

(1939) 03 CAL CK 0019
In the Calcutta High Court

Jogendra Krishna Banerji and Others

APPELLANT

Vs

Administrator-General and Others

RESPONDENT

Date of Decision : 29-03-1939

Acts Referred:

Bengal Sanitary Drainage Act, 1895 — Section 23, 23, 6

Citation : AIR 1940 Cal 87

Hon'ble Judges : S.K. Ghose, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

S.K. Ghose, J.—This is a second appeal by some of the defendants in a suit for recovery of drainage cess. The following facts are relevant to this appeal. R.S. 94 of 1932 was filed by a zamindar named Rani Harsamukhi in the Court of the Munsif at Baruipur on 15th April 1932 against the present defendants making the Administrator-General of Bengal as executor to a certain estate of the pro forma defendant. The claim was for cess under the Bengal Sanitary Drainage Act of 1895 for a period of four years before suit in respect of certain Mouzas in Touji 109 R.S. This plaint was returned and subsequently filed before the proper Court, namely the Court of the Subordinate Judge, Alipore. On 8th July 1932 the Administrator-General of Bengal was made a co-plaintiff on his application. He then put forward his own claim, namely cess for a period of 11 years in respect of two other mouzas not mentioned in the original plaint of Harshamukhi. The entire claim was decreed ex parte on 5th November 1932. The present appellant then appealed to the District Judge. The District Judge modified the decree of the first Court by limiting the cess to a period of four years before suit. This judgment was passed on 18th April 1933. The Administrator-General appealed to this Court being Second Appeal No. 1663 of 1933. This appeal was heard by Henderson and Nasim Ali JJ., who passed judgment on 9th January 1936 remanding the suit for trial de novo to the Court of first instance after giving both parties opportunity of showing that the drainage cess was actually ascertained. At the new trial the present appellants for the first time filed written statement objecting to the claim of the Administrator-General for cess in respect

of two mouzas not named in the original plaint of Harsamukhi and also objecting to the claim for a period of more than four years.

2. The Courts below have decided against the present appellants. As regards the objection regarding the mouzas not named in the original plaint, the learned District Judge has held that the appellants are not entitled to raise this question as it was not raised before. As regards the point of limitation, the Courts below have taken the view that by the remand judgment passed by this Court on 9th January 1936, there was a decision to the effect that the plaintiffs were entitled to the drainage cess from the time at which it was actually ascertained. As regards the objection to the claim of cess in respect of mouzas not named in the original plaint of Harsamukhi the learned advocate for the appellant in this Court has pointed out that the objection was made in the written statement filed by the appellants. At the same time, he has stated that he does not wish to press this point. Therefore the decision of the lower Appellate Court on this point must be accepted. The present appeal has been pressed on" the ground of limitation and it is contended that the plaintiff is not entitled to claim drainage cess for a period of more than four years. As mentioned already, the Court below took the view that the matter was concluded by the remand judgment of 9th January 1936, but it seems to us that this was not the effect of that judgment. That judgment mainly directed that the time at which the drainage cess was actually ascertained should be found, but it did not decide any question of limitation. No doubt, it was possible for the parties to raise the question of limitation expressly and this Court might then have taken a view which would have made the remand unnecessary. The fact remains that the question of limitation was not decided.

3. Since this judgment, there has been another judgment passed by a Bench of this Court on 9th April 1937 : see the case in Administrator General of Bengal-Complainant Vs. SM. Jnanadayini Devi and Others, . In that case the facts are exactly the same as in this case. The amount due by the tenure-holders in respect of drainage cess was not ascertained when the original assessment was made in 1920. The Record of Rights was finally published in 1930 and therein the amount payable by the tenure-holders was recorded. The suit by the proprietor for the recovery of drainage cess was instituted in 1932 for the recovery of the cess for the period from 28th September 1920 to 14th April 1932. Jack J. pointed out that although the amount due from the tenure-holders had not been previously settled, this could not affect the question of jurisdiction. As a matter of fact, in 1924, the Administrator-General brought a suit for a declaration that he was not liable to pay drainage cess and this suit ended in a compromise in 1926 when an agreed sum was found to be payable. It was held that the fact that the amount due from the tenure-holders had not been fixed by the Government would not affect the limitation as regards the tenure-holders and the suit could be decreed only for a period of four years up to the date of the institution of the suit. It is contended by Mr. Basu for the respondents that the zamindar was not in a position to sue for drainage cess payable by the tenure-holder until the amount payable had been recorded by the Collector. In the previous suit, Jack J. pointed

out that it was possible for the zamindar to bring a suit against the tenure-holders for the amount which was considered to be due from him. The ratio of calculation is laid down by Section 23, Bengal Sanitary Drainage Act, 1895. It is pointed out that the provisions of the drainage scheme as laid down in Ch. 1, Part 2 of that Act show that once a cess valuation has been made it is not, specially provided that that amount payable by the tenure-holder for drainage cess would be settled by the Collector and by nobody else. In the later Act (Act 6 of 1920) there is a provision, namely Section 19 which lays down that the Collector has to determine the amount recoverable from, each landlord or tenant and enter such, amount in a detailed statement. Such express provision does not occur in the Act of 1895. In the present case, I see no reason why the same conclusion should not be reached as in the case which was decided! by this Court on 9th April 1937 to which I have already referred.

4. I must hold therefore that the Courts, below were not right in decreeing cess for a period of 11 years and the plaintiff is entitled to a decree for cess for a period of four years only before suit. The decree of the lower Appellate Court is therefore re-modified accordingly. Having regard to the circumstances of the case, parties will bear their own costs in this Court. The appellant (Mr. Deb's client) will be entitled to his costs in proportion to his success in the Courts below.

B.K. Mukherjea, J.

5. I agree with my learned brother that the view taken by the Courts below is wrong and that the plaintiff is not entitled to recover drainage cess beyond four years from the date of the institution of the suit. The whole controversy centres round the point as to when the plaintiff's right to recover the amount of drainage cess from the tenure-holders under him accrued u/s 23, Bengal Sanitary Drainage Act of 1895. The Section runs as follows:

Any holder of an estate or tenure who shall pay to the Collector any instalment of such rate payable under the last preceding Section shall be entitled to recover half the amount of instalment so paid from the holder of a tenure or cultivating raiyat holding lands within the local area under such holder of an estate or tenure in the same proportion and in the same manner as he is entitled to recover road cess or public works cess, payable under the provisions of the Cess Act, 1880.

6. Taking the Section as it is, it seems that the right of the plaintiff to recover the amount stated in the Section from the subordinate tenure-holders accrued at the same time when he paid the amount determined by the Collector as payable by him u/s 22 of the Act. Mr. Basu for the respondents argued that the amount can be recovered by the plaintiff only from those tenure-holders who hold lands within a certain local area and further the proportions in which the various tenure-holders are to pay these amounts have got to be determined by the Collector or certain other local authority and unless that is done, the sum recoverable by the plaintiff cannot be said to be ascertained and no suit can

possibly be instituted for recovery of that amount. There is some apparent force in this contention but I think that it was not within the contemplation of the Sanitary Drainage Act of 1895 to make the landlord's right to recover half the amount paid by him from the subordinate tenure-holders dependent on the ascertainment of the dues of the latter by any other authority. The Act itself does not provide for any machinery for apportioning the amount amongst the different tenure-holders, and there is no provision in this Act though undoubtedly there is one in the subsequent Act of 1920, for determining the amount of cess payable by the tenants. It seems to me that the Legislature did not think it proper to make any provision whatsoever for determination or ascertainment of the amount which is payable by the different tenure-holders but allowed the landlord to follow the same provision as is laid down in the Cess Act of 1880. In other words, the proportion in which the different tenure-holders are to pay the amount recoverable from them u/s 23 would be exactly the same as are recoverable from them under the provisions of the Cess Act of 1880. As Section 6, Bengal Sanitary and Drainage Act of 1895 shows, where the preliminary scheme is submitted to the Collector for his approval, the Collector before he embarks upon the scheme would prepare a statement showing the valuation for cess purposes of all the land included in the tract affected and it must be taken that both the landlord and the tenants knew perfectly well what the cess payable in respect of the lands under the Cess Act was and what were the different proportions in which the different tenure-holders had to pay the same. For these reasons, I agree with my learned brother that the plaintiff will be entitled to recover only four years' cesses and no more.