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his action there if he likes, and, if he chooses to bring it in Bombay, he cannot claim the right to suit his own convenience at the cost of most serious inconvenience to the defendant. But I do not say that the [470] costs of the rule and of taking inspection at defendant's place of business up-country should be borne entirely by the plaintiff in the event of his having to pay the costs of the suit. As to that, I say nothing now, but reserve the question of the costs of taking the inspection until the hearing. But this much is quite clear, that, in such a case as this, it would be most unreasonable to require the defendant to bring all these books down to Bombay to the serious obstruction of his business in the meantime.

Costs of the summons costs in the cause.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Sir Charles Sargent, Kt., Mr. Justice M. Melvill and Mr. Justice Kemball.

SHA NAGINDAS JEYCHAND (*Plaintiff*) v. HALALKORE NATHWA GHEESLA, DECEASED, BY HIS WIDOW BAI PANEE (*Defendant*).*
[14th June, 1881.]

General Stamp Act I of 1879, sch. I, arts. 16 and 21, ss. 21, 23, 24, 27—Judicial sale—Certificate of sale, stamp duty on—Sale or transfer subject to a mortgage or other lien—Mortgage-debt "part of the consideration"—Interest—Proclamation of sale.

Where a certificate of sale, granted to the purchaser of property sold by public auction under an order of Court, has expressly set out that such sale is made subject to the mortgage right of a third party, the principal sum (but not the interest) due at the time of the sale on such mortgage, is to be deemed "part of the consideration in respect whereof the transfer is chargeable with *ad-valorem* duty" under s. 24 of the Indian Stamp Act: so that the whole consideration in respect of which such sale is, under arts. 16 and 21 of sch. I of that Act, liable to stamp duty, is the sum of the purchase-money and the principal money so due on the mortgage. The certificate of sale, therefore, whenever it is possible, should set out the exact amount that is due, at the time of the sale, in respect of the principal sum secured by the mortgage.

Semble.—It is otherwise if the mortgage be only recited in the proclamation of sale, and not expressly set out, as an existing incumbrance on the property sold, in the certificate of sale.

Arrears of *interest* due on the mortgage are to be excluded from such calculation, since s. 23 of the Indian Stamp Act—which enacts that "where interest is expressly made payable by the terms of the instrument, [471] such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein"—applies as much in this case as if the document of transfer, on which the stamp duty was to be calculated, had been the document itself which stipulated for the payment of interest.

[N.F., 10 C. 92=13 C.L.R. 164; 7 M. 421 (F.B.); F., 15 B. 532; R., 6 O.C. 76 (78); 1 S.L.R. 44 (46).]

THIS case was referred for the opinion of the High Court by Rao Bahadur Mukundrai Manirai, First Class Subordinate Judge at Ahmedabad, under s. 49 of the General Stamp Act I of 1879.

The facts of the case, as stated by the Subordinate Judge, are briefly these. The plaintiff, Nagindas, having attached a house, the property of his judgment-debtor (the defendant), one Kuber Hargovan informed the

* Civil Reference, No. 16 of 1880.

Subordinate Court of Ahmedabad, which issued the attachment, that he (Kuber) had a mortgage on the said house for Rs. 49. Kuber's claim, accordingly, was mentioned in the proclamation of sale, as directed by s. 287 of the Civil Procedure Code (Act X of 1877). At the Court sale the house was purchased by one Bhagia Gola Sakra for Rs. 10. The certificate which the Court granted to the purchaser was written on a stamp paper of *eight annas*, and stated that the sale was made subject to the mortgage of Kuber for Rs. 49. The Subordinate Judge forwarded a copy of the certificate of sale to the Sub-Registrar of Ahmedabad, as directed by s. 89 of Act III of 1877, amended by Act XII of 1879, s. 107. The Sub-Registrar and the Inspector-General of Registration were of opinion that the certificate was insufficiently stamped. The Subordinate Judge, therefore, submitted the question for the decision of the High Court with the following remarks:—

“The auction purchaser is not subjected by the sale itself to any further payment; nor is the transfer contingent on the payment, by him, of the mortgage money. He purchases the right of the judgment-debtor only; and the specification in the proclamation of the mortgage incumbrance, required to be inserted by s. 287 of the Civil Procedure Code, is intended to prevent a purchaser from being unknowingly entrapped, and the fact is notified simply to enable the purchaser to judge of the nature and value of the property he is going to purchase. Article 16 of sch. I of the General Stamp Act (No. I of 1879) clearly [472] directs that the proper stamp duty on a certificate of sale is ‘the same as a conveyance (art. 21) for a consideration equal to the amount of the *purchase-money*’ and it is a question whether we shall be justified in demanding stamp duty on a sum higher than that amount.”

There was no appearance of parties in the High Court.

JUDGMENT.

The following is the decision of the Full Court delivered by WESTROPP, C.J.—The question, referred to us by the Subordinate Judge of Ahmedabad, as put by him was: “Whether a certificate of sale, granted to the purchaser of property sold by public auction by our Courts, and which (property) is proclaimed, under s. 287 of the Civil Procedure Code, to be incumbered with the mortgage right of a third party, should be charged, under art. 16 of sch. I” (of the Indian Stamp Act I of 1879), “with a stamp duty for a consideration equal to the amount for which the auction-purchaser purchases the property only, or for a consideration equal to that amount *plus* the amount of the mortgage to which the property is liable?” We are not prepared to hold that the mere mention of a mortgage claim in the proclamation of sale would warrant a reply in the affirmative to the question of the Subordinate Judge. But, on procuring from him the certificate of sale, we find that the sale is therein expressly mentioned to have been made “subject to the mortgage of Kuber Hargovan for Rs. 49.” Under art. 16 of sch. I of the Indian Stamp Act I of 1879, the duty on a “certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue Court, or Collector or other Revenue Officer” is “the same duty as a conveyance (art. 21) for a consideration equal to the amount of the purchase-money;” and s. 24 of the same Act enacts that “where any property is transferred to any person in consideration, wholly or in part, of any debt due to him, or subject (1), either certainly or

(1) *Vide Mortimore v. Commissioners of Inland Revenue*, 2 H. & C. 838.

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contingently, to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the [473] transfer is chargeable with *ad-valorem* duty" (1). That is the present law with respect to the stamp duty on a private conveyance. It has been held here by a Bench of three Judges (Sargent, Acting C.J., Melvill and Pinhey, JJ.), on the 27th of January, 1880, in Civil Reference 27 of 1879, that, having regard to art. 16 of sch. I of Act I of 1879, there is not any difference in respect of stamp duty between a certificate of sale by public auction and a conveyance by way of private sale. We think that decision is correct, and we are prepared to follow it. Therefore, if the property be sold expressly subject to a debt due upon a mortgage of such property, that debt must be added to the further sum (if any) given as purchase-money, in order to ascertain the total amount of consideration of the certificate of sale or private conveyance, as the case may be, upon which stamp duty is payable. In the present case the certificate of sale mentions that the sale was made "subject to the mortgage of Kuber Hargovan for Rs. 49." The manner in which the certificate is worded leaves it doubtful whether the sum of Rs. 49, mentioned in it, indicates the sum due on the mortgage at the time of the sale, or merely the original sum in respect of which the mortgage was granted. The sum of Rs. 49 may be the whole or only part of the principal money originally secured by the mortgage, or the whole of such principal money and interest, or part of such principal money and interest. We have not any reason for supposing that there was any fraudulent intention in referring to the sum of Rs. 49 in the mode in which it is mentioned in the certificate of sale. But it should be remembered that s. 27 of Act I of 1879, directs that "the consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of duty with which it is chargeable, shall be fully and truly set forth therein." This direction is of especial importance where the conveyance or certificate of sale is made subject to a mortgage or other incumbrance. In such a case we think that, under s. 24 of the Act, when taken in combination with s. 23, the amount due on the mortgage or other incumbrance, for principal only, at the time of the sale, is chargeable with stamp duty, and that interest is not so chargeable. Section 23 of Act I of 1879 (which is a re-enactment of s. 9 [474] of Act XVIII of 1869) is as follows:—"Where interest is expressly made payable by the terms of the instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein." Hence it is certain that if, in the mortgage itself, interest were expressly made payable, stamp duty would not have been leviable on that mortgage in respect of such interest. The exemption from stamp duty in respect of interest does not, however, appear to us to be limited to the mortgage or other instrument by which the interest was originally made payable. Where property is transferred expressly subject to a mortgage or other incumbrance, we think that the transferee, or such other person as pays the stamp duty on the document of transfer, would be entitled to the benefit of s. 23, if, in such document of transfer, it were expressly mentioned that the transfer is made subject to interest already due, or thereafter

(1) *Vide In re Gill's Conveyance*, 8 Exch. 376.

to accrue due on the mortgage or other incumbrance, subject to which the transfer is expressly made. Section 24 of Act I of 1879 is new in India. We have not been able to discover any similar provision in previous Indian enactments. It seems to have been copied from s. 73 of the English Stamp Act of 1870 (Statute 33 and 34 Vic., c. 97). The prototype of that section is to be found in the following enactment under the title or article. "Conveyance" in Part I of the schedule (1) to the Statute 55, Geo. III., c. 184; "And where any lands or other property shall be sold or conveyed in consideration, wholly or in part, of any sum of money charged thereon by way of mortgage, wadset, or otherwise, and then due and owing to the purchaser, or shall be sold and conveyed subject to any mortgage, wadset, bond or other debt, or to any gross or entire sum of money to be afterwards paid by the purchaser, such sum of money or debt shall be deemed the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty is to be paid." In consequence of the decision in *The Marquis of Chandos v. The Commissioners of Inland Revenue* (2), the passage now cited from the Statute 55, Geo. III., [475] c. 184, was amended in 1853 by s. 10 (1) of the Statute 16 and 17 Vic., c. 59. That section, after reciting the concluding portion of the passage above quoted, and that "it has been held and determined that the said *ad valorem* duty is payable in respect of any such sum or debt only where the purchaser is personally liable or bound or undertakes or agrees to pay the same, or to indemnify the vendor against the same; and it is expedient to alter and amend the law in this respect," enacted that "Where any lands or other property shall be sold and conveyed subject to any mortgage, wadset, or bond, or other debt, or to any gross or entire sum of money, such sum of money, or debt shall be deemed the purchase or consideration money, or part of the purchase or consideration money, as the case may be, in respect whereof the said *ad valorem* duty shall be paid, notwithstanding the purchaser shall not be or become personally liable, or shall not undertake or agree to pay the same, anything in any act or otherwise to the contrary notwithstanding." It should be especially noted that, in the Statute 33 and 34 Vic., c. 97, there is not any provision so advantageous to the subject as s. 23 of Act I of 1879. On the contrary, the second clause of s. 71 of the Statute 33 and 34 Vic., c. 97, enacted that "Where the consideration or any part of the consideration for a conveyance or sale consists of any security, not being a marketable security, such conveyance is to be charged with *ad-valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon such security" (3). The Indian Legislature, while in Act I of 1879, s. 21, adopting the first clause of s. 71 of the Statute 33 and 34 Vic., c. 97, relating to stock or any other marketable security, has deliberately discarded the second clause of that section just quoted. This leads to the conclusion that the provisions of s. 23 of Act I of 1879 were intended, by that Legislature, to apply as well to transfers of property subject to non-marketable securities, as to the conveyances or other instruments originally stipulating for the payment of interest.

(1) Repealed by Stat. 33 and 34 Vic., c. 99, Schedule.

(2) 6 Exch. 464. A criticism of that case by Mr. Tilsley, the Solicitor to the Board of Inland Revenue, is contained in page 56th of the supplement published in 1853 to the 1st ed. of his Treatise on the Stamp Laws.

(3) See also, to the same effect, the concluding passage under the title "Conveyance" in the schedule to the English Statute 13 and 14 Vic., c. 97.

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Section 24 of Act I of 1879, which, as already noticed, makes its appearance in the Indian Statute Book for the first time in [476] Act I of 1879, even though, as we think, properly controlled by s. 23 in so far as interest is concerned, imposes both upon private purchasers and upon the officers of Government a difficult task. When property is sold subject to a mortgage or other incumbrance, from whom is the amount due for principal to be ascertained? It may be replied: from the mortgagor and mortgagee, or other incumbrancer. But in India the mortgagor and mortgagee, even though they may concur as to the existence or validity of the mortgage (which they often do not), are seldom in accord as to the amount due upon it. If the existence of the mortgage be not altogether concealed from a private purchaser by the mortgagor and vendor, as it frequently is, he generally would have great, if not insuperable, difficulty in ascertaining the amount due upon it. In the case of Court sales, s. 287 of the Civil Procedure Code of 1877, confers certain powers on the Court for the purpose of preparing the proclamation of intended sale with a view to afford to intending purchasers such information with regard to the property as the Court may find itself able to procure. The mortgagor and mortgagee or other incumbrancer may not always be present in the locality and available for examination; and, even if they be so, their evidence is not always to be trusted. Sometimes they are in direct conflict as to the facts: at other times they are in collusion to charge the property with a fictitious mortgage in order to defeat the judgment-creditor. It would be hard on the purchaser that his conveyance or certificate of sale, if insufficiently stamped in consequence of misinformation or want of information as to the amount due on a mortgage or incumbrance subject to which the property is sold to him, should be rendered ineffectual, or that he should be subject to a penalty in order to have the document properly stamped. If s. 24 be ultimately retained on the Statute Book, which we hope it may not, it is fair that some reference to it should be made under the article 'Conveyance' in the schedule to the Act. The majority of people look to the schedule for the stamp duty. As it now stands, they would find no hint there that the amount due on a mortgage or incumbrance, subject to which the property is sold, is to be regarded as part of the consideration liable to duty. A similar precaution to that now suggested has been taken by the Imperial Legislature, which under the title 'Conveyance' [477] in Statute 33 and 34 Vic., c. 97, refers to its 73rd section amongst others, as explanatory of the mode in which the stamp duty on conveyances is to be calculated.

It would, we think, be a wholly erroneous practice to charge stamp duty on the amounts of claims against the property mentioned only in the proclamation of sale; inasmuch as, by the circular orders of this Court, the proclamation of sale must contain an express intimation that "the Court does not warrant the title of judgment-debtor or any other claimant specified in the proclamation to any lot set forth in it or any interest therein or charge or claim thereon." See Circular Order Book, page 175, cl. (b) of the form of proclamation of sale, and page 180 C, rule 11, cl. (b) of the Government Rules regulating sales by Collectors. The Civil Procedure Code of 1877, ss. 282 and 295, show that property may be attached and sold subject to a mortgage or lien. The case of *Faquir Baksh v. Chutterdharee Chowdry* (1) shows what the words, "subject to a

mortgage" which occur in s. 271 of Act VIII of 1859 (the section in that Act analogous to s. 295 of Act X of 1877), have by the High Court of Calcutta been held to mean. It may thence be inferred that a judicial sale subject to a mortgage means a sale made expressly so subject—*i. e.*, by the certificate of sale. The power of the Court, to sell expressly subject to a mortgage or other lien or incumbrance, is one which manifestly ought to be exercised with the greatest caution, and in none except the clearest cases. In the present case, the sale to the auction-purchaser having been, by the certificate of sale, made expressly "subject to the mortgage of Kuber Hargovan for Rs. 49," and there being nothing to show that any portion of that sum consisted of interest, or that less than that sum was due on the mortgage for principal at the time of the sale, we hold that the stamp duty chargeable on the certificate of sale should be upon a consideration in the whole of Rs. 59, *viz.*, Rs. 49, the sum named in respect of the mortgage, and Rs. 10, the amount of the purchase-money payable by the purchaser, Bhagia Golla Sakra.

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[478] APPELLATE CIVIL.—FULL BENCH.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, Mr. Justice Melvill, Mr. Justice Kemball and Mr. Justice Pinhey.

*REFERENCE FROM THE CHIEF COMMISSIONER OF CENTRAL PROVINCES.† [4th July, 1881].

Indemnity note, stamp duty on—Stamp Act, I of 1879, sch. I, arts. 5 and 28.

An indemnity note, passed to a railway company by a consignee and his surety in respect of goods delivered to the consignee, and for which he is unable to produce the railway receipt—by which note they undertake to hold the railway company, its agents, and servants, harmless and indemnified in respect of all claims to the said goods—is not 'an indemnity bond' falling under art. 28, sch. I of the Indian Stamp Act I of 1879, but is an agreement falling under cl. (c) art. 5, sch. I of that Act, and, consequently chargeable only, with a stamp duty of eight annas.

[D., L.B.R. (1893—1900) 119.]

THE Chief Commissioner of Central Provinces submitted, for the opinion of the High Court, the question—what was the proper amount of stamp duty chargeable on an indemnity note? in the following form:—

"I hereby acknowledge to have received from the State Railway valued at Rupees which was despatched to my address from the station of the State Railway on or about the day of , the railway receipt for which has been lost; and for myself, my heirs, executors, and administrators. I undertake, in consideration of such delivery as aforesaid, to hold the State Railway, its agents, and servants harmless and indemnified in respect of all claims to the said goods; and I, the undersigned, signing below consignee of these goods, certify that the first signor is the *bona-fide* owner of the goods, and that I, the undersigned surety, undertake the whole of the said liability equally with the consignee, and for this purpose I affix my signature hereto.

Signature of consignee :

Witness :

Signature of surety :

Witness :"

* [It is not found in I.L.R.—ED.]

† Civil Reference No. 24 of 1881.