

corroboration he acts upon is sufficient to support the evidence of the accomplice.

I confess I do not quite see why Sarwan has been discredited. It is true that he is a criminal person, and it is equally true that he had not made any statement to the police till the 8th of January; but he never changed his statements, although he was aware that the police contradicted him on some points, and although he knew that his evidence was opposed to the evidence of other witnesses about the colour of the coat worn by the deceased. He nevertheless stuck to his original statements; and I am disposed to think that Sarwan was speaking what he believed to be the truth, and that his evidence might be relied upon for the purpose of corroboration. But I do not think it is necessary to go into that matter, as without him there appears to me to be sufficient evidence.

That being so, I am of opinion that the appeal by Government ought to be allowed, and that Gobardhan, being convicted of the crime of murder, should suffer the punishment of being hanged by the neck until he be dead.

Appeal allowed.

FULL BENCH.

1884
 March 25.

Before Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Clifford, Mr. Justice Brodhurst and Mr. Justice Tyrrell.

IN THE MATTER OF GAJRAJ SINGH.*

*Act I of 1879 (Stamp Act), s. 3, subsections 4 (c) and 13, ss. 7, 26, sch. I, Nos. 13
 44—Bond—Mortgage.*

A grower of sugarcane executed a deed whereby he borrowed a sum of Rs. 25 as "earnest-money," and covenanted to deliver to the lender on a certain date 21 maunds of *rab* (unrefined sugar), upon which he was to receive a profit of 9 annas per maund over and above a price to be thereafter fixed at a meeting of growers. He further covenanted as follows:—"If the supply of the *rab* be less than the fixed quantity, and the money still remains due, then the said money thus due, including the profits, shall be paid at the rate of Re. 1 per maund; that in case of my not supplying the *rab* at all, or selling it at some other place, I will pay the whole amount at once, including the said profits." As collateral security he hypothecated the produce of a field of sugar-cane, the value of which was not stated.

* Reference by the Board of Revenue under s. 46 of the Stamp Act (I of 1879).

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Held by the Full Bench that the instrument was a "mortgage-deed" within the meaning of s. 3 (13) and No. 44 (b) of schedule 1 of the Stamp Act (I of 1879).

Held by STUART, C. J., STRAIGHT, J., and BRODBURST, J., that it was also a "bond" within the meaning of s. 3 (4) (c), and No. 13 of schedule 1, and, with reference to the provisions of s. 7, was chargeable with stamp duty solely as a bond under No. 13, the contract being a single one.

Held by the Full Bench that the proper stamp duty payable on the instrument was four annas.

Held by STUART, C. J. and STRAIGHT, J., that in estimating the stamp-duty payable on the instrument, the amount stipulated to be paid by way of penalty in case of breach of the covenant to deliver the *r. b* must not be taken into account.

Reference by Board of Revenue, N.-W. P. (1) doubted, and *Gisborne v. Subal Bowri* (2) referred to by STRAIGHT, J.

Per STUART, C. J., that, for the purpose of estimating the stamp duty, the amount secured by the instrument was Rs. 25, the amount borrowed, plus Rs. 11-3, the amount to be paid to the borrower on the 21 maunds at 9 annas per maund, and that the additional profit, *i e.*, the price fixed at the meeting of growers, not having been ascertainable at the time of execution, fell within the provisions of s. 26 of the Stamp Act, and could not have the effect of adding to the stamp-duty.

Per OLDFIELD, J., that the amount secured or limited to be ultimately recoverable under the instrument, was Rs. 25, the amount borrowed, plus Rs. 21, the sum recoverable at Rs. 1 per maund, in the event of the borrower's non-delivery of the 21 maunds; and stamp-duty was payable on this amount.

THIS was a reference by the Board of Revenue, under s. 46 of the Indian Stamp Act (I of 1879). The reference was in the form of a letter from the Secretary of the Board to the Registrar, and the material portion of it was as follows:—

"The Board desire me to request that you will be so good as to lay the accompanying copy of an instrument impounded by the Collector of Shahjahanpur, together with a translation of the same, before the Honorable Court, and to obtain from the Court a ruling under s. 46 of Act I of 1879 as to its liability to stamp duty.

"The document relates to the supply of goods or merchandise. It provides for the payment of a sum of Rs. 25 as earnest-money to secure the supply of 21 maunds of *rad* (unrefined sugar), on which the grower is to receive as profit 9 annas per maund over the price fixed at the meeting of growers. As collateral security

for fulfilment of the contract, the grower hypothecates a field of sugar-cane, the value of which is not stated.

“The amount secured by the deed is therefore Rs. 25, earnest-money advanced, *plus* Rs. 11-3, amount of profit to be paid to the grower on the 21 maunds at 9 annas a maund, *plus* the payment of a sum which could not have been ascertained at the time of execution of the deed owing to the price not having then been fixed.

“Further, there is a mortgage (without possession) securing the last mentioned sum, which could not be ascertained at the time of execution of the deed.

“The Board are of opinion that the document should be classed as a mortgage-deed without possession, and should be stamped accordingly for the amount secured. In the present case, as the amount secured could not be ascertained at the time of execution, the sum recoverable on the mortgage-deed would, under s. 26 of Act I of 1879, apparently depend on the value of the stamp used, provided it were not less than 2 annas, the minimum stamp for a mortgage-deed.”

The instrument to which this reference related was dated the 28th December, 1878, and was in the following terms:—

“I, Gajraj Singh, son of Pahlwan Singh, caste Thākūr, of mauza Baskhara Bazrag, pargana Pawayan, zila Shāhjahānpur, borrowed Rs. 25 of Government coin, half of which is Rs. 12-8, as earnest-money, as per detail below, from Lala Shih Charan Lal, son of Jagannath, caste *Baqaludha*, resident of kasha Pawayan, on the following conditions:—That I will supply 21 maunds *pukhta* of *rāb* of the first quality, the produce of sugarcane of the year 1286 fasli, at the rate of 9 annas per maund profits over and above the Katauli prices, on Magh Badi *dooj*, 1286 fasli; that if the supply of the *rāb* be less than the fixed quantity, and the money still remains due, then the said money thus due, including the profits, shall be paid at the rate of Re. 1 per maund; that in case of my not supplying the *rāb* at all, or selling it at some other place, I will pay the whole amount at once, including the said profits, and, on my refusal to pay, the creditor shall have power to institute a suit and to recover the money on demand, and I shall have no defence. To secure payment of the said money, including the pro

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fits, I do hereby hypothecate in this document the produce of a field sown with sugar for the year 1286 fasli, measuring 6 bighas *khamz*, boundaries detailed below, situate in mauza Jiwan, pargana Pawayan, and possessed and cultivated by me, and agree that I will not transfer it in any other way until the payment of this money; and if I do transfer it, the transfer shall be held invalid. I have therefore executed this mortgage-deed that it may be useful in time of need."

The following opinions were delivered by the Full Bench:—

STUART, C. J.—The stamp duty chargeable on the instrument submitted to us in this reference is, in my opinion, four annas. The instrument itself, although really one and the same contract or agreement, is of a double character: it is a bond within the meaning of that word as given in s. 3, sub-section 4 (c), because it is an "instrument so attested whereby a person obliges himself to deliver grain or other agricultural produce to another," the consideration for which in the present case is that mentioned in the Board's letter, namely, Rs. 25, and the profits which the Board states to be Rs. 11-3. As to the sum which could not have been ascertained, that appears to fall within the provisions of s. 26 of the Stamp Act, and cannot therefore have the effect of adding to the stamp duty.

The instrument is also, in respect to the hypothecation it provides, a "mortgage-deed" within the meaning of Nos. 44 and 13 of schedule I of the Stamp Act, inasmuch as it is a mortgage-deed "when at the time of execution possession is not given or agreed to be given by the mortgagor."

And being of this double character, the instrument for the purpose of the stamp duty appears to me to fall within the principle recognized by s. 7 of the Stamp Act, whereby it is provided that an instrument of such a description "shall, when the duties chargeable thereunder are different, be chargeable only with the highest of such duties." Here the stamp duty in regard to both descriptions of the instrument is the same, but it is the highest that can be charged in either view of the instrument, the contract made by it being obviously one and the same.

The result is, that having regard to the provisions of the Stamp Act to which I have referred, namely, the definition of "bond" in

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s. 3, subsection 4 (c), Nos. 44 and 13 of schedule 1, and ss. 7 and 26, the stamp duty chargeable on the instrument before us is the highest duty chargeable on a bond the amount or value of which exceeds Rs. 10, but does not exceed Rs. 50, as provided by No. 13 of schedule I.

I have only to add that the stipulation in the instrument in the event of the supply of *rāb* being less than the fixed quantity, and the money still remaining due, with the condition that in such a contingency the money and the profits shall be paid at the rate of Re. 1 per maund, and also as to the *rāb* not being supplied at all or sold at some other place,—are all provisions of an essentially penal character, and also merely contingent, as they may or may not come into operation, and are therefore not to be taken into account in estimating the stamp duty.

STRAIGHT, J.—Looking to the terms of the document to which this reference relates, and construing them in their ordinary legal sense, it would appear to fall within two definitions. First, it is an agreement for the delivery of *rāb* with a provision for damages in case of breach of the contract to deliver, and next it is an hypothecation bond of certain moveable property, to wit, the produce of a sugar-cane field, as security for the payment of any damages that might become recoverable by way of compensation for non-delivery. But clause (c) of s. 3 of Act I. of 1879, declares that “any instrument whereby a person obliges himself to deliver grain or other agricultural produce to another” is a bond, and if *rāb* can properly be regarded as “agricultural produce,” which I think it may, the instrument now before us exactly falls within the above definition, and should bear a stamp of the value of four annas. As regards the provision in it for a penalty, I have present to my mind the Full Bench ruling reported in I. L. R., 2 All., 654, in respect of which Garth, C. J., has made some remarks in *Gisborne v. Subal Bowri* (1), which I may note related to Act XVIII. of 1869, where there was no provision such as that to be found in cl. (c) of the present law. Upon further consideration I am disposed to doubt the correctness of the ruling of this Court to which I was a party, and to concur in the views expressed by Garth, C. J., upon the subject of a penalty clause. The sum named in a contract to be

(1) I. L. R., 8 Calc. 285.

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paid in case of breach is not necessarily recoverable *in toto*. On the contrary, it only fixes the extreme amount beyond which compensation cannot be assessed. In the present case, upon failure to deliver the *rāb*, the plaintiff was entitled under the contract to recover damages for such non-delivery; but it by no means followed as a matter of course that a Court would give him the full amount provided in the instrument. I do not think that it was ever intended to impose stamp duty upon an item of this fluctuating character. Under these circumstances it seems to me that the document should, in advertence to cl. (c) of s. 3 of the Stamp Act, and s. 7, be dealt with solely as a bond under art. 13 of the 1st schedule, and should be stamped with a stamp of four annas.

OLDFIELD, J.—The instrument to which this reference refers is in the following terms. (His Lordship read the instrument, and continued):—

The effect of this deed is that the obligor borrows Rs 25 from the obligee, and covenants to deliver to him 21 maunds of *rāb* at a certain price on a certain date, and, if delivery is not made in part or in whole, to pay to the obligee the sum borrowed, or as much of it as may be due, together with a sum of Re. 1 per maund on the 21 maunds which he covenants to deliver and fails to deliver; and property is mortgaged to secure the payment of the money advanced and to be paid on failure to deliver the *rāb*.

This instrument is, in my opinion, a mortgage-deed, which, for the purposes of the Stamp Act, is defined to “include every instrument whereby, for the purpose of securing money advanced or to be advanced by way of loan or an existing or future debt, or the performance of an engagement, one person transfers or creates to or in favour of another a right over specified property.”

The duty therefore will be leviable under No. 44 of schedule I, that is, the same duty as a bond (No. 13) for the amount secured by the deed.

The amount secured, or, in other words, the amount limited to be ultimately recoverable under this deed, is, in my opinion, Rs. 25, the sum borrowed, *plus* Rs. 21, which is the sum recoverable at Re. 1 per maund on the 21 maunds of *rāb* the obligor engaged to deliver in the event of non-delivery.

The sums taken together are the limit of what is ultimately recoverable or secured by the deed, and are ascertainable from the deed, and are sums on which duty is capable of being fixed, and the duty is payable on this amount, and is not affected by the question whether the obligor may or may not fulfil his engagement and thereby render void his obligation of payment, or whether the amount secured may or may not be ultimately recovered.

BRODHURST, J.—The document that is the subject of this reference is, I consider, a “bond” as defined in cl. (c), subsection 4, s. 3 of Act I of 1879, and also a “mortgage deed” as defined in subsection 13 of the same section. The stamp duty in either case is, with reference to arts 13 and 144 of schedule I, respectively, four annas, and four annas only is, I think, the amount of stamp duty that is, with regard to the provisions of s. 7, chargeable on the instrument.

TYRBELL, J.—Without going into the question whether *rdb* or saccharine liquor comes within the definition of “agricultural produce,” it seems clear that this instrument is a mortgage, and therefore I concur in the answer recorded by the learned Chief Justice.

APPELLATE CIVIL.

1887
April 12.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and Mr. Justice Mahmood.

CHURAMAN (PLAINTIFF) v. BALLI (DEFENDANT).*

Malikana—Heritable charge—Suit for arrears of malikana allowance—Small Cause Court suit—Act XI of 1865, s. 6—Bona fide transferee without notice—Act IV of 1882 (Transfer of Property Act), s. 3.

S sold a share in immoveable property to M, by a registered deed of sale which contained the following provision:—“The said vendee is at liberty either to retain possession himself or to sell it to some one else; and he is to pay Rs. 25 of the Queen’s coin to me annually (as *malikana*), which he has agreed to pay.” M mortgaged the property to B, who obtained possession; and, after the mortgage, the annual payments provided for by the deed of sale ceased. The representatives of the vendor sued M and B to recover arrears of *malikana*, the amount sued for being less than Rs. 500.

* Second Appeal No. 614 of 1886, from a decree of W. Barry, Esq., District Judge of Banda, dated the 12th January, 1886, modifying a decree of Maulvi Muhammad Hafiz Rahim, Munsif of Hamirpur, dated the 28th April, 1885.