

1890

DEC. 22,

15 B. 532 (F.B.),

## APPELLATE CIVIL—FULL BENCH.

FULL  
BENCH.*Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Birdwood and  
Mr. Justice Candy.*15 B. 532  
(F.B.).MEER KAISUR KHAN MURAD KHAN (*Plaintiff*) v. EBRAHIM KHAN  
MUSA KHAN (*Defendant*).\* [22nd December, 1890.]*Auction-sale—Mortgage lien—Certificate of sale—Stamp.*

Where property is sold at a Court sale subject to a mortgage lien, the stamp upon the certificate of sale should cover the amount for which the property was sold, as well as the amount of the mortgage lien reserved.

*Sha Nagindas Jeychand v. Halalkhore Nalhuwa Gheesla* (1) followed.

THIS was a reference made by A. C. Trevor, Acting Commissioner in Sind, under s. 46 of the Indian Stamp Act (I of 1879).

Originally the reference was made by the Acting Collector of Karachi under s. 45 of the Stamp Act to the Acting Commissioner, who submitted the point referred to him for the opinion of the High Court.

The Acting Collector of Karachi made the reference in the following terms:—

“In execution of a decree obtained by one Meer Kaisur Khan Murad Khan in the District Court at Quetta against Ebrahim Khan Musa Khan one-third share of several landed properties in Karachi was sold by the District Court, Karachi, and was purchased by the decree-holder for Rs. 4,010, but in the certificate [533] of sale, which the District Court granted to the purchaser, it is stated that the sale is subject to a lien of Edalji Dinshaw on the said properties for Rs. 27,000 under a mortgage-deed dated the 9th December, 1885.”

“The certificate is executed on a stamp paper of Rs. 45, but the Sub-Registrar, being of opinion that it should have been executed on a paper of Rs. 135, under circular No. 6 of the Inspector General of Registration and Stamps, Bombay, \* \* impounded the document and sent it to the Collector.

“The Inspector-General’s circular is based on the Bombay High Court ruling to the effect that when property is sold by public auction, subject to a mortgage lien, and when that lien is clearly set forth in the certificate of sale, the stamp duty to which the certificate of sale is liable, is to be reckoned on the amount of purchase-money *plus* the amount of the mortgage lien. Under this ruling, therefore, the certificate of sale granted to Meer Kaisur Khan would be liable to stamp duty on Rs. 4,010 (purchase-money) *plus* Rs. 9,000, being one-third of the mortgage lien on the entire property.

“But as the High Courts of Calcutta and Madras have decided this point in a different manner in the rulings quoted below, and the Collector feels inclined to follow those rulings, he thinks it best to refer the matter for orders under s. 45 of the Indian Stamp Act.”

The rulings of the Calcutta and Madras High Courts referred to by the Collector were the following:—(1) I. L. R., 10 Calc., 92; (2) I. L. R., 5 Mad., 18; (3) I. L. R., 7 Mad., 421.

\* Civil Reference, No. 18 of 1890.

(1) 5 B. 470.

The Acting Commissioner, in submitting to the High Court the reference made to him by the Acting Collector, stated as follows:—

“The accompanying statement of a case received from the Collector of Karachi under s. 45 of the Stamp Act is forwarded to the Registrar of Her Majesty’s High Court of Judicature, Bombay, with a request that it may be laid before the Honourable Court for any opinion they may deem fit to give on it.

[534] “2. The question involved is whether, in the case of a certificate of sale granted by a Civil Court and declared to be incumbered with a mortgage lien, the amount of purchase-money only or such purchase-money plus the amount of the mortgage due on the property sold should be held to be the consideration in respect of which the stamp duty should be levied. The Bombay High Court in a Full Bench decision printed at pp. 470 to 477 of the Indian Law Reports, Bombay Series, Vol. V; 1881, have ruled in favour of the latter alternative, and the decision appears to have been circulated by the Inspector-General of Registration and Stamps to all Registrars for guidance. It will, however, be found to be in conflict with the following decisions reported in the Calcutta and Madras Series of the Indian Law Reports, in which the Courts have decided that such certificates should bear stamp for a consideration equal to the amount of the purchase-money only:—Calcutta, Vol. X, 1884, p. 92; Madras, Vol. V, 1882, p. 18; Madras, Vol. VII; 1884, p. 421.

“3. The Collector of Karachi is in doubt as to the proper course to be followed in the particular case before him, and he has referred the matter for final orders. The Commissioner is of opinion that s. 24 of the Indian Stamp Act and that the decisions passed by the Calcutta and Madras High Courts are the more correct interpretation of the law. In view, however, of the conflicting opinions which have been expressed, he considers it desirable that the case should be referred for the consideration of the Honourable Court. It will be seen that the Bombay decision referred to was before the Calcutta and Madras Courts when the latter recorded their opinions in the first and third cases quoted in the preceding paragraph.”

The Government Pleader (*Shantaram Narayan*), for the Government.

*Vishnu Krishna Bhatavdekar* (*amicus curiæ*), for the plaintiff.

*Shivram Vitthal Bhandarkar* (*amicus curiæ*), for the defendant.—I support the view taken by the Collector and the Commissioner. We contend that the certificate of sale should bear a stamp with respect to the purchase-money only. Article 16 of sch. I of the Stamp Act is applicable to a certificate of sale, [535] and it lays down that the stamp duty should be for a consideration equal to the amount of the purchase-money. The provisions of s. 24 of the Stamp Act are vague, and are inapplicable to the present case; while art. 16 of sch. I specifically relates to a certificate of sale. The propriety of the Calcutta and Madras decisions and the hardship of the Bombay rulings may be thus illustrated. Suppose a property incumbered with a mortgage lien of a considerable value is sold at an auction sale, subject to the mortgage lien, in separate lots. Each of such lots being incumbered with the mortgage lien will naturally fetch a very low price. But the purchaser of a lot will, according to the Bombay rulings, have to pay the stamp duty on the amount of the purchase-money and the mortgage lien, and in such a case it may happen that the auction-purchaser will be

1890  
DEC. 22.

FULL  
BENCH.

15 B. 532.  
(F.B.).

1890  
DEC. 22.

FULL  
BENCH.

15 B. 532  
(F.B.).

saddled with a stamp duty which would exceed the amount of the purchase-money. In framing the Stamp Act the Legislature could not have intended such a result.

ORDER.

SARGENT, C. J.—Section 24 of the Stamp Act is applicable. The Bombay High Court has considered the point in several cases—*Sha Nagindas Jeychand v. Halalkhore Nathwa Gheesla* (1), *In re Ramkrishna* (2), and *Ramkrishna* (3).

The ruling of this Court in *Sha Nagindas Jeychand v. Halalkhore Nathwa Gheesla* (1) must be followed.

Order accordingly.

15 B. 536.

[536] APPELLATE CIVIL.

Before Mr. Justice Birdwood and Mr. Justice Parsons.

MULTANCHAND SHIVRAM (*Original Plaintiff*), Appellant v. KHAN SAHEB KHARSEDJI NASARVANJI (*Original Defendant*), Respondent.\*  
[17th January, 1891.]

*Civil Procedure Code (Act XIV of 1882), s. 545—Stay of execution—Notice to decree-holder—Practice.*

A final order for staying the execution of a decree should not be made without giving the decree-holder notice of the judgment-debtor's application. The application should be supported by an affidavit.

APPEAL from the order of T. Hamilton, Acting District Judge of Ahmednagar, in application No. 223 of 1889.

The plaintiff obtained a money decree for Rs. 2,326-12-0 against the defendant.

The defendant appealed against the decree to the District Court, and applied for stay of execution pending the disposal of the appeal.

The application was to the following effect:—

“If the decree is executed against me, the appellant, I shall have to sell my immoveable property, and if the property is sold under such pressing circumstances, it will not fetch a proper price; and if the lower Court's decree is eventually reversed in appeal, the property would be sold for no reason, and I would suffer a great loss. I, the appellant, therefore, pray that the Court may be pleased to order execution to be stayed.”

This application was not supported by any affidavit.

The District Judge, without issuing any notice to the decree-holder, passed an order for stay of execution on security being furnished.

Against this rule, the decree-holder appealed to the High Court.

*Ghanasham N. Nadkarni*, for appellant.—The order for stay of execution is improper, and contrary to the universal practice of the Courts in this Presidency. Notice ought to have been [537] issued to the

\* Appeal No. 46 of 1890.

(1) 5 B. 470.

(2) 9 B. 47.

(3) P. J. for 1884, p. 260.