

(1933) 01 CAL CK 0026
In the Calcutta High Court

Maharaja Bir Bikram Kishore

APPELLANT

Vs

Munshi Tafazzal, Hussein and Others

RESPONDENT

Date of Decision : 13-01-1933

Acts Referred:

Bengal Cess Act, 1880 — Section 54

Citation : AIR 1933 Cal 632

Hon'ble Judges : Mitter, J;M.C. Ghose, J

Bench : Full Bench

Judgement

Mitter, J

1. This appeal and the forty revision cases arise out of an order of the Subordinate Judge of Noakhali, dated 16th January 1931, by which he directed a remand for re-hearing of the suits in which this appeal and these revision cases arise. It appears that His Highness the Maharaja of Hill Tipperah instituted the forty-one suits in which this appeal and these revision cases arise in the Court of the Munsif at Feni for recovery of arrears of cesses for four years covering the period from 1332 to 1335 B.S. His case is that the defendant or defendants in each of these suits are the owners of niskar lands within the ambit of his zamindari and they used to pay cesses to the Collector of Tipperah but since 1913 these Niskar lands having been affiliated to his zamindari under the provisions of the Cess Act the Maharaja had been paying cesses to the Collector and realizing cesses from the defendants. The cesses were subjected to a re-valuation after an interval of ten years and the Maharaja being a mere Collector of cesses imposed according to the latest re-valuation claimed these cesses from the defendants as finally assessed by the Deputy Cess Collector under the provisions of the Bengal Cess Act, Act 9 of 1880. The Maharaja had in pursuance of those provisions paid cesses to the Collector according to the said re-valuation. In these suits which were tried together the defendants appeared, but they did not take a plea to the effect that they were not liable to pay the cesses as the plaintiff had not caused a service of notice in each mouza as contemplated

by the provisions of Section 54, Cess Act. The Munsif accordingly refused to allow them to take the plea at the time of the argument as it had not been taken in the written statement filed by them. He was of opinion that to allow them to take the plea at that stage of the argument would operate to the prejudice of the plaintiff, the Maharaja. He accordingly decreed the suits for cesses as claimed by the plaintiff in each of the suits.

2. Against these decrees the defendants preferred appeals to the Court of the Additional Subordinate Judge of Noakhali, and the learned Subordinate Judge was of opinion that as the notice u/s 54 was the foundation of the defendants' liability to pay cesses it was really a part of the plaintiff's case to establish the service of these notices before the defendants can be called on to pay the cesses paid by the Maharaja to the Collector. It appears that these 41 suits were tried along with about 33 more suits the suits being altogether 74 in number; in some of these suits there was some evidence to the effect that the notice u/s 54 was published in the village Dakhin Sripur and Nilakhi in the month of Chaitra 1335 B.S. that is, for the period just outside the period for which claim for cesses had been made in each of these suits. In this view the Subordinate Judge was of opinion that an opportunity should be given to the plaintiff for establishing the publication of notices more particularly in view of the fact that the plaintiff offered to prove the notices in the Court of the first instance but could not do so as there was objection on the part of the defendants. It may be mentioned that except the nishkar lands in the two suits with regard to which there are two revision petitions, namely, revision petitions Nos. 482 and 495 all the other nishkar lands are situate in either Nilakhi and Dakhin Sripur. The Subordinate Judge seemed to think that in view of these facts it would not be right to throw out the plaintiff's suit altogether but that an opportunity should be given to him to prove that the notices u/s 54 had been served. Although in respect of the suits to which revision cases Nos. 482 and 495 relate, nishkar lands are situate outside the two mouzahs. I have mentioned, the Subordinate Judge is of opinion that the two suits to which Appeals Nos. 33 and 50 of 1930 before him relate were also governed by the same consideration; and he directed that there should be an order of remand in all these suits to the Munsif who should determine the question of service of notice and also any other relevant issues that might arise for consideration.

3. Against this decision the plaintiff Maharaja has preferred one appeal and has filed forty applications in which Rules have been granted; and in support of this appeal and the revision cases it has been argued by Mr. Jogesh Chandra Roy who appears for the Maharaja appellant that the judgment or rather the order of remand of the Additional Subordinate Judge is vitiated on several grounds. It is argued in the first place that the form of the order of remand is bad and as all the suits in their entirety were tried by the Munsif on the evidence in the case the remand to the Munsif made by the Subordinate Judge in respect of all these suits contravenes the provisions of Order 41, Rule 23, Civil P.C. It has been argued in the second place that the service of notice u/s 54 being a condition

precedent to the institution of the suits it must be taken to have been implied in the allegation in the plaint that such a notice had been served in view of the provisions of Order 6, Rule 6, Civil P.C., and it was for the defendant or defendants in each of these suits to dispute the question of the maintainability of these suits on the ground of want of notice having regard to the provisions of Order 8, Rule 2, Civil P.C. It has next been argued that even if there was no notice u/s 54, Cess Act, that does not debar the Maharaja from recovering cesses not at the double rate as contemplated by the provisions of Section 58 but at any rate according to the old rate. In this appeal and in these revision cases a further ground has been taken, namely, that there being an ex parte decree against many of the defendants in these suit and only some of the defendants having appealed before the Subordinate Judge, so far as the non appealing defendants are concerned the decree for cesses against them as made by the Munsif should be allowed to stand.

4. We may dispose of the last contention at once by saying that although only some of the defendants did appeal the other non-appealing defendants were entitled to take advantage of any decision which had been arrived at in favour of the appealing defendants by reason of the provisions of Order 41, Rule 4, Civil P.C. So there is not much substance in this last contention of Mr. Roy. It becomes necessary to deal in the first instance with the second ground for if the appellant succeeds on that ground it would not be necessary to deal with the other contentions. So that ground really goes to the root of the defence. It is said that although it was not specifically alleged in the plaint that the notice u/s 54, Cess Act, had been served yet if one examines the provisions of Order 6, Rule 6, of the Code it must be taken that the fulfillment of the condition precedent, namely, service of notice, must be implied. Order 6, Rule 6 runs as follows:

Any condition precedent, the performance or occurrence of which is intended to be contested shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleadings.

5. It is said further that having regard to the provisions of Order 8, Rule 2 the defendants should not be permitted to raise the defence as one of notice u/s 54 as the defendant in each case did not take the same in their respective written statement. Order 8, Rule 2 runs as follows:

The defendant must raise by his pleading all matters which show the suit not to be maintainable...

6. It is not necessary to quote the other part of the rule. It is argued that this rule is really a reproduction of Order 9, Rule 14 of the Supreme Court Rules and according to Order 6 Rule 6 it does away with the necessity of general averment of the performance or occurrence of all conditions precedent; and in support of this contention reliance has been placed on the decision of the case of Gates v.

W.A. & R.J. Jacobs, Ltd. (1920) 1 Ch D 567 which lays down the proposition which is now embodied in Order 6, Rule 6 of the Code. An examination of that case however will show that case is no authority for the proposition that although notice may be impliedly taken to have been served where there is no such allegation in the plaint the plaintiff is relieved from proving the service of the notice which is really the foundation of the liability of the defendants.

7. It has now been settled by the decisions of this Court, a type of which is to be found in the case of Ashanullah Khan v. Trilooan Bagchi (1886) 13 Cal 197 that in order that a zemindar or a superior landlord may be entitled to obtain decree for cesses as against a tenure holder or against a nishkardar he must establish that there has been a notice u/s 54, Cess Act. In other words that notice is really a condition precedent to the tenure holder's or nishkardar's liability or rather the foundation of his liability. In support of this view a case has been placed before us from the Patna High Court which was also a case under the Cess Act where the question now in controversy was directly raised. That decision is in the case of Murli Manohar and Others Vs. Raja Nand Singh and Others, , where Ross, J., sitting singly held that notice u/s 54, Cess Act is a condition precedent to the liability to pay cess. A defendant must, the learned Judge says, if he contends non-service of such notice, state this specifically in his pleadings otherwise due service of the notice will be presumed. The circumstance which distinguishes this case before Ross, J., from the present case is that in the case before Ross, J., the point was really taken before the lower appellate Court. In the present case it appears that although the point was not raised in the pleadings that is in the written statement in each of these suits, the defendants raised this contention in the course of the argument at a late stage of the suits, and at that stage the plaintiff offered to prove "the notice which was objected to by the defendants. The other circumstance which distinguishes these cases from the Patna case is that these cases were tried along with 33 other cases in which there was some evidence led to show that notices u/s 54 were published in villages Dakhin Sripur and Milakhi in the month of Chaitra 1335 B.S., that is, after the period for which cess has been sued for in these suits, and this circumstance is relied on by the Subordinate Judge when he thought that the ends of justice will be met by directing a remand. There was no such evidence in the Patna case. The subordinate Judge makes the following pertinent observation in this behalf which may be usefully reproduced here. He says this:

The ruling reported in Gan Kim Swee v. Ralli Bros (1886) 13 Cal 237 is also to the effect that cesses may be recovered as they fall due after the publication of such a notice, and not cesses such as fell due prior to such publication. To this the plaintiff-respondent's pleader replies that the evidence of the publication of notices under S, 54 that was adduced related to those cases only in which such an objection has been raised and those cases were dismissed as the Munsif considered the evidence to be insufficient and there have been no appeals in them. On the other hand the plaintiff as it appears offered to put in papers showing the publication of notices which were refused by the Court on

defendant's objection and so nothing is known, so far as the plaintiff's pleader in this Court is advised, as to how and when the notices on the present cases were published, for the lower Court did not consider that the plaintiff was called upon to prove this. It is further pointed out that it will not be fair to have refused the plaintiff's documentary evidence about publication in the lower Court, and to non-suit the plaintiff here on account of absence of evidence to prove publication of notice u/s 54 here. This contention appears to be prima facie reasonable just as much as contention by the learned pleader for the appellants that once some evidence about the publication of such notices is admitted at the joint trial of group of oases and is rejected, or is (as now) suspected to be insufficient, it will not be permissible to think that fact, the more specially as the publication of such notices is the legal pre-requisite to defendants being called upon to pay any cess at all, In these circumstances for the ends of justice the suit must be remanded for a fresh trial after investigation of the question of the publication of notices u/s 54 and any other relevant issues that will arise for consideration.

8. We are therefore of opinion that the Subordinate Judge has taken a correct view so far as the merits of the order of remand is concerned and we think, except in the two cases to which we shall advert presently, the order of the Subordinate Judge on the merits can be sustained. This brings us to the other point, namely that the order of the remand is bad in form. That is the first contention which has been put forward and we agree with the learned advocate for the appellant that is so. The suits not having been decided on the preliminary point it was not open to the appellate Court to send back these suits for determination to the Court of first instance, Order 41, Rule 23 not applying to such a case. The result is that except in the two revision cases to which we will refer presently the order of the Subordinate Judge directing a remand to the Court of first instance must be set aside and he is directed to deal with the appeals in these cases after either taking such evidence on the question of notice u/s 54, Cess Act, and on other questions as he may deem expedient or if he so chooses by directing the Court of first instance to take evidence on these points and by asking it to send the evidence after recording its own findings to the lower appellate Court. The lower appellate Court in these cases is directed to deal with the further question raised before this Court, namely as to the liability of the defendant to pay cesses even if no notice had been served u/s 54; and the right of the plaintiff to get cesses at the old rate will also be determined by the said Court. The learned Subordinate Judge is also directed to determine as to whether notice u/s 54 is a pre-requisite in each of these 41 cases. The lower appellate Court will re-hear these cases in the light of these observations, Costs will abide the result. The hearing fee of this Court is assessed at one-half gold mohur, i.e. Rs. 8, for each of these cases.

9. With regard to Civil Revision Cases Nos. 482 and 495 it appears that the nishkar lands are not situated within either the village of Dakhin Sripur or the village of Nilakhi and therefore the considerations which justify the Subordinate Judge in thinking that an opportunity should be given to the plaintiff for

establishing the publication of the notice in the other cases do not apply to these two cases. The result is that the order of the Subordinate Judge in each of these two cases is set aside and that of the Munsif is restored with costs throughout in each case. The hearing fee of this Court is assessed at one half gold mohur, that is, Rs. 8 in each case. The Rules are thus made absolute.

M.C. Ghose, J.

10. I agree.