards each of them. The first deed of mortgage contains the following provisions: "And this indenture also witnesseth that for the consideration aforesaid, the mortgagor doth hereby grant and assign unto the Bank and its assigns all and singular, &c., together with all buildings, fixtures, rights, easements, advantages and appurtenances whatsoever to the said hereditaments appertaining, or with the same held or enjoyed or reputed as part thereof or appurtenant thereto, and all the estate, right, title and interest of the mortgagor in and to the said premises .... to hold the said premises unto and to the use of the Bank and its assigns subject nevertheless to the proviso for redemption hereinafter contained." Then the mortgagee is empowered to sell the mortgaged premises or any part of them without the further consent of the mortgagor, and then we have a covenant for quiet enjoyment. Under this deed it may well be that the mortgagee has a legal right to take possession, but I think we cannot say that possession of the property or any part of it is agreed to be given within the meaning of clause (*a*), Art. 44 of Schedule I of the Stamp Act.

1884

ANONYMOUS CASE.

The second mortgage deed which forms the subject of the reference is marked No. 1*a*, and is generally similar to the first instrument, save that it contains no covenant for quiet enjoyment. I think we cannot say that possession of the property is agreed to be given by this instrument.

The third deed forming the subject of the reference is marked No. 2, and is of a more complicated nature. It recites that the mortgagees, their heirs, executors, &c., shall stand "seized and possessed" of the mortgaged premises. I think that upon the construction of the entire contents of this document it is clear that the words "seize and possessed" are used in the sense merely of English legal phraseology, and that it is not meant by these words that the mortgagees should enter into possession. This would appear to be clear from a subsequent provision of the deed which authorizes the trustees or trustee upon the happening of certain events to enter upon and take possession of the mortgaged premises. This instrument also contains a covenant for quiet enjoyment. Now, although there is an authority to the mortgagees and trustees to take possession upon the happening of certain events, I think it impossible to say that there is any agreement by the mortgagor to give possession. This instrument therefore comes in my opinion under the provisions of clause *(b)* of Art. 44.

The fourth deed which forms the subject of the reference is marked No. 3. It declares that it shall be lawful for the mortgagee, his successors, assigns, &c., upon a breach of the covenants to enter into and upon the said mortgaged premises, but here also there is no agreement by the mortgagor to give possession, and I think that this instrument also comes under clause *(b)*.

The result is, that in my opinion, all four instruments should be stamped under clause *(b)* Art. 44, Schedule I of the Stamp Act.