
(1965) 11 GUJ CK 0002
In the Gujarat High Court
Case No : Stamp Ref. No. 1 of 1964

Collector of Ahmedabad

APPELLANT

Vs

Deepak Textile Industries Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 25-11-1965

Acts Referred:

Bombay Stamp Act, 1958 — Section 25, 33, 37(2), 54
Stamp Act, 1899 — Section 24

Citation : AIR 1966 Guj 227 : (1966) 7 GLR 282

Hon'ble Judges : J.M. Shelat, C.J.; P.N. Bhagwati, J.; B.J. Divan, J

Bench : Full Bench

Advocate : A.D. Desai, Asst. Govt. Pleader, for the Appellant; I.M. Nanavati and G.T. Nanavati, for the Respondent

Judgement

Shelat, C.J.—This is a reference by the Chief Controlling Revenue Authority u/s 54 of the Bombay Stamp Act LX of 1958. The questions referred to us under the reference are--

(1) Whether the agreement to which merely a passing reference has been made in the sale deed and which is not an adjunct to the sale deed can be taken into consideration for the purpose of fixing stamp duty;

(2) Whether in absence of any mention regarding apportionment of mortgage debt as encumbrances over the immovable and movable properties, the party can escape stamp duty over the mortgage amount at all;

(3) In the case under consideration whether the stamp duty should be Rs. 24,000 or Rs. 96,000.

Questions (1) and (2) are not pressed by the learned Assistant Government Pleader and therefore it is only the third question that remains to be considered. The answer to that question turns on the true and proper interpretation of some of the clauses of the deed of conveyance entered into on October 3, 1968 between the first respondent company described therein as the vendors of the

one part and the second respondent company on the other part therein described as the purchasers To appreciate the question more properly, we may set out a few facts which are recited in the deed of conveyance.

2. The property which is the subject-matter of the sale under the said deed is a textile mill situate at Ahmedabad comprised of plant, machineries, various buildings, offices and chawls constructed on lands bearing several survey numbers in Asarva City Mahal Registration District, sub-district Ahmedabad, more particularly described in Part I of the Schedule annexed to the deed. One Kalidas Motilal Mehta, the managing agent of the Kalyan Mills Co. Ltd., had taken on lease these lands under diverse indentures of lease, particulars whereof are set out in the second part of the Schedule to the deed. The said Kalyan Mills Co. Ltd., there after constructed several buildings, offices and chawls on those lands. By an indenture of trust dated January 3, 1941 made between the said mills company and Ardeshar Darabshah Shroff and Jehangir Doshabhai Chowksi, therein referred to as the trustees, being a trust deed to secure payment of certain debentures issued by the said mills company, the said mills demised to the said two trustees the leasehold hereditaments in perpetuity together with all the buildings constructed as aforesaid thereon and assigned to the said two trustees, the plant and machinery, equipments, tools etc., upon trust that so soon as the security constituted by the said trust deed should become enforceable, the trustees may take possession of the said properties and sell the same and apply the sale proceeds in the manner set out in the said trust deed. The said Ardeshar Shroff and Jehangir Chowksi were thereafter discharged as trustees and the debenture holders under Clause 55 of the said trust appointed, by a resolution dated April 17, 1951 one Rukana Ul-Mulk S. Abdul Wajid and Hanumanprasad Motilal Pasari as trustees in place and stead of the said two trustees. By a deed of transfer dated January 11, 1956 the said properties were transferred to the said new trustees so as to vest them in the new trustees. The security constituted by the said trust deed having become enforceable, the trustees took possession of the said hereditaments, plant, machinery, etc.. of the said mills and by a sub-lease dated May 8, 1951 the trustees demised unto the first respondent company the said properties along with the said machinery plant etc., for a period of three years commencing from May 9, 1951 on terms and conditions set out in the said sub-lease. On the expiry of the said term of three years and on the first respondent company exercising the option reserved to it for renewal, the said sublease was renewed. By an agreement between the said trustees, the first respondent company and the said Kalyan Mills Co. Ltd., it was agreed that the trustees should sell to the first respondent company the said mills together with all leasehold properties, plant, machinery, equipment, etc., and the buildings constructed on the said lands for a consideration of rupees twenty-one lacs. It was also agreed that out of the said sum of rupees twenty-one lacs the sum of Rs. 2,90,000 should represent the price of the leasehold properties, the buildings thereon and a part of the said plant and machinery in the nature of immovable property and the balance should represent the price of

the movable machinery and articles capable of passing by manual delivery The said sale was completed by delivery of movables and by execution of an indenture of assignment dated July 20, 1967 in respect of the said leasehold hereditaments, the buildings standing thereon and the said plant and machinery in the nature of immovable property.

3. It appears that on or about January 4, 1963, the first respondent company, in consideration of the Union Bank of India Ltd.. having advanced to it a sum of rupees twelve lacs, mortgaged in favour of the bank all the said leasehold hereditaments and properties along with all buildings, plant, machineries, fixtures and furnitures with a view to secure repayment of the said sum of rupees twelve lacs. The first respondent company thereafter executed an indenture of mortgage dated August 3, 1963 creating thereby a first mortgage on the said leasehold properties and the buildings standing thereon and all the plant, machineries and fixtures of the said mills. On August 3, 1963 the first respondent company entered into an agreement with one Ramanlal Mathurbhai Patel and one Ravjibhai Mathurbhai Patel to sell to the said Ramanlal Mathurbhai Patel and the said Ravjibhai Mathurbhai Patel or their nominees or a company which they intended to promote the said leasehold properties and all buildings standing thereon together with all machineries, plant, fixtures and furnitures, for a sum of rupees forty lacs. It was inter alia agreed that out of the sum of rupees forty lacs, rupees four lacs should represent the price for the assignment and sale of the said leasehold properties, buildings and constructions made thereon and such of the plant and machinery in the nature of immovable property and the balance of rupees thirty-six lacs should represent the price of the rest of the plant and machinery capable of passing by manual delivery. The said Ramanlal and Ravjibhai thereafter promoted the second respondent company on October 1, 1963 and intimated to the first respondent company that the sale pursuant to the said agreement dated August 17, 1963 be made in favour of the second respondent company. The said Hamanlal and Ravjibhai thereafter requested the Union Bank of India Ltd. to transfer and/or grant to them a sum of rupees fourteen lacs as and by way of a loan on the same terms and conditions on which the bank had advanced the sum of rupees twelve lacs to the first respondent company and giving facility to repay the aforesaid amount of rupees fourteen lacs by eight annual instalments on the security of a first mortgage of the said properties, the second respondent company agreeing to execute a deed of mortgage in favour of the bank. It appears that the arrangement arrived at between the bank and the second respondent company was that the bank should permit the first respondent company, being the mortgagors of the said properties, to sell them to the second respondent company, the second respondent company agreeing to redeem and discharge the said mortgage dated August 3, 1963 executed in favour of the bank by the first respondent company from out of the sum of rupees fourteen lacs agreed by the bank to be advanced to the second respondent company, so that on the deed of conveyance being executed by the first respondent company in favour of the second respondent

company, the latter company should get the said properties free from the said mortgage dated August 3, 1963. This position is made clear in the said agreement of sale of which we will now recite the terms and conditions relevant for our purposes Clause 1 of the agreement provided:

"That the vendors shall sell and the purchasers shall purchase the block of the mills consisting of lands, buildings, fixtures, furniture and installed machineries (more particularly described in schedule hereto) for a sum of Rs 40.00,000 (Rs. forty lakhs only) out of which the sum of Rs. 4,00,000 (Rs. four lakhs) represents the value of lands, buildings, fixtures and machineries, which are in the nature of immovable properties and Rs. 36,00,000 (Rs. thirty-six lakhs) represents the value of machineries which are in the nature of movable property capable of passing by manual delivery and furniture."

Clause 2 provided that--

"That the block of the mills is mortgaged by the vendors in favour of the Union Bank of India Ltd., Bombay along with lands of the vendors situate outside the compounds of the mills which outside lands do not form part of this agreement to secure the advances made by the said bank to the vendors for a sum of Rs. 12,00,000 (Rs. twelve lakhs only) with interest due thereon This agreement is made on the basis that the Union Bank of India Ltd. continues this facility on the first mortgage of the block of the mills which will be purchased by the purchasers herein with such instalments for the repayment of their advance which shall not exceed Rs. 3,00,000 (Rs three lakhs only) annually so that the purchasers will get a period of four years from the date of conveyance in their favour for the repayment of the said advance of the Union Bank of India Ltd. In case the Union Bank of India Ltd. does not extend this facility, this agreement shall be treated as having terminated without any liability to the vendors or the purchasers and the earnest money paid under this agreement shall be returned to the purchasers" Clause 4 allocated the aforesaid sum of rupees forty lacs to be paid by the purchasers in the manner set out in that clause. A sum of rupees one lac was to be paid as and by way of earnest money for the due performance of the agreement, the cheque whereof was handed over to the advocate of the purchasers to be kept in a separate account and to be utilised for the due performance of the agreement and to be given over to the vendors on the execution of the conveyance pursuant to this agreement but to be returned to the purchasers in the event of the vendors being unable to execute the conveyance pursuant to the agreement. Rupees twelve lacs were to be adjusted by discharge of the mortgage executed by the vendors in favour of the said bank by the purchasers executing a first mortgage in favour of the bank for a sum of rupees twelve lacs, and rupees twenty-seven lacs to be paid by the purchasers, to the vendors in half yearly instalments carrying seven per cent running interest per annum, the first instalment to be due on June 30, 1964. The instalments were so adjusted that if in any one year the purchasers would not have to pay more than rupees seven lacs inclusive of the instalments payable to the bank,

provided that the bank granted an advance of rupees fourteen lacs to the purchasers against a first mortgage of the properties, the purchasers were to pay to the vendors a further sum of rupees two lacs out of the said advance of rupees fourteen lacs so that the balance payable to the vendors would be rupees twenty-five lacs. So far as this agreement is concerned, there can be no doubt whatsoever that the consideration for the sale was rupees forty lacs and no more and the manner of payment of that amount was to be as set out in Clause 4 of the agreement which makes it dear that out of the consideration of rupees forty lacs, rupees twelve lacs were to be adjusted towards the price by the second respondent company discharging the said mortgage executed by the first respondent company in favour of the bank and the mortgage was to be discharged by the second respondent company executing for the like amount, i.e. rupees twelve lacs, a first mortgage in favour of the said bank. The arrangement thus was a tripartite arrangement between the two respondent companies and the bank whereunder the bank agreed to transfer the facility granted by it to the first respondent company to the second respondent company by granting an advance of rupees fourteen lacs and the second respondent company discharging from out of these rupees fourteen lacs the mortgage executed by the first respondent company by paying off to the bank rupees twelve lacs, being the mortgage debt payable by the first respondent company to the bank. This arrangement was incorporated in the deed of conveyance, for Clause 1 of that deed in terms provided: "The balance of the price shall be paid in the manner arranged In the agreement dated 17th August, 1333 provided, however, that if and when the purchaser is granted an advance of Rs. 14,00,000 (Rs. fourteen lacs) by the Union Bank of India Ltd on the first mortgage of the immovable properties comprised herein and other plant and machineries of the mills the sum of Rs. 12,00,000 (Rs. twelve lacs) shall be utilised in order to discharge the mortgage executed by the vendor by indenture dated 3rd August 1963 in favour of the said bank."

4. It appears that when this deed of conveyance after the execution thereof by the parties, was presented for registration, the Registrar before whom it was presented impounded it u/s 33 of the Act presumably feeling that it was not duly stamped as required by the Act The Registrar then sent it to the Collector under Sub-section (2) of Section 37. By his letter dated November 16/18, 1963 to the Chief Controlling Revenue Authority, the Collector stated that the document was not stamped as required by Section 25 of the Act and that the document ought to have been stamped with the stamp duty of rupees ninety-six thousand and pot rupees twenty-four thousand as was actually done. This conclusion was arrived at by him as he felt that the sale was subject to the said mortgage executed by the first respondent company in favour of the bank and that u/s 25 the amount of rupees twelve lacs should be deemed to be part of the consideration. The Chief Controlling Revenue Authority thereupon made this reference raising the questions referred to already. In the reference, the Controlling Authority relied on Clause 2 of the said deed of conveyance which

runs as follows:

"That in consideration of the aforesaid price of rupees 4,00,000 Rs. four lacs, the vendors hereby assign and convey unto the purchasers all the lease-hold lands and hereditaments described in the first part of the schedule hereto along with all mill's buildings, offices chawls and other constructions standing thereon or in any part thereof and all fixtures and plant and machineries which are in the nature of immovable properties, free from all encumbrances and charges, but subject, however, to the first legal mortgage in favour of the Union Bank of India, etc."

Relying on the words "but subject however to the first legal mortgage in favour of the Union Bank of India" the Authority expressed the view that Section 25 would apply and the mortgage debt of rupees twelve lacs should be deemed to be part of the consideration for the sale and therefore the proper duty payable would be rupees ninety-six thousand and not rupees twenty-four thousand.

5. Section 25, on which the Authority relied upon, provides:

"Where any property is transferred to any person in consideration, wholly or in part, of any debt due to him or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or encumbrance 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 transfer is chargeable with ad valorem duty. " The Explanation to that section states :

"In the case of a sale of property subject to a mortgage or other encumbrance, 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."

The section thus enacts a deeming provision under which no doubt if the consideration or part of it is any debt due to the vendee or if the transfer is subject to payment or transfer of money or stock constituting a charge or encumbrance upon the property or not, such debt or money or stock is to be treated as consideration or part of such consideration. Under the Explanation, if the sale is subject to a mortgage or other encumbrance, the unpaid mortgage money or money charged together with interest due thereon is to be treated as part of the consideration. Illustration (1) to the section illustrates the first part of the section and illustrations (2) and (3) illustrate the latter part of the section and the Explanation. It is clear from the three illustrations that over and above the sale price, there is also in the first illustration the discharge of debt due to the vendee and in illustrations (2) and (3) the sale being subject to an existing mortgage the property is conveyed with the burden of the mortgage on it. Therefore, when the property is conveyed to a purchaser under the conditions set out in the illustrations, the purchaser receives the property with the burden of the encumbrance over the above the consideration which under the deed he has

to pay. The actual consideration in all the three illustrations is the price set out in the deed plus the burden of a mortgage or other encumbrance subject to which the property is transferred to the vendee. What Section 25, therefore, actually provides is that such a burden is part of the consideration, for it is subject to such burden and liability that the property is assigned to the vendee. The purchaser thus is conveyed the property in consideration of the price mentioned in the document and in addition to it the burden or the encumbrance. If the sale is thus made subject to a mortgage in favour of a third party, the purchaser, in addition to the consideration mentioned in the conveyance, has also to discharge the mortgage debt in order that he may get the property and the title thereto free from the mortgage. But it often happens that a property burdened with a mortgage or other charge is sold and an arrangement is made where-under the purchaser pays off the mortgagee and redeems the mortgage out of the purchase price payable by him. thus freeing the property of the encumbrance and getting clear title thereto free from any encumbrance, and then pays the balance to his vendor. In such a case, it is not possible to say that u/s 25 the mortgage debt is part of the consideration, the consideration being that which is mentioned in the conveyance as the sale price. Though Section 26 enacts a deeming provision, it is enacted only to get at the real consideration, such real consideration as contemplated by the section being the apparent consideration set out in the conveyance and in addition the consideration by way of discharge of a debt due by the vendor to the purchaser or the consideration of the transfer of debt to the purchaser or the burden of an encumbrance, such as a mortgage, subject to which the property is sold to him.

6. The question is, what is the position in the present case. The learned Assistant Government Pleader stated that he was relying upon the Explanation and argued that in the present case the sale of the property was subject to the mortgage executed by the first respondent company in favour of the bank and therefore the mortgage debt must be regarded as part of the consideration and therefore liable to stamp duty. He also argued that we can look at the deed of conveyance only and construe it to find out whether the case falls under the Explanation and cannot look at the agreement of sale which, according to him, is not a relevant document. That, in our view, is not a correct approach, for Clause 1 of the deed of conveyance not only refers to the agreement but in express terms sets out that apart from the earnest money of rupees one lac already paid and the receipt whereof by the first respondent company is acknowledged therein, the balance of the price was payable in the manner set out in the agreement of sale. That part of the agreement, therefore, is and must be held to have been incorporated in the conveyance and cannot, therefore, be considered as irrelevant for the purpose of ascertaining the consideration. If that is done we feel that it is clear (1) that the total consideration for the transfer and assignment of all the properties, movable and immovable, was agreed at rupees forty lacs, (2) that the consideration in respect of immovable properties comprised of the leasehold properties, the constructions standing thereon and the plant and machinery

treated as immovable property not being capable of manual delivery, was rupees four lacs out of which rupees one lac was payable as earnest money and (3) that though the properties were then subject to the first mortgage in favour of the bank, it was not as if the properties were to be conveyed subject to that mortgage in the sense that the purchasers were, over and above rupees forty lacs, also to be burdened with the liability to pay the mortgage debt. If the document were to be read in that manner the consideration would be rupees forty lacs and in addition a liability of the debt to the extent of rupees twelve lacs. If that were the case, the instant case would certainly fall under S 25 and the Explanation thereto. But such is not the position in the present case and that is clear if we were to look to the manner of payment as provided by the conveyance which, as we have already stated, incorporates Clause 2 of the agreement for sale. So read, it is clear that a tripartite arrangement was made under which the bank as the mortgagee consented to the property being sold by the first respondent company to the second respondent company. The bank also agreed to transfer to the purchasers the facility of advance made to the vendors and agreed under such transfer to advance rupees fourteen lacs on the purchasers executing a first mortgage. Out of the sum of rupees fourteen lacs to be so advanced by the bank to the purchasers, rupees twelve lacs being the mortgage debt was to be paid off by the purchasers to the bank, thus redeeming the mortgage created by the vendors and eventually the said amount of rupees twelve lacs so paid to the bank was to be adjusted towards the balance of the purchase price of rupees forty lacs. Therefore it is clear that the total consideration for the sale of all the properties was rupees forty lacs only payable in the manner agreed to between the three parties and it was not as if the mortgage debt was an additional liability over and above rupees forty lacs. The Collector and the Chief Controlling Revenue Authority apparently read the document wrongly and thus erroneously came to the conclusion that the total consideration was rupees fifty-two lacs and not forty lacs, thereby misjudging the transaction and failing to take the actual realities of the transactions which, the Act being a fiscal and a taxing statute, they were bound to take into consideration,

7. The learned Assistant Government Pleader in fairness pointed out to us a recent decision of the Supreme Court in Board of Revenue, Uttar Pradesh Vs. Rai Saheb Sidhnath Mehrotra, which practically concludes the question raised before us by the department. In that case, the Supreme Court was concerned with the construction of Section 24 of the Indian Stamp Act, 1899 which is in practically the same terms as Section 25 of the Bombay Act. Dealing with that section, the Supreme Court observed that the test adopted by the Legislature by Section 24 in valuing the property taken by the vendees was that any unpaid mortgage money or money charge, together with interest (if any) due on the sum was to be deemed to be part of the consideration for the sale. The underlying object of the section was that the fair incidence of tax should not be defeated. Construing the expression "subject to a mortgage or other encumbrance" in the Explanation

to Section 24, the Supreme Court observed that that phrase qualified the word "sale" and not the word "property". It also observed that the Stamp Act being a taxing statute must be construed strictly and that if two meanings were equally possible, the meaning in favour of the subject must be given effect to. Therefore the phrase "sale of property subject to a mortgage" implied that if the mortgaged property was sold subject to a mortgage, then, and then only, the Explanation applied but the phrase did not mean that whenever a mortgaged property was sold the Explanation was to apply. Thus, it is only the unpaid mortgage money that has to be deemed to be part of the consideration. If the mortgage money has been paid off by the date of the conveyance, the Explanation would not require it to be added to the consideration. If the mortgage amount has been paid off by the vendee before the date of the sale as part of the consideration, it would be included in the amount leviable with stamp duty under Article 23 and not under the Explanation to Section 24. These observations, though made in connection with Section 24 and the Explanation thereto of the Indian Stamp Act, 1899 equally apply to Section 25 and the Explanation thereto of the Bombay Act.

8. From the provisions of the agreement as also the deed of conveyance cited by us in the earlier part of this judgment, it is clear that though the second respondent company was to pay off the mortgage debt, namely, the aforesaid sum of rupees twelve lacs, it was not an amount in addition to the consideration set out in both these documents. The clear intention of the parties was that the second respondent company should get a clear title in respect of the property and it was therefore that the parties arranged that the second respondent company should discharge and redeem the outstanding mortgage in favour of the bank on the bank advancing to the second respondent company the sum of rupees fourteen lacs in consideration of the purchasers executing a first mortgage in favour of the bank. It is clear that the amount of rupees twelve lacs payable by the second respondent company to the bank for the purpose of discharging the said mortgage was to be adjusted towards the satisfaction of the total consideration under the said deed, namely, rupees forty lacs and was not in addition to that amount as supposed by the department.

9. For these reasons, our answer is that the stamp duty payable upon the said deed of conveyance was rupees twenty-four thousand and not rupees ninety-six thousand. The Collector of Ahmedabad will pay to the respondents the costs of this reference.