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**(1930) 02 CAL CK 0044**  
**In the Calcutta High Court**

U.K. Janardhan Rao

APPELLANT

Vs

Secy. of State

RESPONDENT

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**Date of Decision :** 12-02-1930

**Acts Referred:**

Stamp Act, 1899 — Section 24, 57

**Citation :** AIR 1931 Cal 193

**Hon'ble Judges :** Rankin, C.J;C.C. Ghose, J;Buckland, J

**Bench :** Full Bench

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**Judgement**

Rankin, C.J.—This is a reference u/s 57, Stamp Act of 1899, made by the Board of Revenue, Bengal, pursuant to an order made by my learned brother Panckridge, J. The question is as to the amount of duty to be charged upon a conveyance, dated 13th December 1928 whereby the applicant U.K. Janardhan Rao bought from Rama Raju Hanumantha Rao certain immovable property known as 16, Ramesh Mitter Road, in Calcutta. The case stated does not set out the facts at all clearly but the following facts are not in dispute:

2. On 23rd May 1923 a certain man called Biswas and his wife executed a mortgage over this property to a lady of the name of Hemlata for Rs. 15,000 with certain interest. The property at that time may have belonged to Biswas or to his wife, or to both, or to neither; the mortgage may or may not have been a mortgage according to the true construction whereof the mortgagors, or either of them, became personally liable to repay the loan. In 1925, Rama Raju, in execution of a money decree obtained by him against Biswas, purchased the right, title and interest of Biswas in this property for a sum of Rs. 3,233-6-0. On 13th December 1928, when the applicant purchased the same from Rama Raju, by the conveyance which is now in question, there was due and outstanding upon the mortgage of Hemlata a total sum of Rs. 25,636, namely Rs. 10,636, due as interest and Rs. 15,000 as principal. The document was stamped with a stamp of Rs. 35 on the footing that the stamp had to be calculated solely on the purchase price payable thereunder by the applicant to Rama Raju, namely, Rs.

1,000. The Board of Revenue claim that they are entitled to a stamp duty amounting to Rs. 405 upon the sum of Rs. 26,636, that is upon the consideration of Rs. 1,000 plus Rs. 25,636 due for principal and interest on Hemlata's mortgage.

3. Now, an instrument must be stamped according to its legal effect and intention. The conveyance before us recites that the vendor is seized and possessed of, or otherwise, well and sufficiently entitled to, the property therein described; it recites that this property was sold on 16th July 1925 in execution of a decree obtained by the vendor against Biswas and was purchased by the vendor for Rs. 3,233-6-0; that the certificate of sale was issued by the Court of the Subordinate Judge, 24 Pergannahs, on 9th March 1926; and that delivery of possession was obtained from the said Court on 19th April 1928. By its operative clause, in consideration of Rs. 1,000 the vendor grants to the purchaser all the right, title and interest of the vendor in the property. Next the vendor declares that he has not in any way incumbered the property. Next comes a covenant for further assurance and then follows this:

Be it stated that there is a suit being Title Suit No. 88 of 1928 pending in the Court of the First Subordinate Judge of Alipore relating to the said property brought by one Sreemutty Hemlata Dassi of 124 Aheeritola Street, Calcutta for enforcing a previous mortgage deed for Rs. 15,000 said to be executed on "23rd May 1923 by Rasaraj Biswas the aforesaid vendee of the vendor and his wife Sreemutty Promodini Dassi of Sonamukhi within the District of Bankura in which the said vendor has been made a defendant.

4. It appears to me that the first question to be asked upon this document is whether or not, according to the true meaning and intention of the applicant's bargain with the vendor, the vendor undertook, for the consideration of Rs. 1,000 therein stated, to give to the applicant a title to the property free from all claim of Hemlata under her mortgage.

5. To this question the answer is in the negative. The learned advocate for the applicant did not contend before us to the contrary. His contention was that there is a dispute as to whether the property belonged originally to Biswas or to his wife; that unless it belonged to Biswas the applicant by his purchase has got nothing; and, that this accounts for the smallness of the consideration money of Rs. 1,000. It is not disputed however that there was a mortgage of 23rd May 1923 and that Biswas was a party thereto as a mortgagor. The goodness or badness of the vendor's title in no way affects the question of the stamp duty. The instrument has to be stamped according to the true intent and meaning of the bargain which it represents.

6. The amount of stamp duty which is payable depends upon the terms of Section 24, Stamp Act of 1899 which runs as follows:

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 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 transfer is chargeable with ad valorem duty:

Provided that nothing in this section shall apply to any such certificate of sale as is mentioned in Article 18, Schedule 1.

Explanation: In the case of a sale of property subject to a mortgage or other incumbrance 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:

Provided that where property subject to a mortgage is transferred to the mortgagee, he shall be entitled to deduct from the duty payable on the transfer the amount of any duty already paid in respect of the mortgage.

Illustrations.

(1) A owes to B Rs. 1,000, A sells a property to B. the consideration being Rs. 500 and the release of the previous debt of Rs. 1,000. Stamp duty is payable on Rs. 1,500.

(2) A sells a property to B for Rs. 500 which is subject to a mortgage to C for Rs. 1,000 and unpaid interest Rs. 200. Stamp duty is payable on Rs. 1,700.

(3) A mortgages a house of the value of Rs. 10,000 to B for Rs. 5,000. B afterwards buys the house from A. Stamp duty is payable on Rs. 10,000 less the amount of stamp duty already paid for the mortgage.

7. It may be as well to proceed, to begin with entirely upon a construction of the words used by the legislature. I will say something later as to the history of this section. But the section must be construed and the applicant's liability depends upon it being shown from the words of the section that there is a clear intention to tax him in the manner and at the rate claimed by the revenue authorities.

8. To begin first with the section itself:

Where any property is transferred to any person subject either certainly or contingently, to the payment of any money, whether being a charge of an incumbrance upon the property or not.

9. Do these words fit the present case? The language is somewhat abstract and more than a little vague and only in the widest sense of the words can it be said that when property is sold subject to a mortgage it is transferred subject either certainly or contingently to the payment of money. In *Sha Nagindas Jaychand v. Halalkore Nathwa* [1881] 5 Bom. 470 this wide interpretation was given to Section 24, Stamp Act of 1879 which is identical with Clause 1 of the present section, the proviso the explanation and the illustrations having been added in 1899. Putting these additions upon one side for the moment and considering by

itself the first paragraph which is common to both statutes, I find that though the Bombay High Court stuck firmly to its opinion (of Meer Kaisur Khan Murad Khan v. Ebrahim Khan Musa Khan [1891] 15 Bom. 532 and Shantappa Chedambaraya v. Subrao Ramchandra [1894] 18 Bom. 157 a contrary view of its meaning was taken by this Court in In the matter of a Reference to the Board of Revenue [1884] 10 Cal. 92 by the Madras High Court in 1882 and -1884, Reference under Stamp Act [1882] 5 Mad. 15 and Reference under Stamp Act [1884] 7 Mad. 421 and by the Allahabad High Court in 1892 Jwala Prasad v. Ram Narain [1892] 15 All. 107. Now, the explanation which was added by the present Stamp Act of 1899 was clearly intended to resolve the difference of opinion disclosed by these decisions and the opening clause of the present section has now to be examined and interpreted in the light of the legislature's explanation of its meaning.

10. The first question which can be put is whether the phrase "subject to a mortgage or other incumbrance," qualifies the word "property" or qualifies the word "sale." If the former is the correct meaning then property which is in fact subject to a mortgage will if it is sold attract the consequences set forth in the explanation whether or not the property is sold on the terms that the vendor is to clear off the mortgage and give to the purchaser a clean title. In Waman Martand Bhalerao Vs. The Commissioner, Central Division, this question was raised and it was held that the clause "subject to a mortgage or other incumbrance" governs "sale of property" and not "property", that property may be subject to a charge and yet the sale may not be subject to it and that where a bargain between the vendor and the purchaser is that the vendor will make a good title free from all incumbrances the explanation does not apply. I am clearly of opinion that this is the correct view. To begin with an instrument is to be stamped according to the nature of the bargain. That is the general principle in the light of which a question of this character must be approached. The language of the main clause shows that the question is whether the property is transferred subject to the payment of money. The explanation is in my judgment entirely consistent with the language of the main clause. If property is subject to a mortgage but the vendor, in return for the purchase price, is to give a clear title free from all incumbrances, the explanation does not apply. Nor does Illus. 2 apply, for, the case there put is clearly not a sale free from the incumbrance. It is dangerous to rest one's view of a clause in the Stamp Act upon reasons of justice or fair play. Still it would require very clear words to induce one to think that where the purchase price is given as the full value of the property and the vendor as part of the consideration therefor undertakes to clear off all incumbrance the amount of the incumbrance was intended to be added to the whole value of the property and stamp duty assessed upon the same thing twice over.

11. But the case before us is not a case of this character. The bargain between these parties was not that for Rs. 1,000 the vendor would pay off Hemlata's mortgage and give a clean title to the applicant. On the face of it the applicant can make no such ease and the sale to him was a sale subject to Hemlata's

mortgage. His learned advocate contends however that even on this footing the language of the explanation is not intended to apply to a case like the present. Belying upon the opinions expressed by the learned Judges of the High Court of Bombay in Waman Martand's case, already cited he maintains that the explanation must be confined to cases where as a part of the consideration which the vendor gets for his transfer he is to be relieved expressly or impliedly from the burden of the mortgage as between himself and the purchaser. If this contention is correct the applicant is certainly entitled to succeed upon this reference. The case as stated does not show whether or not under Hamlata's mortgage either Biswas or his wife gave any personal covenant to repay the loan or the interest. Even if they did it is highly doubtful, to say the least of it, whether the purchaser in execution of a "money-decree who buys the right, title and interest of a mortgagor is liable to indemnify the mortgagor against such a personal covenant.

12. The Advocate-General has before us disclaimed all intention to rely upon any argument to the effect that the applicant's vendor was under any liability contingent or otherwise to repay the mortgage loan or that the applicant by his purchase undertook in any way to indemnify his vendor in respect of such liability.

13. We have therefore to see whether there is any real foundation for the view adopted by the Bombay High Court in the case last cited, that is, that unless as a part of the consideration which the vendor gets for his transfer, the purchaser comes under an obligation to relieve the vendor from the burden of the mortgage, the explanation does not apply. With the greatest respect for the learned Judges who so held I am of opinion that the explanation cannot be limited in this manner. Keeping still to the construction of the section as it stands I would point out that in the opening clause of Section 24, the words "in consideration wholly or in part of any debt due to him" and the words "subject either certainly or contingently to the payment etc." are alternatives. For the purpose of a case like the present, the first set of words may be neglected. To construe the explanation in such a way as to make out that it will apply only to cases in which the mortgage money can be regarded as really and in truth part of the consideration for the purchase is a misguided effort. What the main clause says is that where any property is transferred subject, either certainly or contingently, to the payment of any money, such money is to be deemed the whole, or part, as the case may be, of the consideration. The explanation is intended to make it clear that this applies to any unpaid mortgage money when the property is sold subject to the mortgage. It is reasoning in a circle to cut down the explanation so as to confine it to cases in which, apart from the provision of the main clause, it seems reasonable to say that the mortgage money is part of the consideration for the purchase.

14. A Stamp Act cannot be construed in this way. If it be true that a tax cannot be imposed without clear and express words for that purpose, and that the Court will intend nothing in favour of stamp duty, it is equally clear that general words

imposing a tax can-not be restrained in the manner now proposed : of *Mortimore v. Inland Revenue Commissioners* [1864] 2 H. & C. 838 and *In re Wright* [1855] 11 Ex. 458. The words of the explanation are at least meant to explain. They are intended to show that the more general and abstract language of the main clause applies to the case of property sold subject to a mortgage and to bring that case within them as a minor premise. The view taken in *Waman Martand's* case, by Martin, J., and Fawcett, J., is in my judgment inconsistent with the endeavour of the legislature in 1899 to settle the controversy disclosed in the case law by inserting the explanation and adding, Illus. (2) thereunder. Further it appears to me to be improbable that the legislature intended that in order to assess stamp duty upon a conveyance a decision should be arrived at upon the question whether in all the circumstances of the case there is an equity or implied obligation that the purchaser should indemnify the vendor against liability for the mortgage debt. To make the liability to stamp duty depend upon a series of facts of which no mention is made in Section 24 is to take a liberty with the section which is all the more serious in view of the statutory obligation (see Section 27) to set forth in the instrument itself the consideration" and all other facts and circumstances affecting its chargeability to duty : see also Section 64 of the Act which renders punishable a breach of this requirement if committed with intent to defraud.

15. In my view the unpaid mortgage-money is, in the case of a sale subject to a mortgage, to be deemed to be part of the consideration for the sale not because it is part of such consideration but because the legislature is determined to tax it. If the question be asked why in order to make it taxable the legislature has declared that it is to be deemed to be part of the consideration, the answer will be clear enough to anyone who pays attention to the lines upon which the statute is drafted, for example, the language of Article 20, Schedule 1, which is part of the machinery for carrying out the purposes of Section 24. This is the proper standpoint for purposes of construction of the statute though it is no doubt true that the motives of the legislature, even when enacting stamp duties, may be discovered to have some reason behind them.

16. So much for the construction of Section 2-1 of the Act of 1899. In view of the fact that the main clause in this Act is in identical language with that of Section 73, English Act of 1870 and Section 57, English Act of 1891, and that there is English and Scotch authority upon its meaning, some observations on the history of this enactment may not be out of place. Having regard to the decision of this Court in 1883 in the case already cited : *In the matter of a Reference to the Board of Revenue* (4), it is I think as well to examine the matter from this point of view.

17. By the Statute 55, George 3, Oh. 184 it was in 1815 provided as follows:

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 owing to the purchaser, or shall be bold 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.

18. In this enactment the important words to be noticed are:

shall be sold and conveyed subject to any mortgage...or to any gross or entire sum of money to be afterwards paid by the purchaser.

19. The meaning and policy of this provision came in question in the case of *The Marquis of Chandos v. The Commissioners of Inland Revenue* [1851] 6 Ex. 464. By the deed in that case B had conveyed to C certain estates subject to mortgages and charges of a very large amount. No price or purchase money was stipulated to be paid by C. The revenue authorities contended that as the estates were conveyed subject to the mortgages, the deed ought to be stamped with an ad valorem stamp upon the amount thereof. It was contended by the subject that the second , portion of the clause applied only to the case where, the amount of the mortgage is agreed to be paid by the purchaser as the consideration or price or part of the consideration or price and that this was the true meaning of the words "to be after wards paid by the purchaser." It was contended for the revenue authorities that wherever the charge is not paid or discharged by the vendor it was to be considered as "to be afterwards paid by the purchaser" that in such cases the purchaser obtains the power of acquiring all the estate by paying the charge whenever he pleases and was therefore deemed liable to pay the duty on the full value of the estate. The decision of the Court was:

In the clause which is to define what is the consideration or purchase money, the terms "to be paid by the purchaser" mean where it is stipulated that he is to pay it and the provision applies only to those cases, where in consideration of the conveyance of the estate the vendee agrees to pay a certain sum to the mortgagee or incumbrancer. Where the purchaser does not bind himself to pay, but is left to pay it or not as he pleases, it cannot be a part of the consideration money.

20. In consequence of this decision Parliament in 1853 amended the section (16 and 17 Victoria Ch. 59, Section 10). After reciting the previous Act and reciting that it had been held and determined that the said ad valorem duty is payable in respect of such sum or debt only where a purchaser is personally liable or bound or undertakes or agrees to pay the same or to idemnify the vendor against the same, it was declared to be expedient to alter and amend the law in this respect:

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 of 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.

21. Between 1853 and 1870, it was thus absolutely clear in England that the liability to pay stamp duty upon the amount of a mortgage debt depended in no way upon there being an undertaking by or obligation on the purchaser to discharge it or to indemnify the vendor against it.

22. In *Mortimore v. Inland Revenue Commissioners*, Baron Martin put the matter thus:

The scope and object of the enactment is clear, namely that upon every purchase ad valorem duty shall be paid on the entire consideration which either directly or indirectly represents the value of the free and unincumbered corpus of the subject-matter of the sale.

23. It may be noticed that in that case the property was charged with a sum which was to be paid within three months after the decease of two persons, provided that one of them died without male issue. Accordingly the debt with which the property was charged was a contingent debt and the argument on behalf of the subject was that a debt, which may not become payable at all, was not within the words

subject to any mortgage or debt or sum of money

as used in Section 10 of the Act of 1853. This contention was rejected by the Court on the ground that a contingent debt is a debt:

The words are general, and we think we are bound to give them general application.

24. In 1870 the words with which we are now concerned appear for the first time in Section 73, Stamp Act, and instead of the provision:

subject to any mortgage or to any gross or entire sum of money," the language now employed is : "subject either certainly or contingently to the payment of transfer of any money or stock whether being or constituting a charge or incumbrance upon the property or not.

25. The old phrase "to be afterwards paid by the purchaser," which had given difficulty in *Marquis of Chandos's* case had been eliminated in 1853. On the other hand the Act of 1870 no longer con-rains the words:

Notwithstanding the purchaser shall not be or become personally liable or shall not undertake or agree to pay the same or to indemnify the vendor or any person against the same.

26. The intention of the legislature in 1870 was to re-state the matter in a positive fashion and the only question is whether it meant to make any change in

the liability of the subject to pay tax upon the amount of the mortgage money if he brought the property subject to the mortgage. As by Section 57 the present Stamp Act in England, the Act of 1891, repeated the words of 1870 and added no explanation to make more plain their purpose, that question has not lost its importance in English law. Now Section 73, English Act of 1870, was copied verbatim into the Indian Statute Book as Section 24. Stamp Act of 1879. Curiously enough neither Sir Michael Westropp, in *Shah Nagindas'* case nor Sir Richard Garth in the *Calcutta* case already cited In the matter of a Reference to the Board, of Revenue appears to have noticed that the provisions of the English Act of 1853 had already been incorporated in Section 34, Stamp Act (18 of 1869). CI. B of that section contained the words,:

Notwithstanding the purchaser is not or does not become personally liable for such debt or sum or does not agree to pay the same or indemnify the seller against the same,

so that in 1869 the law in India upon this subject was exactly the same as the law in England. When the Indian Act of 1879 adopted the language of the English Act of 1870 it seems to have been thought both by Sir Michael Westropp and by Sir Richard Garth, that if , the Act was construed as the Revenue Board was contending, something altogether new was being introduced into India, and that difficulty would be experienced in India if in order to assess stamp duty upon a conveyance it was necessary to ascertain the amount due upon outstanding mortgages. The real question both upon the English Act of 1870 and upon the Indian Act of 1879 is whether or not the new language then introduced was intended to effect a change in the law-a relaxation of the rigour of the duty in favour of the subject and a reversion to the meaning which the Court of exchequer had attributed to the old Statute (55, George 3, Ch. 184) or at least an approach thereto.

27. In Great Britain this question has long ago been answered in the negative and under the Acts of 1870 and 1891 the principle laid down by Martin, B., under the Act of 1853 has been upheld. In 1881 this view was challenged in the Court of Session in the case of *Liquidators of City of Glasgow Bank v. Commissioners of Inland Revenue* [1881] 18 SCC. Law Hep. 242. There the transferor was possessed of certain property which in the hands of a previous owner had been burdened with a charge for ? 2,400. He was conveying, the property subject to the charge in consideration of a debt due to the liquidators of ? 2,350. The question was whether stamp duty was exigible upon the sum of ? 2,400 in addition to the sum of ? 2,350. The transferor was not personally bound for the payment of the mortgage debt. Lord President Inglis, after referring to the Act of 1853 said:

But they say that the provision of the 73rd , section of the existing Act is very different from this, and that its true construction leads to an opposite result. Now, the session in question is no doubt differently expressed from that which occurs in the Act 10 and 17 Vict. But the reason why it is so expressed, I

apprehend, is this, that it is intended to state the matter more shortly, and at the same time in compliance with a rule which is now very generally observed in statutes which are intended to be applicable to the whole United Kingdom, and particularly statutes of this description—Revenue Acts—the language employed is not technical language either of the law of England or of the law of Scotland, but language of a popular character, equally intelligible in all parts of the United Kingdom... Now, is not the amount of this bond and disposition in security a sum of money subject to which this property is conveyed? I really cannot concede anything more simple than the answer to that question. There cannot be the least doubt that the property in the hands of the purchasers, the liquidators, is subject to this bond and disposition in security for £ 2,400, and when they pay off that bond, if they think fit to do so, they will then be the heritable proprietors of a subject the price and value of which is £ 4,750, and therefore it seems most reasonable, if it is necessary to look at the reason of the thing at all, that as they can put themselves tomorrow in the position of being the unburdened proprietors of this estate, upon adding to the sum that they have already given the sum contained in this bond, they will thereby become proprietors of that estate who have obtained a conveyance to that estate of the value of £ 4,750 by means of the deed which is now to be stamped.

If any other rule were adopted, it is quite plain that the fair incidence of this tax would be altogether frustrated and defeated. A proprietor has an estate worth £ 20,000. There is a bond upon it for £ 10,000. He sells that estate and the purchaser pays to him the difference between the amount of the bond and the value of the estate, so that the bond is for £ 10,000 and he pays £ 10,000. The day after he obtains infestment he pays off the bond. Well, the practical result of that is that he has paid £ 20,000 as the purchase money of this estate and he has obtained conveyance with an ad valorem stamp of the value of £ 10,000. That is a simple defeating of the purpose and intention of the legislature as expressed in this clause, and therefore I think it very clear, upon the plain meaning of this section, that there was no intention whatever to go back upon the enactment of 16 and 17, Viet., and to restore the enactment of the 55 Geo. 3 which is what the liquidators are contending for. On the contrary, it seems to me that Section 73 plainly intended to continue the provisions of the Statute 16 and 17 Vict., and therefore that the Commissioners of Inland Revenue are right.

28. Lord Shand's judgment is expressed with greater hesitation:

If this question had been to be decided on the terms of the Stamp Act of 1870, without the light of the previous legislation, I should have felt it to be attended with very great difficulty, because I think there was a great deal of room for the argument maintained on behalf of the liquidators of the Bank that the word "payment" occurring in Section 73 of the Statute, used in this expression "subject either certainly or contingently to the payment of any money or stock," ought to be limited to a case in which there was a personal obligation to pay money, and would not include the case where the money or stock was a burden

merely upon land without a personal obligation. But I think the difficulty is entirely removed when the previous legislation is regarded .... but it appears to me, keeping in view what the existing law was, that this was intended in briefer terms to preserve the law upon that footing. The enactment is that where the consideration is partly discharge of a debt and partly a payment of money or stock, whether constituting a charge upon the property or not, the amount of that charge shall be part of the consideration, and I think the word "payment " there is " intended to cover the case in which the party is under an obligation to meet the burden, or it may be to give stock in return, while the words "constituting a charge or incumbrance upon the property " are intended to cover the case where that is the only way in which the burden is mentioned, although there be no obligation to pay.

29. *Swayne v. Commissioners of Inland Revenue* [1900] 1 Q. B. 172 is a clear authority to show that the same view is taken of Section 57, Stamp Act of 1891, by the English Courts. The question in that case was whether upon a conveyance of leaseholds stamp duty could be claimed upon the rent which the assignee covenanted to pay. It was held that payment of rent is an obligation ordinarily incident to lease-hold property and that this did not come within the words of the section. The judgment of Bruce, J., which was approved in the Court of appeal, *Swayne v. Commissioners of Inland Revenue* [1900] 1 Q.B. 172 contains this:

The history of the legislation on this subject, I think, confirms the view that I have expressed. It is related in the judgments delivered by the Lord President and. the other Judges of the Court of Session in the case of *Liquidators of City of Glasgow Bank v. Commissioners of Inland Revenue*. Where property is incumbered and is sold subject to the incumbrance or even subject to a bond or condition that certain money shall be paid in future, then upon payment off of the incumbrance or upon payment of the money stipulated to be paid in future the purchaser obtains an estate discharged from the incumbrance, or bond, or condition, and the money so paid in discharge of the incumbrance, or bond, or condition is paid indirectly as part of the purchase money of the estate, and therefore it is right that the sums of money, upon the payment of which the purchaser is able to obtain an unincumbered estate, should be taken into consideration as forming part of the purchase money and be added to the amount paid by the purchaser as the price of incumbered estate, or as the price of the estate sold burthened with the condition of the payment of money in future. It was to meet case of this kind that from time to time various provisions have been made by the legislature, the last of which is contained in the section now under consideration. No doubt the words in the section are very wide, but I think they cannot properly be applied to mean more-to use the language of Martin, B., in the case of *Mortimore v. Inland Revenue Commissioners*-than this: "that ad valorem duty-shall be paid "on the entire consideration which either directly or indirectly, represents the value of the free and unincumbered corpus of the subject-matter of sale.

30. Wills, J., said:

The real question is: What is the meaning to be put upon the word "property" in Section 57, Stamp Act, 1891 ? In the case of a mortgage it has been held to be the physical property which is the subject of the mortgage considered as unincumbered.

31. Turning now to Indian decisions we find that as very many sales of immovable properties are judicial sales, the section gave some trouble and on this point the present Act of 1899 has amended the law by excepting certificates of sale from the provisions of the section.

32. In 1882 the Madras High Court, dealing with a sale certificate of property sold subject to a previous mortgage held that the stamp duty on a conveyance is assessed on the consideration, that an undertaking in the future to pay money or deliver stock may be part of that consideration; that where there is such an undertaking the property is transferred subject to the payment, but where there is not such an undertaking the transfer is not subject to the charge. In Sha Naginda's case, Westropp, C. J., having examined the language of the section in the light of its history, came, as we have Keen, to an opposite conclusion:

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 for the certificate sale or private conveyance, as the case may be, upon which the stamp duty is payable.

33. The matter came in 1883 before Sir Richard Garth and a Division Bench of this Court. An examination of the judgment of the Chief Justice shows that he was of opinion that the language of the Indian Act of 1879 and the English Act of 1870 followed the language of Statute 55, George 3, Chap. 184. In this and in his view that the decision in the Marquis of Chandos' case governed the construction of the section before him, he appears to have been mistaken. The crucial words in the earliest Act "to be afterwards paid by the purchaser," upon which the decision had turned, are not to be found in the Indian Act., They had been jettisoned in England in 1853 and had never been re-enacted. It is true that it cannot be said of the Indian Act that it follows the language of Section 10, English Act, 1853, since it does not contain the words "notwithstanding the purchaser shall not be or become personally liable, etc." The learned Chief Justice argued that

where property is sold subject expressly to the payment or transfer by the purchaser of any money or stock, whether such money or stock be charged upon the property or not, such payment or transfer becomes the consideration for the sale and as soon as it is paid or transferred, and not till then, the purchaser is entitled to his conveyance. In such a case it is perfectly fair that the ad valorem stamp duty should be calculated upon the amount of such money or stock, but where property is merely sold subject to a mortgage or other charge, the

payment of such mortgage or charge forms, under ordinary circumstances, no part of the consideration for the purchase. The vendor simply soils and the purchaser buys an incumbered property and it is in no way essential to the validity of the sale that the mortgage or charge should be paid off.

34. He did not observe the difficulty arising in this view from the words "subject either certainly or contingently," but the chief point on which the argument fails is this: that it fails to take account of the circumstance that in order to construe the section we have not got to find out what in ordinary language or even in truth and in right reason, does form part of the consideration of a purchase. We have to construe a section in which the legislature has laid down that something, presumably not part of the consideration shall be deemed to be part of the consideration for the purpose of computing ad valorem duty. The same criticism must be made of the Allahabad decision based simply on the ground that "the incumbrance constituted no part of the consideration:" *Jwala Prasad v. Ram Narain*. Again the appeal to "reason and justice" is not very impressive. It is always a dangerous argument in a stamp case, not so much perhaps because the stamp law

imports nothing of reason and justice but de-ponds entirely upon the language of the legislature. Per Taunton, J., in *Morley v. Hall* [1834] 2 Dowl. 494.

as because the legislature may have reasons and good reasons, which do not appear upon the surface. It persumably had some reasons for enacting Section 24 of the Act of 1869.

35. The real question, and the only question was whether when property is transferred subject to a mortgage it is transferred "subject either certainly or contingently, to the payment of money?"

36. Madras said:

No-not unless there is an undertaking by the purchaser to pay or be liable for the mortgage money.

37. Calcutta said:

No-not unless the payment of the mortgage-money is a condition to be fulfilled by the purchaser before he gets his conveyance.

38. The former answer seems to have the greater reason and, simply as an interpretation of "the words of the section, it has genuine force. When dealing with a charging section in a taxing statute it is not unreasonable to reject a wider meaning in favour of a narrower lest the intention be exceeded. The subject is not to be charged without clear words. Hence neither the English decisions which I have cited nor the weakness of some of the reasoning in the Indian cases leads me to any confident opinion that the Bombay view was right or that the Madras and Calcutta cases were wrong in the result.

39. We need not however dwell upon the law as it stood in 1883. In 1899 the

legislature excluded certificates of sale from the operation of the section and added the explanation with which we are now concerned. The purpose of the explanation is to clear up the question whether in the case of a sale of property subject to a mortgage, the unpaid mortgage money is liable to duty or not and to make this matter plain in view of the conflict of authority already noticed. The High Court of Bombay which in Sir Michael Westropp's time, had, in the absence of the explanation, held that the mortgage was liable to duty has recently, in spite of the explanation, refused so to hold save in cases where the purchaser undertakes to pay the mortgage debt or to relieve the vendor therefrom. No such qualification is to be found in the explanation itself or in the illustration which is given by the legislature to throw light upon its meaning. The argument takes no notice of the possibility that the legislature, well knowing that a mortgage debt is in many cases no part of the consideration, according to the meaning of the bargain between vendor and purchaser, may, nevertheless, have enacted that it is to be deemed to be part thereof, because for purposes of tax, it desires that, as a purchaser of an estate subject to a mortgage put himself into the position by his purchase of having the right to acquire the whole property by paying off the mortgage money, he should be taxed in a manner which will correspond to the unincumbered value of" the property. What was clear law in India from 1869 and for ten years thereafter what has passed in England for over 50 years for a" wise and reasonable method of levying stamp duty, cannot well be regarded by the Indian Courts as something so unreasonable that the express terms of this explanation will fail to convince them that it can have been intended by the Indian legislature. In my judgment, whatever difficulty there may be in making certain of the meaning of the language of the main clause of the section had it stood entirely by itself, there is no difficulty in saying that the explanation has made clear the intention of the clause to exact duty in such a case as the present upon the basis that unpaid mortgage money is to be added to the consideration money properly so called in order to find the sum upon which the stamp duty is to be calculated under the schedule.

40. The question which Panckridge, J., ordered to be referred to us was in the following terms:

Whether the property No. 16, Ramesh Mitter Lane in the suburbs of Calcutta conveyed to the applicant on 13th December 1928, was by the conveyance of that date sold subject to a mortgage or encumbrance within the meaning of Section 24, Stamp Act.

41. In my opinion this question should be answered in the affirmative and the document is liable to stamp duty calculated not only upon the sum of Rs. 1,000 but also upon the amount of any unpaid mortgage money and interest due on the mortgage of 23rd May 1923.

42. The Revenue Authorities must have their costs against the applicant of this reference.

C.C. Ghose, J.

43. I agree.

Buckland, J.

44. I agree.