
(1940) 08 CAL CK 0033
In the Calcutta High Court

Manindra Chandra Roy Chowdhury and Another	APPELLANT
Vs	
Gopi Ballav Sen and Others	RESPONDENT

Date of Decision : 22-08-1940

Acts Referred:

Bengal Cess Act, 1880 — Section 99
Evidence Act, 1872 — Section 114(e)

Citation : AIR 1941 Cal 353

Hon'ble Judges : Nasim Ali, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—This is an appeal on behalf of the tenants-defendants in a suit for recovery of arrears of rents. The material facts lie within a short compass and are for the most part undisputed. One Chandra Mohan Roy Chowdhary had certain shares in four revenue-paying estates to wit touzies Nos. 162, 46, 207-1 and 338E of the Rangpur Collectorate. After the death of Chandra Mohan, his executor Raja Janaki Ballav Sen, granted a putni in respect of these interests in favour of defendants 1 and 2 on 27th May 1896, at an annual rental of Rs. 11,290. In the kabuliyat which was executed by the putnidars, they agreed to pay the revenues and cesses payable by the zemindars out of the rent reserved and pay over the balance as munafa to the landlords. Defendants 3 to 7 are the heirs of Chandra Mohan of whom defendants 3 to 5 have got a moiety share in the properties left by the latter and the other 8 annas share belong to defendants 6 and 7. Defendants 3 to 5 executed a usufructuary mortgage bond in favour of the father of the plaintiffs in June 1922, to secure an advance of Rs. 37,000 and by the said mortgage bond they conferred upon the mortgagee the right to realize rents in respect of the putni in their 8 annas share. It is on the basis of this mortgage bond that the plaintiffs commenced the present suit for recovery of rent due in respect of the putni in 8 annas share, making the other 8 annas cosharers parties defendants. These defendants subsequently got themselves transferred to the category of plaintiffs.

2. The suit was resisted by defendants 1 and 2. A number of pleas were taken in

the written statement but the substantial defence of the tenants was that touzi No. 162, which was one of the estates to which this putni appertained was attached by the Collector u/s 99, Bengal Cess Act, and consequently nobody except the Collector had any right to recover rents payable by the tenants in respect of the said putni. It was further averred that the sum realized by the Collector from the properties in suit far exceeded the sum which was payable as cesses to the Collector and as these sums were to be regarded as deposits to the credit of the plaintiffs their demands were fully satisfied. It may be stated here that the attachment by the Collector u/s 99, Bengal Cess Act, was effected on 30th November 1933 and the notification was withdrawn in December 1936.

3. The learned subordinate Judge who heard the case negated the defence of the tenants defendants and gave the original and the added plaintiffs a decree in full. He held inter alia that there was no proper publication of the notification u/s 99, Cess Act, and even if there was a proper attachment, that could not operate as a bar to the institution of the rent suit or the recovery of a decree. It was said that Section 99 only restrained the actual payment of rent only. The third ground upon which the learned Judge based his decision was, that as the putni was held under four touzis of which one only was under attachment by the Collector and as the rent was a consolidated rent which was not capable of being apportioned, Section 99, Cess Act, had no application. It is against this decision that the present appeal has been preferred and Mr. Gupta, who appears in support of the appeal, has challenged the propriety of the decision of the trial Court on all these three points.

4. So far as the first point is concerned, it seems to me that the decision of the Court below cannot be supported. I need not dispute the proposition of law put forward by Mr. Bose, that when an Act prescribes certain things to be done before any liability attaches to any person in respect of any right or obligation, it is for the person, who alleges that the liability has been incurred, to prove that the thing prescribed by statute has actually been done: vide the ease in *Ashanullah Khan v. Trilooahaa Bagchi* ("86) 13 Cal 197. u/s 99, Cess Act, it is open to the Collector, under the circumstances mentioned in the section, to cause a notification to be issued in the form prescribed in Schedule F in respect of any estate or tenure for which any amount is due to the Collector under the provisions of the Cess Act. It further provides that such notification shall be published by beat of drum in every village containing any land to which such notification relates, and a copy thereof shall be posted in a conspicuous place in every such village and at the mal cutchery of the estate or tenure to which such notification relates, if such cutchery be found. It is undoubtedly necessary for the defendants to show that there was a publication of the notice in the manner contemplated by Section 99, Cess Act. They have produced an order-sheet of the Collector which goes to show that on 1st September 1933, the Collector made an order u/s 99, Cess Act, in respect of toujis Nos. 162 and 162/1 of the Rangpur Collectorate and directed the notification to be published in all the villages comprised in the estates. On 30th November 1933, we find another order

recorded in the sheet which runs as follows : "All the service returns received after duly served." In my opinion the two orders mentioned-above would certainly entitle the defendants to invoke the presumption u/s 114 Clause (e), Evidence Act. It is true that the mere fact that the Collector directed the notification to be published could not by itself justify the Court in presuming that the order was complied with, or that the notification was published in the manner contemplated by law. But as the latter order shows that the publication was as a matter of fact made, Section 114, Clause (e), Evidence Act, would, in my opinion, entitle the Court to presume that the publication which was made was made regularly and in due conformity with the provisions of the statute.

5. The decisions relied on by Mr. Bose, and which are reported in *B. Walvekar and Others Vs. Emperor*, and *Khurshid Chik Vs. Raniganj Municipality*, , are of no assistance to him in the present case. In the first case it was held that a warrant u/s 46, Police Act, was not a public record and no presumption could arise as to the correctness of the facts stated therein relating to the preliminary conditions of the issue of the warrant. This case apparently has no bearing on the present one. In the other case, which was also a criminal case, the complainant was the Raniganj Municipality and the question arose as to whether there was an extension of Chap. 6, Bengal Municipal Act, to this particular municipality. u/s 222, Bengal Municipal Act, the order extending the provisions of chap. 6 of the Act to any municipality had to be published in the Calcutta Gazette and the Commissioners were bound within 15 days of such publication to cause a copy of the same to be posted in their office and also to publish it as required u/s 354 of the Act, namely by beat of drum and otherwise. It was found as a fact that there was no resolution passed by the Commissioners extending Chap. 6, Bengal Municipal Act, to this municipality and in these circumstances it was held, and in my opinion rightly, by Jack J., that there was no presumption whatsoever that this official act was performed at all. Section 114, Clause (e), Evidence Act, simply raises a presumption as to the regularity of the procedure, if the official act was as a matter of fact proved to be done and not otherwise. In this case I am of the opinion that the publication of the notification u/s 99, Cess Act, or service of the same in the villages comprised in the estate have been proved by the order recorded on 30th November 1933. Consequently, a presumption u/s 114, Clause (e), Evidence Act, would arise that this publication was made properly and in due compliance with the provisions of the law. The case in my opinion comes within the principle enunciated by their Lordships of the Judicial Committee in AIR 1934 217 (Privy Council) and the passage which is at page 374 of the report applies with all force to the circumstances of the present case. Their Lordships of the Judicial Committee in their judgment observed as follows:

It is alleged that an attachment of the 250 canals followed. The Court of the Judicial Commissioner in the present case has held that that attachment has not been proved, because there was no direct evidence that a copy of the order of attachment was fixed in the Collector's office. Their Lordships are of opinion that there is evidence that the land was attached, and that in the absence of any

evidence to the contrary, it ought to be presumed that all necessary formalities were complied with.

6. The plaintiffs in the present case did not adduce any evidence to show that the notification, was not duly published in all the villages as required by the Cess Act. The result therefore is that the decision of the trial Court on this point must be held to be wrong. The second question raised in this appeal is one of considerable importance and the point is as to how far a proprietor is precluded from instituting a suit for recovery of rent and obtaining a decree in such suit against a tenant when the estate is under attachment by the Collector u/s 99, Bengal Cess Act. Mr. Gupta argues that no suit can at all be instituted by the proprietor so long as the estate remains under attachment and he refers in this connexion to the provisions of paras. 2 and 3 of Section 99, Cess Act. Paragraph 2 says that

every payment of rent, save and except to the Collector or some person by him thereunto appointed, made after such publication, until further order from the Collector, shall be null and void.

7. The next paragraph provides that the Collector may recover by any process of law the rent then or thereafter to become due from any occupier, tenure-holder, undertenant or raiyat on the estate or tenure in respect of which the notification has been issued. It is contended by Mr. Gupta that these provisions operate as a bar to the institution of any suit for recovery of arrears of rent by any person other than the Collector. As payment of rent to any person other than the Collector is interdicted and declared to be null and void, there can be no cause of action for a rent suit which must presumably be founded on non-payment of rent. It is said further that if the Collector is empowered to institute proceedings for realization of rent, it would be anomalous and absurd that the right to sue for recovery of the same rent could be exercised simultaneously by two different persons. These are undoubtedly weighty matters for consideration and it is necessary for us to examine the provisions of the section with some care. The provisions of Section 99, Cess Act, are undoubtedly of a drastic character. It imposes a prohibition on all classes of tenants down to the actual cultivator or occupier of the soil to pay rent to anybody other than the Collector, so long as the estate remains under attachment, and the Collector is constituted, so to say, a statutory agent to collect rents on behalf of the different classes of rent receivers. What is prohibited expressly is the payment of rent and the section does not say in clear words that the institution of any rent suit by the zemindar or any other tenure-holder is forbidden. Section 107, Cess Act, to which our attention has been drawn by Mr. Bose, lays down that

nothing in this part contained, and nothing done in accordance with this Act shall be deemed to affect the rights of any person in respect of any immovable property or of any interest therein except as otherwise expressly provided in this Act.

8. It is conceded by Mr. Gupta that the right to institute a suit has not been taken away by any express words in the section, but his argument is that the institution of such suit being directly contradictory to the express provision of the section it must be deemed to have been taken away by necessary implication. I do not think that I can accept this contention as correct. Section 99, Cess Act, which encroaches upon the ordinary right of the landlords, must be construed strictly and the prohibition need not be carried beyond the express words used in the section. Any other interpretation, I think, would lead to manifest injustice. After all, it may not be necessary for the Collector to realize more than a fraction of the rents payable by the tenants, for, as soon as his realizations come up to the amount of cesses and costs due to him, he is bound to withdraw the notification and release the estate. If the proprietor has got to wait till the attachment is withdrawn before he can institute a suit for rent against his tenants, it may very well be that his right to institute a suit at that time will be barred by limitation. The section itself does not make any provision under which the landlord is entitled to an exemption of the period during which the estate remains under attachment, for the purpose of counting the time for instituting rent suits. I do not think also that Section 15, Limitation Act, can be invoked in such cases. The notification u/s 99, Cess Act, is not, strictly speaking, either an "order" or an "injunction," and these expressions ordinarily connote an order or injunction passed by a civil Court: vide the case in *Deutsch Asiatische Bank v. Hira Lall Burdhan & Sons* AIR 1919 Cal 706. In my opinion the proper interpretation to put upon the section will be to hold that it does not operate as a bar to the institution of the rent suit. The mere fact that a particular interpretation would work injustice is certainly not enough to induce the Court to refuse to follow the well-settled canons of construction, but as has been said by Maxwell in his well-known treatise on the interpretation of statutes, it may properly lead to the selection of one rather than the other of two reasonable interpretations:

Whenever the language of the Legislature admits of two constructions and, if construed in one way, would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention had been manifested in express words: Maxwell on the Interpretation of Statutes, Edn. 8, p. 177.

9. But though I hold that it is open to the zamindar to institute a rent suit during the continuance of attachment by the Collector u/s 99, Cess Act, I cannot hold that the Court can proceed with the suit and pass a decree in favour of the plaintiff so long as the notification u/s 99, Cess Act, is not revoked. A decree in a rent suit would certainly mean an unconditional order directing the defendant to pay the rent due by him to the landlord. This would be to compel the defendant to do something which is not lawful for him to do so long as the attachment subsists. Mr. Bose argues that it is the actual payment of rent that is restrained, and consequently there will be no harm in passing a decree, for the question of payment would only arise when the decree is put into execution. I do not think

that I can accept this as a sound contention. Section 99, Cess Act, does not merely make the payment of rent by the tenant to his landlord null and void but it authorizes the Collector to realize all such rents, and makes a receipt given by the Collector operate as a valid discharge so far as the liability of the tenant is concerned. So long as the estate remains under attachment, I think it would be impossible for the Court to ascertain the amount due to the landlord and pass a suitable decree in his favour. It would be open to the Collector to realise any rents from the defendant in the suit not only before but after the decree is made and it would I think not be competent to the judgment-debtor to plead before the executing Court that any payment to the Collector has discharged or satisfied the decree. To hold that a decree can be passed but cannot be executed as Mr. Bose suggests is, in my opinion, altogether useless. The same difficulty about limitation would arise and as Mr. Bose concedes that Section 15, Limitation Act, is not attracted to such a case the decree itself would become inexecutable if the statutory period for putting it in execution expires before the estate is released.

10. My conclusion therefore is that Section 99, Cess Act, does not bar the filing of the suit but at the same time the Court is not competent to proceed with the suit and pass a decree so long as the notification u/s 99, Cess Act, is not removed. The necessary consequence is that the hearing of the suit must have to remain stayed during this period. This procedure would on the one hand, enable the Court to pass a proper decree after giving due credit to the tenant for any amount that he might have had to pay to the Collector during this period and on the other hand it will avoid the conflict which must necessarily arise if a simultaneous legal proceeding can be instituted by the Collector against the same tenant for recovery of the same arrears of rent. In the view that I have taken, the Court in the present case was not justified in hearing the suit and making a decree in favour of the plaintiff before the attachment u/s 99, Cess Act, was withdrawn. The decree must therefore be set aside. But as the attachment was as a matter of fact subsequently withdrawn, I think that in the interest of justice the case should go back to the trial Court and the Court will now consider the entire matter and after giving credit to the defendants for any sum that they might have paid to the Collector as rent in respect of this putni pass a proper decree as the circumstances of the case require.

11. In view of the fact that we are sending the case back for rehearing and that the attachment is no longer in existence, it is unnecessary for us to consider or express any opinion on the other point raised in the appeal. It is doubtful whether the rent in the present case is a consolidated one or is capable of being apportioned amongst the different touzis to which the tenure relates. It is also an arguable point as to whether in a case like this it is possible for the plaintiff to prosecute his claim with regard to that portion of the rent which is payable in respect of the tenure which is held under estates other than what was attached by the Collector u/s 99, Cess Act. It is unnecessary however in the facts of this present case to decide these questions. The result is that the appeal is allowed, the judgment and decree of the trial Court are set aside and the case is sent

back for rehearing " in accordance with the directions given above. Parties will be entitled to adduce such evidence as they think proper. Costs will abide the result.

Nasim Ali, J.

12. I agree.