

1939

*Present : Keuneman and de Kretser JJ.***BARTLEET & CO. v. COMMISSIONER OF STAMPS***107—D. C. (Inty.) Special*

Stamps—Sale of property under mortgage decree—Sale under secondary mortgage—Primary mortgage satisfied after sale—Secondary mortgage—Purchaser gives credit for amount of primary mortgage—Consideration for conveyance—What is the true consideration—Stamp Ordinance, No. 22 of 1909, Schedule A, part I., item 23 (1) (b), (Cap. 189).

The appellants who were the plaintiffs in D. C. Colombo, No. 52,344, obtained a decree for Rs. 148,714.82, which included a sum of Rs. 79,078.38 due upon a secondary mortgage bond, hypothecating the half share of Soranawallie estate. The primary mortgage bond in respect of the same estate was for the sum of Rs. 40,000 and interest in favour of another person.

In D. C. Colombo, 52,344, on April 19, 1934, the appellants applied for an order to bid and an order giving them credit in a sum not exceeding their claim and costs. This was allowed subject to the condition that they were allowed to purchase at any value, on agreeing to enter satisfaction of the decree for a sum of Rs. 5,000. The District Judge in making the order took into consideration the fact that the primary bond was for Rs. 40,000 and that the half share of the estate was valued by the auctioneer at Rs. 42,500.

Thereafter the premises were sold by the auctioneer on April 28, 1934. At this sale the premises were bought by the appellants for Rs. 1,000.

On May 21, 1934, the appellants applied to the Court for an order confirming the sale.

In doing so, the appellants' Proctor stated that they were willing to give credit for the amount of Rs. 42,500, the appraised value of the estate as it had been ascertained that the primary mortgage had been discharged. The District Judge confirmed the sale.

On June 12, 1934, the transfer deed was executed. In the recitals all the above-mentioned facts were mentioned. A copy of the District Judge's order of May 21 was annexed to the deed.

The operative words of the deed were as follows:—"Now know ye and these presents witness that the Secretary of the District Court, Colombo, in pursuance of the said authority and in consideration of the said sum of Rs. 1,000 credited as aforesaid doth hereby grant".

Held, that the real consideration for the deed was the agreement by the appellants to give credit to the judgment-debtor to the amount of Rs. 42,500 and that the deed was liable to stamp duty on that basis.

It is competent for the Commissioner of Stamps to insist on being satisfied that the property, which is the subject-matter of the deed, has been correctly valued.

In arriving at this adjudication, the Commissioner is entitled to consider matters not expressed in the deed.

Gunawardene v. Gunasekera (1 *Times of Ceylon Law Report* 90) followed.

AN appeal from an order of the Commissioner of Stamps under section 31 of the Stamp Ordinance. The facts are stated in head-note.

N. Nadarajah (with him *F. C. W. VanGeyzel*), for appellants.—According to Schedule A, part I., item 23 (1) (b) of the Stamp Ordinance (Cap. 189), the "consideration expressed" is Rs. 1,000. Item 23 (1) (b) receives a certain amount of support from the proviso in section 22. Schedule F, Miscellaneous, also throws light.

M. T. de S. Amerasekere, K.C., Acting S.-G. (in reply to question from Court).—The Commissioner of Stamps has acted on the footing that Rs. 42,500 is the true consideration. It is the fact that the appellant gave credit for Rs. 42,500 which entitled him to the conveyance. Alternatively, the deed itself states that the purchase is subject to the mortgage for Rs. 40,000. Add to this figure the Rs. 5,000, for which the appellants agreed to enter satisfaction, and the total is Rs. 45,000. The consideration, therefore, is either Rs. 42,500 or Rs. 45,000.

N. Nadarajah.—To deal with the alternative submission first, the operative part of the deed does not convey subject to the mortgage. Even if it does, it would create no obligation. See *Donogh on The Indian Stamp Act* (1929 ed.) pp. 269 and 274. Where property is sold subject to a mortgage, the payment of such mortgage forms no part of the consideration money for the purchase. The stamp duty payable on a transfer conveying such a property is an *ad valorem* duty on the amount of the money paid as consideration for the sale—Reference from the Board of Revenue¹; *The Marquis of Chandos v. The Commissioner of Inland Revenue*²; *Waman Martand v. The Commissioner, C.D.*³; Reference under Stamp Act, S 464.

¹ *I. L. R.* (1833) 10 *Calcutta* 92.
² (1851) 6 *Exch.* 464.

³ *I. L. R.* (1924) 49 *Bombay* 73.
⁴ *I. L. R.* (1884) 7 *Madras* 421.

The actual consideration was Rs. 1,000. The appraised value of the property, viz., Rs. 42,500, is not a governing factor. The appellants gave credit for that sum only out of generosity. The purchase price as set out in the conditions of sale should determine the amount of consideration. The order of Court is to confirm the sale at Rs. 1,000 and not at Rs. 42,500. The value of a property should be its market value, i.e., the value obtainable at a public sale.

M. T. de S. Amerasekere, K.C., Acting S.-G. (with him *S. J. C. Schokman, C.C.*), for Commissioner of Stamps.—To arrive at the true consideration, the instrument of conveyance should be considered as a whole—*In re Chettyar Firm*¹. The real consideration is that on which the Court permitted the conveyance. The consideration of Rs. 42,500 was the amount for which the plaintiffs gave the defendant credit and can be described as “other than pecuniary”—item 23 (1) (b). “Consideration” must be given the meaning it has in English law—*Waharaka Investment Co., Ltd. v. Commissioner of Stamps*².

Extrinsic evidence is admissible under section 29 (2) of the Stamp Ordinance to ascertain the true consideration—*Gunawardene v. Gunasekera*³; *Croos v. Attorney-General*⁴. This view is in consonance with *Conybear v. British Briquettes, Ltd.*⁵ The present case should be distinguished from *Application of A. K. Chellappa*⁶.

In a sale subject to a mortgage, the amount due under the mortgage bond should be regarded as part of the consideration, except where the vendor expressly undertakes to pay the mortgage—*Janardhan Rao v. Secretary of State*⁷ where the Indian cases which have been cited on behalf of the appellants are reviewed. The instrument should be stamped according to the true intent and meaning of the bargain which it represents—*In re Trimbak Madhao Kshirsagar*⁸.

N. Nadarajah, in reply.

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Cur. adv. vult.

July 11, 1939. KEUNEMAN J.—

This is an appeal under section 31 of the Stamp Ordinance from an order of the Commissioner of Stamps under section 30 determining that the duty payable in respect of deed No. 170, dated June 12, 1934, and attested by D. J. Boniface Gomes, Notary Public, is Rs. 801.

The deed in question is a transfer executed by the Secretary of the District Court of Colombo in favour of the appellants of (a) an undivided half share of the estate known as Soranawallie and (b) an undivided one-fourth of the estate known as Madulla. The only matter in dispute in this appeal is the duty payable in respect of the half-share of Soranawallie. No question arises about the quarter share of Madulla.

The facts are as follows:—The appellants in D. C. Colombo, No. 52,344, obtained a decree for Rs. 148,714.82; this sum included Rs. 79,078.38

¹ (1935) *Rangoon A. I. R.* 243.

² (1932) 34 *N. L. R.* 266 at 272.

³ (1922) 1 *Times Law Rep.* 90.

⁴ (1930) 32 *N. L. R.* 78.

⁵ (1937) 4 *A. E. R.* 191.

⁶ (1916) 19 *N. L. R.* 116.

⁷ (1931) *Calcutta A. I. R.* 193.

⁸ (1937) *Nag. A. I. R.* 57.

due upon a secondary mortgage bond hypothecating the half share of Soranawallie, No. 1358, dated July 23, 1927. The primary mortgage bond in respect of the same estate was No. 1,258 of May 14, 1926, for the sum of Rs. 40,000 and interest in favour of some other person. In D. C. Colombo, No. 52,344, on April 19, 1934, the appellants applied for an order to bid and an order giving them credit in a sum not exceeding their claim and costs. This was allowed on April 25, 1934, subject to the condition that they were allowed to purchase at any value, on agreeing to enter satisfaction of the decree for a sum of Rs. 5,000. The District Judge took into consideration the fact that the primary bond was for Rs. 40,000. Further, the half share of the said estate was valued at Rs. 42,500 by the auctioneer appointed to conduct the sale (Mr. J. G. vander Smagt).

Thereafter the premises in question was sold by the auctioneer on April 28, 1934. At this sale the appellants made the highest bid, viz., Rs. 1,000, and the premises was knocked down to them.

On May 21, 1934, the plaintiffs applied to Court for an order confirming the sale. The journal entry of that date reads as follows :—

“The plaintiffs having purchased the mortgage property sold in the case, viz., an undivided half part of Soranawallie *alias* Panwila-watta . . . for the sum of Rs. 1,000 . . . , the Proctor for plaintiffs move that the plaintiffs may be given credit in the said sum and that the sale be confirmed.

“They also move that the Secretary be directed to execute the necessary conveyance in favour of the purchasers. Mr. Rowan for plaintiffs states that the plaintiff is willing to give credit for the amount of the appraised value of Soranawallie estate, viz., Rs. 42,500, as it has now been ascertained that the primary mortgage has been discharged, although the discharge has not been registered The sale will now be confirmed”.

It is not in evidence when the primary mortgage was discharged, except that this happened before the application for confirmation of the sale. It is clear, however, that the conditions originally imposed by the Court as regards the order to bid and the order for credit had been based upon the supposed existence of the primary mortgage, and the orders were allowed upon that footing. Either the primary mortgage had no existence at all at that date, or had been extinguished thereafter. Under the circumstances, it may have been open to the Court to refuse to confirm the sale, and it is difficult to think that the Court was not materially influenced in confirming the sale by the offer of the plaintiff's Proctor to give credit in the sum of Rs. 42,500.

Thereafter on June 12 the transfer now in question, No. 170, was executed. In its recitals, all the facts which I have mentioned were set out. The recitals stated that the secondary bond No. 1,358 was subject to the primary mortgage No. 1,258, and that the decree in D. C. Colombo, No. 52,344, as far as the hypothecation of Soranawallie estate was concerned, was subject to the said bond No. 1,258. The order of the District Judge allowing order to bid and order for credit was set out,

though not in full. It was also recited that the plaintiffs had made the highest bid at the auction, namely, Rs. 1,000, and that the Court had confirmed the sale. A copy of the District Judge's order of May 21, 1934, was annexed to the deed.

The operative words in deed No. 170 are as follows:—"Now know ye and these presents witness that the . . . Secretary of the District Court, Colombo . . ., in pursuance of the said authority, and in consideration of the said sum of Rs. 1,000 credited as aforesaid doth hereby grant . . ."

In the attestation clause the notary makes no reference to the consideration. Stamp duty was paid upon the footing that the consideration for the purchase of the half share of Soranawallie was Rs. 1,000.

Thereafter on February 17, 1938, the Commissioner for Stamps called upon the appellants to pay the sum of Rs. 664, being the deficiency in the duty paid, together with a penalty of Rs. 25 later reduced to Rs. 5. After some correspondence the appellants applied to the Commissioner under Chapter 3 of the Stamp Ordinance (section 29) for an adjudication as to the proper stamp. The present appeal is from the Commissioner's adjudication.

For the appellants it is contended that stamp duty should be calculated on the basis that the consideration on the deed in question was Rs. 1,000, and that this was "the purchase or consideration money" expressed in the deed [*vide* Schedule A, part I., item 23 (1) (b) and that no further inquiry could be made by the Commissioner. That Acting Solicitor-General contends on the contrary that under section 29 (2) the Commissioner was entitled to call for affidavits or other evidence "necessary to prove all the facts and circumstances affecting the chargeability of the instrument with duty". He further argues that in any event the terms of the deed in question sufficiently showed that the consideration for the deed was the sum of Rs. 42,500 for which credit was given, and the fact that this consideration appeared in the recitals and not in the operative words did not affect the question. He further urges that the consideration either wholly or in part was not a pecuniary consideration, and that accordingly the basis of assessment should be the value of the property, under the later words of item 23 (1) (b), and that the value of the property is Rs. 42,500.

In expanding his argument the Acting Solicitor-General stated that whether we took the original order for credit or the subsequent arrangement made at the confirmation of the sale as operative, the result would be the same. The original order for credit included an agreement to give credit in the sum of Rs. 5,000, and even if we regarded the bid of Rs. 1,000 as pecuniary consideration, the credit to be given for the balance of the Rs. 5,000 was not pecuniary consideration. A similar result would be arrived at if we took into account the arrangement to give credit in Rs. 42,500.

For the appellants it was contended that in any event the consideration was pecuniary, whether it consisted in the payment of money or the giving of credit. It was further argued that the giving of credit in Rs. 42,500 was an act of voluntary generosity, and could not be regarded as forming part of the consideration.

As regards the question whether the Commissioner in arriving at his adjudication was entitled to consider matters not expressed in the deed, the Acting Solicitor-General has referred us to two authorities. In *Gunewardene v. Gunasekera*¹ Bertram C.J. who has dealt very fully with this point, has considered our own as well as English authorities, and has held that it is competent for the Commissioner of Stamps to insist upon being satisfied that the property which has been the subject-matter of a deed has been correctly valued. He rejected the argument that "duly stamped" means "stamped in accordance with what appears on the face of the instrument". Although this is an *obiter dictum*, it is a valuable one. Again, in *Croos v. Attorney-General*² this Court held that the Commissioner, if he was not satisfied with the consideration stated, was entitled to call for affidavits, and to utilize the information so obtained for the purpose of making his adjudication.

In this particular case, however, I do not think it is necessary to resort to the affidavits, as in my opinion the recitals in the deed No. 170 sufficiently contain all the facts which are necessary for the determination of this question of consideration. I am of opinion that we are entitled to take into account not only the operative clause but also the recitals for this purpose. I do not think the affidavits add anything material to what is contained in the deed in question.

Now, it is of great importance that the District Judge's order of May 21, 1934, confirming the sale has been annexed to the deed in question and forms part of that deed. That order shows that before the confirmation of the sale the Proctor for the plaintiffs quite properly pointed out to Court that it had been discovered that the primary mortgage had been discharged, although the discharge had not been registered. The Proctor went further and expressed his willingness to give credit for the appraised value of Soranawallie estate, viz., Rs. 42,500. Can this be regarded as merely an act of voluntary generosity on the part of the plaintiffs? I think not. As I said before, it was capable of influencing the District Judge in his decision either to confirm the sale or to refuse the confirmation, and I have no doubt that this offer had an important effect in inducing the District Judge to confirm the sale.

Can this offer be regarded as the consideration for the deed in question? Now it has been held in *Waharaka Investment Co., Ltd. v. Commissioner of Stamps*³ that the word "consideration" in the Stamp Ordinance must be given the meaning it has in English law, where it has been defined thus:—"a valuable consideration in the sense of the law may consist in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other".

The "profit or benefit" accruing to the defendant in *D. C. Colombo*, No. 52,344, was that his debt was to be diminished to the extent of Rs. 42,500. The Proctor's statement that the plaintiffs were "willing to give credit" to that amount has, in my opinion, the important result of

¹ 1 *Times Law Rep.* 90.

³ 31 *N. L. R.* 266.

² 32 *N. L. R.* 78.

influencing the District Judge to confirm the sale, and I do not think it was open to the plaintiffs thereafter to resile from that position and to refuse to give credit to that amount. I think the position is equivalent to the plaintiffs having entered into an agreement with the defendant to give credit up to the amount of Rs. 42,500. This formed the real consideration for the deed No. 170.

I am of opinion that my finding on this point is in keeping with section 22 of the Stamp Ordinance. I hold that the property was transferred in consideration of the debt due to the plaintiffs to the extent of Rs. 42,500. I incline to the view that this is not a pecuniary consideration, but it is unnecessary, in view of this finding, to decide this point. If it is a pecuniary consideration, it must be taken as the basis of the assessment. If it is not a pecuniary consideration, the value of the land must be taken as the basis, and that value has been held to be Rs. 42,500.

Counsel for the appellants asked for an opportunity to lead evidence that the value of the half share of Soranawallie estate was not Rs. 42,500, but I think it is too late to grant his request. The valuation of Mr. Vander-smagt has not been challenged at any time before the Commissioner, and in fact it was accepted as "the appraised value" by the Proctor for the plaintiffs on May 21, 1934.

I am of opinion that the arrangement of May 21, 1934, superseded the agreement to give credit to the extent of Rs. 5,000, which was the footing on which the order for credit was issued. It is unnecessary in this case to consider how the instrument in question had to be stamped, if that was the only arrangement in operation at the date of the deed. It is also unnecessary to consider the further argument addressed to us, namely, that it was necessary in any event for the purposes of the assessment to add to the price the amount of the primary mortgage bond, in view of the explanation to section 22 of the Stamp Ordinance. A number of Indian authorities were quoted to us, which were not all in accord. It is, however, clear that at the date of deed No. 170 the primary mortgage bond had been discharged and nothing was due in respect of it.

The appeal fails and is dismissed with costs.

DE KRETZER J.—I agree.

Appeal dismissed.