

whether the house is sufficiently described. Both parties before us have argued the case on the footing that the godown is a house within the meaning of section 21, and we are prepared to accept that position so far as the decision in this case is concerned. Taking the go-down to be a house, the description in the document, such as it is, appears to be sufficient. The learned Judge, after a careful consideration of the circumstances of the case came to the conclusion that it was sufficient to identify the property, and we accept that conclusion.

The result, therefore, is that both the contentions urged in support of this appeal fail. We confirm the decree of the trial Court and dismiss the appeal with costs. We discharge the stay order.

Solicitors for appellant : Messrs. *Madhavji & Co.*

Solicitors for respondent : Messrs. *Ardeshir, Hormasji Dinshaw & Co.*

Appeal dismissed.

K. MCI. K.

APPELLATE CIVIL.

*before Sir Lallubhai Shah, Kt., Acting Chief Justice, Mr. Justice Marten,
and Mr. Justice Fawcett.*

VAMAN, MARTAND BHALERAO, VENDEE *v.* THE COMMISSIONER,
CENTRAL DIVISION, REFEROR, AND TATYA BIN VITHOBA AND
ANOTHER, VENDORS^a.

Indian Stamp Act (II of 1899), sections 24 and 57—Sale of property—Property subject to incumbrance—Vendor accepting liability to pay off incumbrance—Stamp duty.

A sale deed of certain property was executed by the vendors for a consideration of Rs. 10,000—a sum which was in fact the full market value of the property free from all incumbrances. The property sold was, however, along with

^a Civil Reference No. 6 of 1924.

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another property, subject to a mortgage incumbrance of Rs. 13,858-6-0 and was also subject to attachment in respect whereof Rs. 1,500 were payable. Under the terms of the sale deed, the liability for the mortgage charges and for the amount payable in respect of attachment was accepted by vendors. The stamp duty actually paid was on Rs. 10,000. The Collector demanded the duty on that amount as well as the amount of the incumbrances under section 24 of the Indian Stamp Act, 1899. A reference being made to the High Court at the instance of the purchaser,

Held, that the proper stamp duty payable was only on the amount of the consideration of the sale deed, viz., Rs. 10,000.

Per MARTEN, J. :—I think...that the *Explanation* [sec. to section 24] 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.

CIVIL Reference made by G. W. Hatch, Commissioner, C. D., under section 57 of the Indian Stamp Act.

One Waman Martand Bhalerao of Yawal purchased Survey No. 640 of Yawal from Tatyaba *bin* Vithoba and Rajaba *bin* Vithoba of Yawal for Rs. 10,000 under a sale deed, dated February 9, 1923. The particulars of the sale deed were as follows :—

"The immoveable property bounded as above have been sold to you for the amount mentioned above (Rs. 10,000) and the property has been given in your possession this day. You have become the sole owner of the said property. The said property and another property have been mortgaged without possession to Narayan and Madhav Deshpande residing at Yawal for Rs. 11,000, eleven thousand rupees. But we have sold to you the said property without keeping any burden of incumbrance, &c. We shall pay off the amount of mortgage by means of our other property mortgaged or from our other estate. Any sort of responsibility thereof will not be thrown upon you. If you will have to pay the amount, or if you are in any way put into troubles or loss we are responsible for the same. Moreover, the said property is attached by the Court for the amount of Rs. 1,500 taken on personal security from Ramabai husband Narayan Martand Deshpande. We are responsible for that amount and we shall get the attachment on the property sold to you raised at our own costs."

The sale deed was written on a stamp paper of Rs. 150, which was the duty chargeable only on the amount of Rs. 10,000 paid by the purchaser.

The Sub-Registrar was of opinion that, as the land had an incumbrance of Rs. 15,358-6-0 (Rs. 13,858-6-0, mortgage amount, together with interest, plus the sum of Rs. 1,500 to be paid into Court), the consideration for the purpose of stamp duty should be taken under section 24 of the Indian Stamp Act, 1899, at Rs. 25,358-6-0 and not Rs. 10,000. He, therefore, impounded the document as insufficiently stamped under section 33 of the Stamp Act and forwarded it to the Collector.

The Collector agreeing with the Sub-Registrar ordered recovery of the deficit duty of Rs. 232-8-0 and imposed a penalty of Rs. 25.

The purchaser Bhalerao applied to the Commissioner and asked for a reference to the High Court under section 57 of the Indian Stamp Act, 1899.

S. S. Patkar, Government Pleader, for the Crown :—
The Explanation to section 24 is clearly applicable when the purchaser undertakes to pay the mortgage. In the present case the vendor sells the property free of the incumbrance. So far as the mortgagee is concerned, however, the charge is not extinguished. The property sold is subject to the charge within the meaning of the Explanation to section 24 of the Indian Stamp Act, irrespective of what the parties to the sale deed may have intended or stipulated to do in the deed. This contention is borne out by illustration 2, the language of which is clearly applicable to a case where the property is subject to a charge. The illustration must be taken as part of the statute and is of value on the question of the construction of the text: *Mahomed Syedol Ariffin v. Yeoh Ooi Garik* ⁽¹⁾; *Lala Balla Mal v. Ahaad Shah* ⁽²⁾; *Holleppa v. Irappa* ⁽³⁾. It is immaterial and irrelevant whether the property was sold free of the

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⁽¹⁾ (1916) L. R. 43 I. A. 256. ⁽²⁾ (1918) 21 Bom. L. R. 558 (p. a).

⁽³⁾ (1922) 46 Bom. 843 at p. 846.

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charge. The charge exists as a fact at law and the amount of the charge must be taken into account in the stamp duty to be levied in respect of the document in question.

P. B. Shingne, for the purchaser :—In order to attract the application of the Explanation to section 21 of the Indian Stamp Act, it is essential that the sale must be subject to the charge as between the parties to the deed. It is the actual contract between the parties that should be looked at.

The property has been sold at its proper value. It is not suggested that it has been sold for a smaller consideration because the property is subject to a mortgage.

The proviso to section 24 does not relate to a case like the one under consideration and the illustration to the section must be construed as governed by the main section. It is further submitted that the term "conveyance" in section 2 of the Indian Stamp Act, be read with Article 23, Schedule 1 of the Act. The conclusion is inevitable that the amount of the incumbrance cannot be added to the amount of the consideration for the sale.

C. A. V.

SHAH, AG. C. J.:—This is a reference under section 57 of the Indian Stamp Act. It relates to a sale-deed, dated 9th February 1923, executed by the vendors for a net consideration of Rs. 10,000.

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 incumbrances. 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 incumbrances on the property, stamp duty is to be charged on the incumbrances 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 incumbrances.

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.

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.

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

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the whole or part, as the case may be, of the consideration in respect whereof the transfer 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 incumbrance, 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 the 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 incumbrance" 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 necessarily be 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.

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.

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 hypothesi* 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.

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

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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. at p. 193 in *Clifford v. Commissioners of Inland Revenue*⁽¹⁾. While the conflict indicated by the decisions under section 24 of the Act of 1879 of which *Sha Nagindas v. Halalkore Nathwa*⁽²⁾ and *Reference from the Board of Revenue*⁽³⁾ 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.

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. :—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

⁽¹⁾ [1896] 2 Q. B. 187.

⁽²⁾ (1881) 5 Bom. 470.

⁽³⁾ (1883) 10 Cal. 92.

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.

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*⁽¹⁾, Lord Cozens-Hardy, Master of the Rolls, says :—

“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 10,000 £., and is subject to a mortgage of 5000 £. and the purchaser only pays the vendor 5000 £., 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 5000 £. 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

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⁽¹⁾ [1912] 1 Ch. 231 at p. 236.

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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."

Then Lord Justice Farwell says at 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."

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.

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.

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.

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.

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 receives is substantially the same.

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.

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

FAWCETT, J.:—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.

Answered accordingly.

J. G. R.

CRIMINAL APPELLATE.

Before Mr. Justice Marten and Mr. Justice Kincaid.

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EMPEROR v. RANCHHOD SURSANG AND OTHERS (ORIGINAL ACCUSED NOS. 1 TO 3)^a.

*Indian Penal Code (Act XLV of 1860), sections 307, 34, 114, 148 and 149—
Accused charged with substantive offence—Conviction of abetment.*

Where accused persons were charged with offences punishable under sections 307, 148 and 149 of the Indian Penal Code,

Held, that, in the absence of circumstances showing that they were in fact misled in their defence, they could be convicted of offences under section 307 read with section 34 or 114 of the Code, the common presence and the common object being sufficiently charged.

Reg. v. Chand Nur⁽¹⁾ and *Emperor v. Raghya Nagya*⁽²⁾, distinguished.

The fact that a criminal act done in furtherance of the common intention of several persons was the act of a single individual does not render the provisions of section 34 inapplicable.

King-Emperor v. Barendra Kumar Ghose⁽³⁾, relied on.

Section 9 also referred to.

THESE were appeals against convictions and sentences passed by C. N. Mehta, Sessions Judge of Broach.

^aCriminal Appeal No. 307 of 1924.

⁽¹⁾ (1874) 11 Bom. L. C. 240. ⁽²⁾ (1924) 26 Bom. L. R. 323.

⁽³⁾ (1923) 128 C. I. W. N. 170; 38 Cal. L. J. 411.