

**(1926) 03 BOM CK 0012**  
**In the Bombay High Court**  
**Case No : Civil Reference No. 7 of 1926**  
**In Re : Frank Portlock**

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**Date of Decision :** 31-03-1926

**Acts Referred:**

Stamp Act, 1899 — Section 24

**Citation :** (1926) 28 BOMLR 1091 : (1926) ILR (Bom) 640

**Hon'ble Judges :** Norman Macleod, J;Fawcett, J;Crump, J

**Bench :** Full Bench

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## Judgement

Norman Macleod, Kt., C.J.—This is a reference by the Chief Revenue Authority, u/s 57 of the Indian Stamp Act 1899, to determine what is the proper amount of stamp duty with which the instrument referred to in the reference and marked A is chargeable.

2. It purports to be a conveyance from one Frank Portlock, as vendor, to Bai Chandanbai and others, as purchasers of a piece of land together with the buildings thereon situate at Alta-mont Road, forming portion of a large piece of land, which had been mortgaged by the vendor to the purchasers, under an indenture of June 14, 1921, to secure an advance of Rs. 5,25,000. The mortgage was duly stamped with Rs. 2,625.

3. On February 6, 1923, the vendor conveyed to the purchasers a portion of the premises comprised in that mortgage in consideration of Rs. 2,75,000 to be retained in part satisfaction of what was then due on the mortgage. The conveyance was duly stamped with the full ad valorem stamp duty of Rs. 4,125 payable under Article 23 of the Indian Stamp Act.

4. The instrument now submitted purports to convey to the purchasers the remainder of the premises mortgaged in consideration of the mortgagors releasing the mortgagee from the sum of Rs. 2,25,000, the balance due on the security of the mortgage. The purchasers, when the instrument was sent for adjudication, u/s 32 of the Act, of the stamp duty payable thereon, claimed that, under the proviso to Section 24 of the Act, they were entitled to deduct from the stamp duty payable on the instrument, namely, Rs. 3,375, the amount of duty

Rs. 2,625 already paid in respect of the mortgage of June 14, 1921. The Chief Revenue Authority was of opinion that the deduction claimed was not admissible, having regard to the decision of this Court in *In re Nirabai* ILR (1904) 29 Bom 203 wherein it was held that it was Contemplated by the proviso to Section 24 of the Indian Stamp Act that, in order to entitle a mortgagor to a deduction when transferring his property mortgaged to the mortgagee, the property transferred ought to be identical with that mortgaged and should not merely form part thereof. In *In re Nirahui* references were made by the Commissioner in respect of two cases. In the first one, Nirabai executed a conditional sale-deed for Rs. 800 of Section No. 294 in favour of one Nagu bin Kondiba in the year 1896. She afterwards executed a simple mortgage for Rs. 60 of the same property in favour of the same person, in 1899. In 1902, an account was made up and in consideration of Rs. 550, which were found due, a portion of S.No. 294 was conveyed to Nagu and the two previous deeds were cancelled.

5. It will be seen that a portion of the property originally mortgaged was transferred in full satisfaction of the amount due to the mortgagee. In the second case, A, B, C and D, mortgaged a moiety of four Survey Numbers for Rs. 400. Later on, A and B executed another mortgage of the same property for Re. 200. A and B then sold the mortgaged property, which they said had come to them on partition amongst their kinsmen after the mortgage deeds were executed, for Rs. 750, including the amount due on account of their share of the first mortgage and the whole of the second mortgage.

6. It does not appear what became of the mortgage debt due by C and D, but in any event the identical property mortgaged was sold.

7. The Commissioner observed :

The proviso to the explanation in Section 24 of the Stamp Act does not specifically include cases in which part of the property previously mortgaged is subsequently sold. My opinion is that such cases are not covered by the proviso because it is difficult to assign a portion of the mortgage money to a part of the mortgaged property subsequently sold.

8. Neither of those cases are similar to the case before us, but the question is whether the ratio decidendi is the same.

9. The judgment says (p. 206):

We think that the proviso to Section 24 of the Indian Stamp Act...contemplates that to entitle the mortgagor to a deduction thereunder, the property transferred should be identical with that mortgaged and should not merely form a portion thereof, Had the intention been otherwise, we think the Legislature would have found no difficulty in expressing it. The words " wholly or in part used in the last paragraph of the section would in such case probably have been inserted in the proviso to the explanation after the words "is transferred.

10. With due respect, I do not think that reasoning is altogether correct.

11. The words "wholly or in part" in the first para, of the section do not refer to the property transferred, but to the debt, the consideration for the transfer. This is clear from the words in the latter part of the section "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."

12. The proviso belongs to, and must be read with, the explanation which is to the effect that, if a mortgagor sells the equity of redemption, the amount due by him to the mortgagee for principal and interest shall be deemed to be part of the consideration for the mortgage.

13. So that, in this case, if the vendor had sold to a third party instead of to the mortgagee, ad valorem duty would have been chargeable on Rs. 2,25,000.

14. The property was, undoubtedly, subject to a mortgage and was transferred to the mortgagee, so that, ordinarily speaking, he would have been entitled to deduct, from the duty payable on the transfer, the amount of duty already paid in respect of the mortgage. But, it is contended, he cannot do this because the mortgage was originally a mortgage on other property as well as on the property under transfer. The duty levied on the original mortgage cannot be split up, and, on transfer of a portion, the mortgagee cannot get credit either for duty paid on the whole of the mortgage money or for duty paid on that portion of it which still remains due.

15. I admit that many difficulties would arise if we were to place the construction asked for by the mortgagees on the proviso, and, I think, therefore, it is right that it should be construed strictly, and confined only to those cases in which the identical property mortgaged is transferred to the mortgagee. Then, I presume that, even if part of the mortgage money has been paid off", and the transfer is for the balance due, still credit would be given for the whole of duty paid on the mortgage.

Fawcett, J.

16. I agree that the deduction claimed is not admissible under the proviso, as it stands at present.

17. I think that the words "is transferred" can only mean transferred by the instrument, the stamping of which is in question : of. the definitions of "conveyance" and "instrument" in Section 2 of the Act. A previous instrument cannot, therefore, be taken into consideration in deciding whether the whole mortgaged property (and not merely a portion of it) "is transferred" to the mortgagee within the meaning of the proviso.

18. The present, no doubt, is a "hard case"; but it is for the legislature to remedy this, and the Court would not, in my opinion, be justified in straining the language of the proviso, in order to bring the present case within its four corners.

19. I do not think there is any sufficient ground for cur not following the ruling in

In re Nirabai ILR (1904) 29 Bom. 203

Crump, J.

20. In my opinion, the decision in In re Nirabai ILR (1904) 29 Bom. 203 should be followed, There is, no doubt; considerable obscurity as to the precise intention of the "proviso" under discussion, but the view, which has already been taken, is not shown to be incorrect. It must follow, I think, that the deduction now claimed is not admissible.