

(1928) 03 CAL CK 0002
In the Calcutta High Court

Secretary of State for India

APPELLANT

Vs

Sati Prasad Garga and Others

RESPONDENT

Date of Decision : 02-03-1928

Acts Referred:

Bengal Cess Act, 1880 — Section 4, 5, 6

Citation : 115 Ind. Cas. 185

Hon'ble Judges : Cammiade, J; B.B. Ghose, J

Bench : Division Bench

Judgement

B.B. Ghose, J.—This is an appeal by the Secretary of State who was the defendant in the suit out of which this appeal arises against the judgment and decree of the Additional District Judge of Midnapore affirming the decision of the Subordinate Judge. The suit was for a declaration that the assessment of cesses under the Bengal Cess Act on the property of the plaintiffs on the basis of realisations on account of hats within the estate of the plaintiffs was ultra vires and for refund of the amount of cesses paid under protest. The learned Judge below held that on the authority of certain cases decided by this Court, the assessment of cesses on the income derived from the hats was ultra vires and made a decree in favour of the plaintiffs for refund of the money paid by the plaintiffs.

Sections 5 and 6 of the Act which run thus:

2. The learned Government Pleader contends that the decision of the Courts below is erroneous having regard to the terms of the agreement in the kabuliyats accepted by the plaintiffs with regard to the hats, read with the provisions of the Cess Act. The relevant portions of the Cess Act should be stated in order to appreciate the contentions of both parties. The imposition of cesses is made under the provisions of 5. From and after the commencement of this Act in any District or part of a District, all Immovable property situate therein... shall be liable to the payment of a Road Cess and a Public Work Cess.

6. The Road Cess and the Public Works Cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other Immovable property ascertained respectively as in this Act prescribed." Immovable property is defined in Section 4 of the Act, but it is not necessary to state the definition for the present purpose. "Land" means land which is cultivated, uncultivated or covered with water, and does not include houses or buildings. "Tenure" includes every interest in land, whether rent paying or not save and except an estate as defined, in the Act. The definition of "annual value of land" runs thus: "Annual value of any land, estate or tenure means the total revenue or rent which is payable, or, if no revenue or rent is actually payable, would, on a reasonable assessment, be payable, during the year by all the cultivating raiyats of such land, estate or tenure, or by other persons in the actual use and occupation thereof". These are all the relevant provisions of the Cess Act which we have to consider in the present proceeding.

3. The contention of the Government Pleader is that the property with regard to which the assessment is made is "land" within the meaning of the Act. It is not disputed that if any interest in "land" was conferred by the agreement cesses may be assessed on the income. The controversy is with regard to the definition of "annual value of land" whether the income derived from the hats in this case falls within it or not. Before I proceed to discuss the several contentions of the parties, it is necessary to refer to the cases on which the learned Judge below purported to base his conclusion. These cases are Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhuri. 28 C. 637 : 6 C.W.N. 128, the Full Bench case of Secretary of State for India v. Karuna Kanta Chowdhry 35 C. 82 : 11 C.W.N. 1053 : 6 C.L.J. 342 and a case reported as Surajdeo Narain v. Mackenzie 5 Ind. Cas. 254. It is not necessary to deal with the case of Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhuri 28 C. 637 : 6 C.W.N. 128 in detail as it was a case the sequel of which gave rise to the Full Bench case of Secretary of State for India v. Karuna Kanta Chowdhury 35 C. 82 : 11 C.W.N. 1053 : 6 C.L.J. 342. The facts of that case were these: There was a certain piece of land in the possession of occupancy raiyats within an estate. On that land a mela used to be held for a certain number of days in the year when there were no crops standing. The owner of the estate granted an ijara to some persons called Fakirs permitting them to hold the mela, and an income was derived from the mela. The land was assessed with cesses on the basis of the income derived from the mela. The owner of the estate had to pay the amount. He then brought a suit to recover a share of the cesses u/s 41 of the Cess Act from the Fakirs. That suit gave rise to the case of Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhuri 28 C. 637 : 6 C.W.N. 128. It was held there that the owner of the estate was not entitled to recover cesses because the income of the mela was not liable to be assessed with cesses. Subsequently, the owner of the estate sued the Secretary of State for a declaration that cesses were illegally levied and for recovery of the amount paid. That gave rise to the Full Bench case reported as Secretary of State for India v. Karuna Kanta Chowdhry 35 C. 82 : 11 C.W.N. 1053 : 6 C.L.J. 342. It was

held by the majority of Judges composing the Bench that the Fakirs, the ijaradars, were mere licensees and had no interest in the land, and, therefore, cesses could not be levied on the income derived from the mela. It was pointed out that the ijaradars were not given and could not be given any right to the land on which the mela was held. The land was in the occupation of occupancy raiyats and the mela could only be held on it with the leave and license of the occupancy raiyats and if they objected the landlords had no right to put the ijaradar Fakirs into possession of the land in question. It was, therefore, held that the ijaradars were mere licensees and the money that was realized by the zemindars from them could not by any means be called rent for the use and occupation of the land. That is what was decided in that case. The case of *Sarajdeo Narain v. Mackenzie* 5 Ind. Cas. 254 on which the learned Judge lays special stress is also similar as regards the facts as there the landlord created a mokarrari in favour of a defendant and also granted the right to the wife of that defendant to collect dues for hats within the mokarrari. That case simply followed the case in *Umed Rasul Shaha, Fakir v. Anath Bandhu Chowdhuri* 28 C. 637 : 6 C.W.N. 128.

4. In the Full Bench case observations were made by some of the Judges as to whether the mela or hat is Immovable property or not; I do not, however, think that it would serve any useful purpose to discuss that question in the present case having regard to the arguments addressed to us. The learned Government Pleader did not argue that the assessment in question could be made on the amount realized on account of the hats under the last portion of Section 6 of the Cess Act, that is to say, as falling within "other Immovable property". Sir Binode on behalf of the respondents argued that the expression "other Immovable property" must be construed according to the rule of *ejusdem generis*, that is, coming after the words mines, quarries, tramways and railways it must have a similar meaning as those words, and he supports his argument by an observation of one of the learned Judges, Mookerjee, J., composing the Full Bench at page 97 of the Report in Indian Law Reports XXXV Calcutta. I have considerable doubts whether the expression "other Immovable property" should be construed with reference to the rule of *ejusdem generis*, because in my judgment there is no connection between mines, tramways and railways, and you cannot find any other Immovable property similar to mines, quarries, tramways and railways. To my mind, it seems that this expression "other Immovable property" was used for the purpose of bringing into the net anything that might have been left out by the previous portion of the section, that is to say, by the words lands, mines, quarries, tramways and railways. It is not, however, necessary for me to express a definite opinion on the question whether a hat is Immovable property or not under this Act, as I have already said that the learned Government Pleader, Mr. Guha, did not base his argument upon this part of Section 6 of the Cess Act.

5. The real question in this case is, as stated by both Mr. Guha and Sir Binode, whether the grant in this case is a mere license or a lease of property. It is not disputed that if any right to the land was granted assessment on the income of the hats could be made, but if it is a mere license the assessment is illegal. I

have to refer to two cases cited on behalf of the respondents on the strength of which it was contended by Sir Binode that we should hold that the transaction evidenced by the kabuliyat which I am presently going to mention constituted a mere license. The first case that was cited was that of *Smith v. St. Michael Overseers* (1860) 3 El. 383 : 30 L.J.M.C. 74 : 3 L.T. 687 : 7 Jur. (N.S.) 24 : 121 E.R. 486 : 122 R.R. 746. There the owner of a house allowed a person to occupy a number of rooms in the house on condition of receiving a certain amount of money and for which he undertook to keep the premises clean, light fires and attend to the same by providing a trustworthy person to reside on the premises to do all these acts. The question was whether the owner was liable to be rated on the value of the premises. It was held that he was as notwithstanding the right given to a third person to live in a portion of the house he was to be considered as the occupier of the whole of the house. That case to my mind is of no assistance to us in deciding whether the transaction in this case should be considered as a license or a lease. The same thing may be said about the case of *Rochdale Canal Co. v. Brewster* (1894) 2 Q.B. 852 : 64 L.J.Q.B. 37 : 9 R. 680 : 71 L.T. 243 : 59 J.P. 132. Lord Justice Lindley in his judgment stated that the transaction pointed to a lease, and Lord Justice Lopes thought that it was a license, but all the Lords Justices were of opinion that the grantor of the right to the third person was liable to be rated as the occupier of the whole of the premises. These cases only illustrate the difficulty under the English Law in determining whether a particular transaction amounts to a demise of property or to a mere license. There are cases in the books where it has been held that the grant of a right to occupy a piece of land for a certain number of days in the year for some purposes may amount to a lease, and, on the other hand, there are cases where it has been held that the right to erect stalls and do certain other things upon a piece of land is a mere license. I think, therefore, that instead of trying to find what this transaction amounts to by reference to English cases we should look into the document itself in order to determine what sort of right was conveyed to the grantee.

6. This brings me to the kabuliyats which were accepted by the plaintiffs with reference to the hats. One of them has been placed before us and we are informed that the other kabuliyats are in the same terms. The relevant portions of the kabuliyat run thus: Kabuliyat for a term of one year commencing from the month of Bhadra.....in respect of hatkars of two hats.... The total area of the site lands of the said two hats being 4 bighas, 5 biswas, 1 cottah, bearing a jama of Rs. 252".... I.... do execute this miadi kabuliyat for a term of one year in respect of jamas for realization of hatkar to the effect following: "Having taken settlement... of two hatkars in respect of all sales of paddy, rice and various other articles that will be effected on each hat day at any place comprised within the boundaries given below and appertaining to the two hats.....appertaining to your touzi... the total area of the site land of the said two hats being 4 bighas 1 cottah 5 biswas (the site lands of such permanent shops as there are in respect of which you are realizing rents and that of your kutcheri bari, etc., that now

exist and that may be constructed in future which has become your khas are excluded therefrom) and remaining in possession thereof by realizing the hatkar at the rate previously approved by you from the vendors of all sorts of articles at the said two hats from the commencement of the current amli year 1318, I execute this kabuliyat for a term of one year in respect of the hatkar jama..... The said two hats shall pass into your khas possession from the commencement of the year 1319 and you shall grant fresh settlements thereof. I have and shall have no objection thereto. If any Police case takes place in the two hats above-mentioned taken settlement of by me during the term of my settlement I shall forthwith lodge information thereof with the local Police and at your office and shall have the investigation made and shall render proper assistance." Then in the schedule are given the boundaries of the site land of the two hats, and there is another schedule of instalments for payment of rent.

7. The question then arises whether the jama payable would be the "annual value" of any land, estate or tenure. It is not necessary, as I have said, in the view I take to decide whether a hat is Immovable property within the meaning of that expression under the Cess Act. The question here is, was the amount to be paid by the person executing the kabuliyat for the "actual use and occupation of any land. It was contended on behalf of the respondents that if no interest in the land was created, although the expression jama, which means rent is used the money payable would not be rent. That may be so, but what is the meaning of "annual value" of land according to the definition in the Cess Act? From the words of the definition it seems to me that the expression means not only the rent payable but if no rent is actually payable then what would on reasonable assessment be payable by other persons (i.e., other than cultivating raiyats) in the actual use and occupation thereof. The expression is so wide as even to include damages which the Court would allow to the owner of the land against third persons for actual use and occupation of the land. If I am right in that view then we have to see next whether the person executing the kabuliyat was entitled to the use and occupation of the land mentioned in the kabuliyat. It seems to me that excluding certain site lands of permanent shops and the site lands of the kutcheri bari in existence or which might be constructed in future on land which has already become khas of the landlord, the rest of the land was given possession of to the person executing the kabuliyat. It may be that this possession would be exercised only on the day on which the hat was to be held. But still there would be use and occupation of the land. Even if I were to accept the contention of the respondents that the grantee could not exclude the grantor from the land on other days or even on the days when the hat was to be held from going upon the land for realizing his rents from the permanent shops or going to his kutcheri bari, still the payment of the jama was on account of his occupation of the land on which the hats were to be held and with regard to the portion of the land on which the hats were to be held; the grantee was entitled to exclude other persons. That being so the money that was realizable on the basis of the kabuliyat is in my view "the annual value" which is payable for use and

occupation of the land. In my view the assessment was not ultra vires. The judgment and decree of the lower Appellate Court cannot, therefore, be supported. The plaintiffs' suit must be dismissed with costs in all Courts.

Cammiade, J.

8. I agree with my learned brother that the preferable view is that hats are covered by the second portion of Section 6 of the Cess Act. The rule of ejusdem generis cannot apply to the words "and other Immovable property" in that section, because the classes of business previously enumerated are exhaustive and there is no room for the application of the rule of ejusdem generis. In spite of that I also agree with my learned brother that hats may be assessed also under the first part of the section. The assessee here is the landlord and the assessment is in respect of the land used for the hat and land is Immovable property. The only difficulty that then arises is about the way in which the assessment is to be made, In respect of properties which are to be assessed on the basis of annual value the criterion for assessment is under the definition of annual value the amount of rent paid for the land or which might be paid for the land where rent is not actually assessed. Then arises the difficulty whether rent is actually paid or not in respect of this land. My personal opinion is that the term rent has been used inartistically in the definition of annual value. But even if that were not so, I agree with my learned brother that the former of the hat has sufficient control over the land to be said to have an interest in the land for which he would pay rent. Under these circumstances I hold that the assessment has been rightly made and that the suit should be dismissed as ordered by my learned brother.