

and orders are defined by section 2 of the Civil Procedure Code, which came into operation on the 1st of June 1882, and it was decided by a Full Bench of this Court, in the case of *Dulhin Golab Koer v. Radha Dulari Koer* (1) that such an order as that of the Munsif of the 28th of February 1893, made in a suit for partition, was a decree and not an order within the meaning of the Civil Procedure Code, as it was an order which decided that the suit must be decreed in favour of the plaintiff. Section 591 of the Civil Procedure Code provides that all orders from which no appeal is given by the Code may be objected to at the hearing of the appeal from the final decree, and embodies so much of the principle contained in the cases of *Moheshur Singh v. Bengal Government* (2), *Forbes v. Ameeroonnissa Begum* (3) and *Sheonath v. Ramnath* (4), as the Legislature thought fit to include in the statutory law of this country, but neither the decisions of the Judicial Committee, nor the Legislature, have ever said that where an order is made in a suit after which the suit cannot be dismissed, and which is a decree within the meaning of the Code, either party to the suit can appeal against such decretal order on the hearing of an appeal by him from the final decree, although he has allowed the time given by law for appealing from such decretal order to elapse without doing so. We think that the conclusion at which the District Judge arrived in this case was correct, and the appeal will be dismissed with costs.

S. C. G.

Appeal dismissed.

REFERENCE FROM BOARD OF REVENUE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, and Mr. Justice Pigot.

IN THE MATTER OF A REFERENCE FROM THE BOARD OF REVENUE
UNDER SECTION 46 OF THE STAMP ACT, 1879.*

Stamp Act (I of 1879), Schedule I, Articles 21, 60 (b)—Conveyance—Transfer of lease.

When by one and the same deed there is a conveyance of freehold lands and good-will and a transfer of interests secured by leases, the deed should be

* Civil Reference No. 4 of 1895, made by the Board of Revenue, dated the 15th November 1895.

(1) I. L. R., 19 Calc., 463.

(2) 7 Moo. I. A., 283.

(3) 10 Moo. I. A., 340.

(4) 10 Moo. I. A., 413.

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stamped under Article 21 of Schedule I of the Stamp Act (I of 1879) with an *ad-valorem* duty on the conveyance of the freehold property, good-will, buildings and erections, and under Article 60 of the schedule with a duty of Rs. 5 on the transfer of each of the interests secured by the leases.

THE case which formed the subject of this reference was as follows: Messrs. Robert Watson & Co., Limited, had sold certain silk filatures and other property connected therewith to the Bengal Silk Company, and the deed under adjudication was the deed under which the transfer was proposed to be carried into effect. Messrs. Sanderson and Co. claimed to have so drafted the deed that item IV of Rs. 30,000, being the value of moveable property, was liable to pay no stamp duty, while item II being a transfer of nine leases, came under clause 60 (b) 2 of Schedule I of the Indian Stamp Act, and was therefore liable to a duty of Rs. 45 only. The duty on the remaining items were admittedly Rs. 1,485. The Collector of Stamp Revenue and the Commissioner of the Presidency Division held that the whole transaction was a conveyance, and that the full duty, under clause 21, Schedule I of the Indian Stamp Act, was payable. The Board of Revenue was of the same opinion, but referred the case to the High Court for an opinion on the question whether the instrument proposed to be executed by Robert Watson & Co. in favour of the Bengal Silk Company was a mere conveyance of freehold lands and good-will and transfer of interests secured by nine leases, or whether it was a conveyance of the effects of Messrs. Watson & Co. as a going concern for the sum of Rs. 2,32,500.

The form of the deed proposed to be executed by Robert Watson & Co., Limited, called "The Vendor Company" of the one part, and The Bengal Silk Company, Limited, called "The Purchaser Company" of the other part, was as follows; (only the clauses material to this report are here set out):—

"AND WHEREAS by an agreement dated the 15th day of September 1894 and made between the Vendor Company of the one part and the Purchaser Company of the other part it was (*inter alia*) agreed—

"(1) THAT the Vendor Company should sell and the Purchaser Company should purchase the said silk filatures and zemindaries and other the hereditaments and premises in Parts I and II of the schedule hereunder written and the good-will and trades-mark of the business theretofore carried on in connection with the said filatures and the machinery and dead stock (exclusive of stocks

of raw silk chassuni waste &c.) chattels and effects of the said business as on and from the first day of October 1894 at the price or sum of Rs. 2,32,500.

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“AND WHEREAS the Purchaser Company have now called upon the Vendor Company to execute in their favour a conveyance of the said factories and premises in terms of the said recited agreement.

“AND WHEREAS the purchase-money of Rs. 2,32,500 of the said silk factories filatures lands hereditaments and premises hereby assured is made up as follows :—

“Rs. 31,500 (the value of the Vendor Company’s interest in the silk factories filatures and lands attached to same in Part I of the schedule hereto described which are all freehold).

“Rs. 54,090 (the value of the Vendor Company’s interest in the silk factories filatures taluks and lands in Part II of the schedule hereto described which are all leasehold).

“Rs. 10,000 (the value of the good-will of the Vendor Company in the business carried on by them in the several factories &c. and also of the trades-mark used by them).

“Rs. 30,000 (the value of all moveable machinery plant implements stores carts utensils tools and other stock and other moveable assets and property which as at the 1st day of October 1894 were in or upon the said several factories).

“And Rs. 1,06,910 (the value of the buildings bungalows and other erections &c).

“AND WHEREAS the said moveable assets and property valued at rupees thirty thousand as aforesaid have already passed to the Purchaser Company by delivery and the said sum of rupees thirty thousand has been paid or satisfied by the issue of three hundred out of the said two thousand two hundred and twenty-five shares.

“NOW THIS INDENTURE WITNESSETH, &c.
the Vendor Company doth hereby grant convey transfer assign and assure unto the Purchaser Company its successors and assigns all and singular the several silk factories filatures taluks patnis &c. and all land and premises whether held on mourasi &c. and other tenures respectively mentioned or described in Parts I and II of the said Schedule hereto together with all messuages bungalows tenements &c. and all rights of occupancy and other rights and interests in or over any of the said lands hereditaments and premises and held or enjoyed with or appertaining thereto or any part or parts thereof
and all the good-will and beneficial interest and trades-mark of the business heretofore carried on in connection with the said filatures and properties by the Vendor Company or its predecessors. AND all outstanding debts balances and sums of money of every description due and owing by the zemindars or

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raiyats or any other person whatsoever to the Vendor Company as the proprietors thereof with all decrees mortgages bonds promissory notes chittahs and other instruments for or relating to the same respectively and all contracts with assistants raiyats and other persons and all causes or rights of suit or action relating thereto respectively."

The *Officiating Advocate-General* (Sir Griffith Evans) in support of the reference.

Mr. *Pugh contra.*

Mr. *Pugh.*—The moveables were not transferred by the deed, and were not liable to pay stamp duty. The transfer of leaseholds comes under clause 60 (b) 2 of Schedule I of the Indian Stamp Act. There is no dispute as to the duty on the remaining items, which is admittedly Rs. 1,485. It is submitted therefore that the amount payable in all is Rs. 1,530, being Rs. 45 and Rs. 1,485.

Now section 3, sub-section 9, defines 'conveyance' as 'any instrument by which property (whether moveable or immoveable) is transferred on sale.' The same duty is chargeable under the transfer as under the original lease. In the statement of the case by the Board of Revenue it is said: "It is admitted that, except the agreement, there is no other deed in existence in connection with this transaction, but Messrs. Sanderson & Co. claim to have drawn up this deed in such a manner that the sum of Rs. 30,000 paid for moveable property is not liable to duty. This contention is, I think, liable to doubt. It is true that no deed is necessary for such a transaction; but if the transaction is entered in a deed, as I hold it is entered in this deed, then it is liable to pay duty. I do not see how the preamble can be lopped off as it were and treated as non-existent for the purpose of stamp duty when it is the only evidence existing in writing of the transaction referred to." The question is not whether the transaction is 'entered' in the deed, but whether the property is transferred by it. It is intended to convey the leaseholds separately, and clause 60 of the 1st schedule applies. The Collector of Stamp Revenue holds that the whole transaction is a conveyance, and that the full duty under clause 21 of Schedule I of the Indian Stamp Act is payable. *Reference from Board of Revenue* (1) does not really affect this case.

(1) I. L. R., 5 Mad., 15.

The next case to be considered is the case of the *Mohargunj Tea Estate* (1), which is referred to by Garth, C. J., in the case of *In re The Menglas Tea Estate* (2), but which has not been reported. It is submitted that if there is a conveyance including property which comes under clause 21 of the 1st schedule, and also property which comes under clause 60, then the one should be assessed under clause 21 and the other under 60. I rely on the *Menglas case* (2) as far as the judgment of the Court is concerned. To show that we were perfectly justified in doing as we did, I refer to the case of *The Commissioners of Inland Revenue v. Angus & Co.* (3). Lord Esher, M. R., says: "The Crown cannot have the stamp duty unless the parties to the sale choose to effectuate the transaction by an instrument which of itself conveys the property."

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In this case it is clear that it was not intended to deal with the moveables, and also clear that it was intended to transfer the leaseholds separately. The deed states how the lump sum was made up. The cases cited show that where leaseholds and freeholds are transferred by one deed, the leaseholds should be assessed separately under clause 60.

The *Officiating Advocate-General* (Sir Griffith Evans).—In *Ohristie v. The Commissioners of Inland Revenue* (4) Kelly, C. B., says: "In all these cases it appears to me that the substance of the transaction is alone to be considered upon the question whether the instrument is liable to the stamp duty under the Statute."

The deed is really a transfer of the business of a company including its assets, and the assets include freeholds and leaseholds and also all debts, for the deed speaks of taking over the accounts. The recital says that the moveables had passed by delivery; but it also appears that the agreement is one for the purchase of the whole concern, and there is great doubt whether there has been any allocation at all except in the recitals. The agreement is for the purchase of the whole business, &c., for over two lakhs of rupees. If there has been a transfer of leases, it can hardly be contended that anything more can be charged than under section

(1) Unreported.

(2) I. L. R., 12 Calc., 333.

(3) L. R., 23 Q. B. D., 579 (593). (4) L. R., 2 Ex., 46 (50).

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60. The Board of Revenue mean that, looking at the real nature of the transaction, it is one and indivisible and that the splitting up is a mere device.

The judgment of the Court (PETTERAM, C. J., and PRINSEP and PIGOT, JJ.) was as follows :—

Our answer to the question referred to us is, that the instrument proposed to be executed by Messrs. Robert Watson & Co. is a conveyance of freehold lands and good-will and a transfer of interests secured by leases, and that it will be properly stamped under Article 21 of Schedule I of the Stamp Act with stamps of the value of Rs. 1,485, that being the *ad-valorem* duty on the conveyance of the freehold property, good-will, buildings and erections, and under Article 60 of the schedule with stamps of the value of Rs. 45, being a duty of Rs. 5 on the transfer of each of the interests secured by the leases.

If we look at the substance of the transaction as disclosed by the deed, it is a conveyance of the freehold property of the vendors together with the good-will and buildings for a certain sum, and a transfer of the leasehold estates for another sum, and as that is what the deed is, it will be properly stamped under section 7 of the Stamp Act, 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.

By section 3, sub-section 9 of the Act, a conveyance is defined to be an instrument by which property, whether moveable or immovable, is transferred on sale, and as the moveables (machinery, &c.) had been as the deed recites already delivered to the vendors, they were certainly not transferred to them by the deed, and we do not think the vendors can be called on to increase the stamp so as to include the value of those things.

We have been referred to several cases on the subject, one being the unreported case of the *Mohargung Tea Estate*. See, as to this, letter No. 501-B. from the Secretary to the Board of Revenue to the Commissioner of the Presidency Division, dated September 5th, 1883, in which he says :—

“ I am directed to acknowledge the receipt of your letter No. 131-R. S., dated 23rd August 1883, submitting, for the decision

of the Board, a reference made by the Collector of Stamp Revenue, Calcutta, under section 45 of the Indian Stamp Act (I of 1879) regarding the stamp duty chargeable on a conveyance executed on the 2nd July 1883 by one Mr J. H. Doyle, of Darjeeling, in respect of the Bloomfield Tea Estate, and in reply to state as follows:—

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“From the paper submitted by you, it appears that Mr. Doyle, by the conveyance above referred to, transfers his right in one piece of freehold land valued at £3,000, and three pieces of leasehold land, the three together valued at £6,000. It seems clear to the Board that section 7 of the Act applies, and that the stamp duty should be levied on this document as comprising distinct matters. On the freehold property the stamp duty should be Rs. 300 under Article 21 of Schedule I of the Stamp Act; but, in regard to the leasehold lands, the question arises, whether under Article 60 (b) 2, the duty should be Rs. 5 on the three properties together, or Rs. 15, *i.e.*, Rs. 5 on each of the three properties. It seems to the Board that the three leasehold properties are distinct. The dates of the leases are: (1) 2nd February 1878 from Government: (2) 20th January 1882 from Government: (3) 20th March 1883 from the Maharajah of Burdwan for different lands in each case and for different periods.

“The Board, therefore, think that the whole stamp duty to be charged should be Rs. 315.”

In this view this Court agreed, and this, as pointed out by the Advocate-General, was a stronger case than the present, inasmuch as in that case the purchase-money was not divided but was one lump sum. Another is the case of the *Menglas Tea Estate* (1). In that case this Court said that where the transaction is in substance the sale of a share in a partnership, and the transfer of a share in the lease only forms part of the subject-matter of the sale, as being a part of the partnership assets, then the transaction should be regarded, not as a transfer of a lease, but as a sale of a share in a partnership, and the proper stamp is an *ad-valorem* duty on the whole of the purchase-money.

(1) I. L. R., 12 Cal., 383.

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Of these two cases the one which most nearly resembles the present is the unreported one, as having regard to the value of the property as compared to the value of the good-will of the business. The transaction was in substance a sale of the various properties, and not a mere transfer of them as parts of the assets of a business, which was in itself the main consideration for the price paid.

Attorney for Messrs. R. Watson & Co. : Messrs Sanderson & Co.
 Attorney for the Board of Revenue : The Government Solicitor
 (Mr. W. K. Eddis.)

F. K. D.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

1895
 June 5.

IN THE MATTER OF JOSHY ASSAM (AN INFANT UNDER THE AGE OF EIGHTEEN YEARS.)

Minor—Infant, Custody of—Parent's or Guardian's right to custody of Infant—Adoption—"Habeas Corpus"—Criminal Procedure Code (Act X of 1882), section 491.

In Courts of Equity a discretionary power has always been exercised to control the father's or guardian's legal rights of custody. *The Queen v. Gyngall* (1) approved.

Held, that this was not a case in which the Court would, having due regard to the interests and well-being of the child in question, assist the parent in exercising his legal rights of custody.

The modern equitable doctrine cited in Seton on Decrees, Vol. II, p. 814, approved.

THIS was the hearing of a rule obtained by Assam, a Chinaman and his wife Levée, the father and mother of an infant, Joshy, for an order in the nature of a *Habeas Corpus*, under section 491 of the Criminal Procedure Code calling upon John and Virginia Allen, a Chinaman and his wife, residing at No. 15 Dhurruntollah Street, who had adopted the Christian religion, to shew cause why the infant Joshy should not be brought by them into Court and be restored to the lawful and proper custody of her natural father and mother.

(1) L. R., Q. B. (1893), Vol. II, 232.