

whether the Tribunal had or had not jurisdiction. We consider that owing to the absence of one of the assessors on a date when evidence was heard the Tribunal ceased to have jurisdiction and therefore the decree passed by the Tribunal must be set aside. We accordingly set aside the decree of the Tribunal and we remand this application to the Tribunal for disposal according to law.

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SECRETARY
OF STATE
FOR INDIA
v.
NURAN BIBI

SPECIAL BENCH

*Before Mr. Justice Niamat-ullah, Mr. Justice Harries
and Mr. Justice Rachhpal Singh*

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1936
April, 28

Stamp Act (II of 1899), sections 2(5) and 6; schedule I, articles 5 exemption (a), 15, 41, 43—Bond—Mortgage of crops—Agreement—Agreement for sale of goods or merchandise exclusively.

(1) Where a document, attested by witnesses, was executed, mortgaging the standing sugarcane crop and the next year's crop on the executant's fields against an advance received from the mortgagee, and also stipulating to supply the said crop exclusively to the mortgagee at a certain rate:

Held that the document was, firstly, a mortgage of crops, falling under article 41 of schedule I of the Stamp Act; and, secondly, it was a bond as defined in section 2(5)(c) of the Act as it contained a specific stipulation, which was over and above the transaction of mortgage and not a necessary or integral part thereof, by which the executant undertook to deliver the sugarcane crop to the other party exclusively, and therefore falling under article 15 of schedule I of the Act. As the document filled this dual character, the higher of the two stamp duties was payable, in accordance with section 6 of the Act.

This document did not come within exemption (a) under article 5; for the document, taken as a whole, could not be considered to be a mere agreement, as an interest in property was created thereby and it was a mortgage and not merely an agreement. Apart from this, the exemption did not apply for the reason that the document was not "exclusively" an agreement for the sale of goods or merchandise, in view of

*Miscellaneous Case No. 34 of 1936.

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the fact that it was also a combination of a mortgage of crops and a bond.

(2) Where a document was a simple agreement to sell sugarcane crop, and it set forth that the vendors had received an advance from the purchasers which would be set off against the price of the crop supplied, and there was no hypothecation of any crops, and although there were several subsidiary covenants the document evidenced only one transaction of sale and no other independent transaction:

Held that the document was an agreement for or relating to the sale of goods or merchandise exclusively and came under exemption (a) in article 5 of schedule I of the Stamp Act.

(3) Where a document, attested by witnesses, was in substance an agreement for supply of sugarcane by the executant to the other party, to be paid for at certain rates, and no advance had been made nor was any hypothecation created of existing or future crops:

Held that the document was not a bond but an agreement for or relating to the sale of goods or merchandise exclusively and came under exemption (a) of article 5. Even if it was assumed that the document filled a dual character and could be regarded both as such an agreement and as a bond, article 15 would not apply as article 5 specifically provided for such an agreement and therefore excluded the operation of article 15.

The definition of a bond given in section 2(5)(c) clearly contemplates cases in which the agreement is merely to deliver grain or other agricultural produce, which is the principal if not the sole obligation incurred under the agreement. Where, however, delivery of grain or other agricultural produce is incidental or merely ancillary to the obligation to sell grain or other agricultural produce, such agreement is not a mere bond but an agreement to sell goods, and the case falls not under article 15 but under article 5 so as to attract the application of exemption (a).

The Government Advocate (Mr. Muhammad Ismail), for the Crown.

Mr. Shib Charan Lal, for the opposite parties.

NIAMAT-ULLAH, HARRIES and RACHHPAL SINGH, JJ.:—
This is a reference under section 57 of the Stamp Act (Act II of 1899) by the Board of Revenue for decision by this Court of the question whether a certain document is a "bond" within the meaning of clause (c) of sub-

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section (5) of section 2 of the Stamp Act, chargeable under article 15, or a mortgage of crops chargeable under article 41, or a simple agreement for sale of goods and merchandise within the purview of exemption (a) to article 5 of the Stamp Act.

The instrument in question was executed by one Thakuri Singh in favour of a firm styled Messrs. Kila Chand Deva Chand & Company of Bombay, proprietors of Kesar Sugar Works, Baheri. The latter had advanced to the executant of the instrument a sum of Rs.40, apparently, some time before the execution of the document. The first stipulation contained in the document expressly mortgages certain sugarcane crop belonging to the executant and standing in certain fields mentioned in the document. The deed proceeds to lay down that the executant would supply the aforesaid sugarcane crop exclusively to Kesar Sugar Works at a certain rate. Then follow a number of covenants incidental to the supply of the sugarcane crop as agreed. One of the covenants is: "That the amount remaining due after supplying the whole of the sugarcane crop will bear interest at the rate of twelve annas per mensem from the date of this document to the date of repayment, and the next harvest of sugarcane belonging to any of my fields in the village will remain mortgaged and will not be transferred to anyone else, unless the whole of the amount including interest is repaid out of the price of sugarcane." There are some other stipulations as regards the time of payment, etc.

"Mortgage deed" is defined in section 2(17) so as 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 or in respect of specified property." Article 41 makes specific provision for stamp duty on mortgages of crops. If there had been no other complication and the instrument had evidenced a transaction whereby the executant hypothecated his sugarcane

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crop to secure the payment of the sum advanced to him, there could be no question as regards the nature of the instrument. It would have been a mortgage deed in respect of a crop, as provided by article 41. As already indicated, however, the deed contains a specific stipulation by which the executant undertakes to supply the sugarcane crop therein referred to exclusively to Kesar Sugar Works. Such a stipulation is not an integral part of the transaction of mortgage embodied in the deed. That is to say, if this stipulation had found no place in the instrument, it would nevertheless have been a mortgage deed. This aspect of the case is, to our minds, very material, in view of the definition of "bond" in section 2(5) of the Stamp Act. Therein "bond" is so defined as to include among others "any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another".

The instrument in question in this case is attested in the manner mentioned in section 2(5) of the Stamp Act. It is, therefore, clear that the particular covenant by which the executant agrees to deliver his sugarcane crop to Kesar Sugar Works is a bond, as defined in section 2(5) of the Stamp Act, and is chargeable as such under article 15. This characteristic of the instrument is wholly apart and separable from its characteristics as a mortgage. As already stated, if this covenant is deleted from the instrument its character as a mortgage deed will remain unaffected. In this view, it is clear to us that the instrument in question fills the dual character of a mortgage and a bond, as defined in section 2(17) and 2(5), respectively, of the Stamp Act. The necessary result of this view is that section 6 of the Stamp Act becomes applicable to an instrument of this kind, and the highest of the two duties provided for by the Stamp Act is payable.

The view taken by us is in accord with what was held by a majority of a Full Bench of five Judges in the case. *In the matter of Gajraj Singh* (1). In that case, as in

(1) (1884) I.L.R., 9 All., 585.

the present, the document contained a stipulation binding the executant to deliver his sugarcane crop to the obligee under the deed. There also the sugarcane crop had been hypothecated as security for payment of money advanced by the obligee. It was held by three learned Judges that the instrument filled the dual character of a mortgage deed and a bond. It is true that no specific provision existed in the Stamp Act, which was then in force, as regards the mortgage of crops. Article 41, as it now exists, has since been introduced; but it seems to us that this will make no difference so far as the present reference is concerned. The definitions of "bond" and "mortgage deed" are substantially the same in Act II of 1899 (the present Act) as in Act I of 1879, which was in force when the Full Bench decided the case noted above. It was in view of the two definitions that the Full Bench arrived at the conclusion that the instrument before them was of a dual character. The same considerations have influenced our view. For these reasons, we think that the aforesaid ruling fully covers the present case.

We have considered the language of exemption (a) under article 5, which exempts from duty an "agreement or memorandum of agreement for or relating to the sale of goods or merchandise exclusively, not being a "note" or "memorandum" chargeable under No. 43." It is clear that the document, taken as a whole, cannot possibly be considered to be a mere agreement. All mortgages must be agreements first and mortgages afterwards. To this extent the deed in question is an agreement; but as an interest in property is created by the document, it is a mortgage and not merely an agreement. Similarly, the stipulation which, as held by us, amounts to a "bond" may be considered to be an agreement in so far as the executant agrees to do something; but falling as it does within the definition of a bond, it is something more. Apart from this, we do not think that the exemption already referred to applies to this case for the important reason that it is not "exclusively" an agreement for or

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relating to the sale of goods or merchandise in view of our finding that it is also a combination of a mortgage of crops and a bond.

The result is that we answer the reference as regards document No. 1, mentioned in the reference by the Board of Revenue, in terms of this order.

By the same reference we are required to determine the character of the following instrument: [Only the material portions are given below.]

"(1) We vendors shall by our own management, superintendence and cartage supply at least 800 maunds pukhta of Coimbatore sugarcane crop of 1342 F., cultivated by ourselves in the aforesaid village. . . .

"(2) We vendors shall daily supply the quantity of sugarcane as fixed by the purchasers. . . .

"(4) The vendors must supply 800 maunds of sugarcane within the time fixed in accordance with the daily allotment. If the quantity supplied be less, or nil, they agree to pay Rs.5 per cent. as costs and profits on the quantity, by which the quantity supplied is short of the stipulated quantity.

"(5) We vendors have received Rs.195 as advance from the purchasers. This amount will be set off towards the price of sugarcane. . . .

"(6) We vendors shall deposit Rs.5 per cent. of the price of sugarcane supplied with the purchasers as security money, and this will be credited to our account at the time of accounting at the end of the stipulated period. Should the contract remain incomplete, the purchasers would be entitled to deduct from the security money such penalty which may accrue due to the purchasers on account of short supply of sugarcane.

"(7) Should any sum remain due from the vendors at the end of the supply of sugarcane, the vendors shall be liable to pay the sum with 1 per cent. interest per month from today, but if any money is found due to the vendors the sum shall be payable without any interest.

"(8) Should the vendors not supply the sugarcane or make 'Kand Siah' or sell it elsewhere, they shall be liable to pay back the above amount with 50 per cent. as interest from their person and all property."

The instrument is not attested. The Board of Revenue are inclined to think that it evidences a mortgage. We have considered all the clauses occurring in

the deed, and are unable to find any hypothecation of the sugarcane crop then standing or to be grown subsequently. To our minds the instrument is a simple agreement to sell sugarcane crop. The promisor undertook to supply 800 maunds of Coimbatore sugarcane crop. The various clauses which follow the principal agreement contained in the first clause are subsidiary covenants and do not take the transaction out of the category of an agreement to sell sugarcane crop. The fact that the promisor agreed to leave 5 per cent. of the price in the hands of the vendee as security does not amount to anything more than an incidental covenant occurring in an agreement to sell a certain commodity. The seventh clause merely contemplates the liability of the promisor to refund the whole or part of Rs.195 received by him in anticipation of the supply of sugarcane to which the agreement relates. The eighth and last clause is merely consequential on the promisor being guilty of the breach of his undertaking.

The learned Government Advocate has strenuously contended that the instrument in question is not "an agreement for or relating to the sale of goods or merchandise exclusively" as contemplated by article 5, exemption (a), schedule I, of the Stamp Act. His contention is that in so far as the instrument contains many collateral stipulations besides the agreement to sell sugarcane crop, it cannot be considered to be one for sale of goods or merchandise exclusively. It has not been contended before us that if the aforesaid exemption is otherwise applicable, it does not apply because sugarcane crop is not "goods or merchandise" within the meaning of exemption (a) of article 5. As to whether the agreement is one for or relating to the sale of goods or merchandise *exclusively*, we think that the instrument embodies only one agreement with several subsidiary covenants which do not detract from its exclusive character. Our view finds support from *Kyd v. Mahomed* (1), in which MUTTUSAMI AYYAR and PARKER, JJ., observed: "The test

(1) (1891) I.L.R., 15 Mad., 150.

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which should be applied is to see whether the document evidences only a transaction of sale or a sale and some other independent transaction, and if the former, the number of subsidiary stipulations it may contain cannot alter the nature of the transaction." As we have already said, the principal agreement embodied in the document is one for sale of sugarcane crop, and all the other covenants which follow are of a subsidiary or auxiliary nature, and none of them is independent of the main agreement which it was the object of the parties to reduce into writing. Accordingly we answer the reference as regards this document as above.

There is yet a third instrument which is the subject of the reference before us. The principal covenant therein contained runs as follows: "I covenant that I shall be bound to supply 250 maunds of sugarcane to the factory at the rate prescribed by the Government for each maund. I shall supply the Coimbatore sugarcanes to the creditors . . . for manufacture of sugar by the factory, i.e., by the Kesar Sugar Works, Baheri, at the Ramnagar station or at the factory aforesaid, according to the instructions of the creditors aforesaid. The entire costs of supply of the sugarcane shall be borne by me, and the creditor aforesaid shall have nothing to do therewith."

The obligee under the deed has been referred to as the creditor, but as a matter of fact no money was advanced to the executant of the agreement. The instrument was drawn up on a printed form, some paragraphs of which contemplate an advance by the obligee. In this case, as nothing was paid to the executant, the places reserved for the amount advanced and connected matters have been left blank. In substance the agreement is for supply of 250 maunds of sugarcane to the factory belonging to the obligee, to be paid for at the rates which the Government would fix from time to time.

There is nothing in the document which creates any hypothecation of existing or future sugarcane crop to secure the payment of any money due or to become due

from the executant. In this view there can be no doubt that this deed is not a mortgage deed.

The learned Government Advocate contends that this instrument is a bond as defined by section 2(5) of the Stamp Act. He relies upon clause (c) of the definition, under which "bond" includes "any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another". If the instrument in question is a bond, as is contended by the learned Government Advocate, the duty payable thereon is in terms of article 15 of schedule I, Stamp Act.

Article 5 of the same schedule relates to an agreement or memorandum of an agreement, for which a specified duty is chargeable. There are, however, three exemptions, the first of which, namely (a), should be taken into consideration in determining the duty payable in respect of the agreement. That exemption includes "Agreement or memorandum of agreement for or relating to the sale of goods or merchandise exclusively. . . ." If the instrument before us be construed to be an agreement for or relating to the sale of goods or merchandise exclusively, and not a bond, it is exempt from stamp duty. It is said that in so far as the agreement contains a stipulation whereby the executant obliges himself to deliver sugarcane which is an agricultural produce, the instrument is a bond for which duty should be paid under article 15. We think, in the first place, that an agreement to deliver grain or agricultural produce where delivery is an essential element of the sale of goods or merchandise cannot be said to be a bond. The definition of that term given in section 2(5) clearly contemplates cases in which the agreement is merely to deliver grain or other agricultural produce, which is the principal if not the sole obligation incurred under the agreement. Where, however, delivery of grain or other agricultural produce is incidental or merely ancillary to the obligation to sell grain or other agricultural produce, such agreement is not a mere bond but an agreement to sell goods and the case falls not under

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article 15 but under article 5 so as to attract the application of exemption (a).

Another ground for treating the instrument in question as an agreement for or relating to the sale of goods or merchandise exclusively, as contemplated by article 5, exemption (a), is that article 15 which provides for duty payable in respect of bonds applies only where the instrument is not otherwise provided for. If it be conceded that the instrument is an agreement for or relating to sale of merchandise or goods exclusively, even though it may also fall within the category of bonds, article 15 does not apply as article 5 expressly provides for an instrument of this kind. It seems to us that article 15 is a residuary article applying only to such bonds as are not separately provided for in other articles.

For the reasons stated above we hold firstly that the third instrument is an agreement for or relating to the sale of goods or merchandise exclusively and is not a bond and secondly, assuming that it fills a dual character and can be regarded both as a bond and an agreement for or relating to the sale of goods or merchandise exclusively, article 15 does not apply as *ex hypothesi* it can apply only if such an agreement is not specifically provided for and that as article 5 expressly deals with agreements of this description the operation of article 15 is excluded.

Our reply to the reference as regards instrument No. 3 is as indicated above.