

(1929) 06 CAL CK 0012
In the Calcutta High Court

Secy. of State

APPELLANT

Vs

Bhupalchandra Ray Chaudhuri

RESPONDENT

Date of Decision : 13-06-1929

Acts Referred:

Cess Act, 1880 — Section 6

Citation : AIR 1930 Cal 739

Hon'ble Judges : Mitter, J;Graham, J

Bench : Full Bench

Judgement

Graham, J.—This is an appeal by the defendant, the Secretary of State for India in Council, against a decision of the District Judge of Dinajpur confirming a judgment and decree of the Subordinate Judge of Dinajpur. The suit was for a permanent injunction restraining the defendant from the assessment and collection of cesses in respect of the plaintiff's income derived from certain hats, ferries, and khutagaries, and for a refund of the sum of Rs. 1,032 and odd annas already realised by the defendant on these accounts together with interest thereon.

2. The plaintiff's case was that the collections made from these sources are not liable to pay cess, and that the assessment was ultra vires.

3. The defendant on the other hand pleaded that, having regard to the terms of the kabuliyats, which were put in evidence, read with the provisions of the Cess Act (Bengal Act 9 of 1880) the assessment was valid and lawful. He also contended inter alia that the suit was barred by limitation.

4. The trial Court found that the assessment was illegal, granted the injunction prayed for, and partially decreed the claim for refund.

5. On appeal by the defendant that decision was affirmed by the District Judge. The Secretary of State has now preferred this second appeal.

6. Both the Courts below have found in favour of the plaintiff on the issue of

limitation, and no argument has been addressed to us upon that point. The question which arises for decision is whether it has been rightly held that these collections are not liable to pay cess. In order to decide the matter reference is necessary to the relevant sections of the Cess Act and to the kabuliyats in question.

7. Dealing first with the Act, the preamble makes it clear that the cess is to be levied on immovable property. Sections 5 and 6, which deal with the method of assessment, read as follows:

5. From and after the commencement of this Act in any district or part of a district, all immovable property situate therein, except as otherwise in Sections 2 and 8 provided, shall be liable to the payment of a road cess and a public works 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 S4 of the Act in these terms : "immovable property" includes lands and all benefits to arise out of land...but does not include crops of any kind, or houses, shops or other buildings.

"Annual value" is thus defined : "annual value of any land, estate, or tenure" means the total rent which is payable, or, if no 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.

8. "Tenure" is defined as including; every interest in land, whether rent paying or not, save and except an estate-as defined in the Act.

9. Coming now to the kabuliyats reference may first be made to Ex. A-L of which a translation has been placed before us. This document is described as a meyadi ijara kabuliyat (i.e., for a fixed term) executed in favour of Bhupalchandra Ray Chaudhuri (plaintiff in this case) in respect of a hat, and the executant binds himself to pay Rs. 190 annually as land tax (rent) for the land of the hat, and Rs. 3,260 annually as license fee for realizing tolls of the hat. i.e., to pay a total jama of Rs. 3,450 per annum. Certain conditions are then stated, breach of any of which will entail the right of the lessor to re-enter into possession of the land. The liability of the lessee to pay the fixed road cess of the hat as per valuation is mentioned, and schedules are annexed giving the boundaries of the land, and the instalments of the rent payable.

10. We are informed that a number of kabuliyats were filed in the case, and that the one just referred to above-(Ex. A-1) is peculiar in this respect that it is the only one in which any distinction has been made between the amount payable as rent of the land, and the amount paid as annual license fee for realizing tolls. In the other kabuliyats, we are informed, the total jama has been given as a lump

sum without any such distinction being made. This apparently was the form of kabuliyat, which had hitherto been used, an example of which is Ex. A, executed at the settlement of 1920, in which the total annual jagna is stated to be Rs. 3,400.

11. It may be mentioned here that, so far as the ferries and khutagaries are concerned, the case is not pressed on behalf of the appellant. It is necessary therefore to consider only the question of the hat.

12. It is contended on behalf of the appellant that having regard to the terms of the kabuliyats and to the relevant sections of the Cess Act, and in particular to Section 6 of the Act, the appellant is entitled to levy cess upon these collections, both under the first part of Section 6 as well as under the second part thereof. The kabuliyats, it is argued, clearly indicate that they give a right to the use and occupation of the land, and the assessment should therefore be upon that basis. The distinction made in Ex. A-1 between the annual rent and the license fees is, it is urged, merely a device for the purpose of evading the tax. In any view, however, even if the first part of Section 6 does not apply, the appellant, it is contended, is entitled to realize the cess under the second part of the section, as these are profits derived from the land.

13. In support of these contentions, reliance has been placed on a recent decision of this Court, *Secy. of State Vs. Sati Prasad Garga and Others*, which was decided about a year after the decision of the Court of appeal below in this case. In that case, where the facts were similar except that the total jama, was stated as in Ex. A without any differentiation between the rent and license fees, it was held *inter alia* that, if any right to a piece of land is granted, and a hat is held thereon, the income of the hat is liable to be assessed with cesses, but that in the case of a mere license to hold a hat on a piece of land, the said income is not so assessable. Further, that where hats are periodically held on lands of which possession is given to *ijaradars*, who have executed kabuliyats in favour of the landlords promising annual *Jamas*, payable to the latter for the same, the income of such hats is liable to be assessed with cesses.

14. So far as the sum of Rs. 190 mentioned in Ex. A-1 as rent of the land is concerned it was only faintly argued before us on behalf of the respondent that this could be treated as free from any liability to pay cess, and it was conceded that this item is covered by the decision of this Court referred to above, which is binding upon us.

15. It was argued however that that decision is erroneous and ought not to be followed on the ground that it is in conflict with a previous decision of this Court, *Secy. of State for India v. Karuna Kanta Chowdhry* (1907) 35 Cal. 882, which followed an earlier decision *Umed Rasul Shaha Fakir v. Anath Bandhu Chowdhri* (1901) 28 Cal. 637. These two cases have been referred to and relied upon in the judgment of the Subordinate Judge in this case, *Secy. of State Vs. Sati Prasad Garga and Others*, not having, as already stated, at that time been

decided. It is clear that these two earlier cases are distinguishable from the third case decided by B.B. Ghose and Cammiade, JJ. Both of those cases related to a mela, which was held upon the land only for a period of about one month in the year, whereas here the land is taken on lease for the purpose apparently of holding a permanent hat on one day or more per week. Again, in Umed Rasul Shaha Fakir's case (1901) 28 Cal. 637 it was found that income tax had been paid on the profits derived from the mela, and the case proceeded upon that footing, while in Karuna Kantha's case (1907) 35 Cal. 882 there was an intermediate tenancy which was liable to pay the cess.

16. Both these cases were considered by B. B. Ghose, J., in his judgment in Secy. of State Vs. Sati Prasad Garga and Others, .

17. The real question, as stated by that learned Judge, was whether the grant in question was a mere license, or a lease of property, and the same question arises here. The learned advocate for the respondent would have it that the ijaradars, as their name implies, are mere licensees, and that they cannot be assessed at all events in respect of the Rs. 3,260 representing license fees. But the matter cannot be determined merely by reference to the expressions used in the kabuliyats. Looking to the substance of the matter, and upon a true construction of these documents, there seems to me to be no doubt that they come within the purview of the first part of Section 6, Cess Act. That indeed was the conclusion of both the learned Judges in Secy. of State Vs. Sati Prasad Garga and Others, , although it was held that the second part of the section would also apply. That decision, as I have already said, is binding upon us.

18. With regard to the kabuliyat Ex. A-1, I do not think that the distinction, which is sought to be made therein between the portion of the money paid as rent and the portion paid for license fees, can make any difference, since it seems to be reasonably clear that this is merely a device for the purpose of evading payment of the cess. On a true construction of the kabuliyats, it seems plain that they are in fact leases of the land with the object of using it for holding a hat thereon, and further that the amount realized, which is described in most of these documents as the annual jama or rent, is profit derived from the land, and as such is liable to pay cess.

19. In the result the appeal succeeds in part and the assessment in respect of the income derived from the hat must be held to be valid and legal. The judgment and decree of the Court of appeal below, in so far as it has granted an injunction restraining the realization of cesses from the defendant upon income derived from this source, are accordingly set aside. The amount of the refund, which has been decreed, viz. Rs. 450-12-0, will also be modified in accordance with this decision, and the plaintiff will obtain a refund only of such portion of this sum as has been paid on account of the ferries or ghats, and the khutagaries.

20. The Secretary of State for India is entitled to his costs throughout in proportion to his success.

Mitter, J.

21. I agree with my learned brother that this appeal should be allowed to the extent indicated in his judgment. The matter in controversy turns on the question whether the kabuliyats, of which Ex. A (which is most favourable to the respondent) is a type, is to be regarded as a lease or demise of the hat or a mere license to collect tolls. I have no doubt, on the construction of Ex. A, that, so far as the sum of Rs. 190 is concerned, it is distinctly stated that it is rent for the hat and it has not been seriously disputed that that sum is assessable to cess. The larger sum of Rs. 3,260 has been stated as license fee for realizing tolls of the hat. Whatever the form of the statement may be, what is the substance of it? It is nothing less than the jama or rent paid for the occupation of the hat. That is apparent from the document itself which, after differentiating between land tax or rent for the land of the hat and the license fee, proceeds to describe the aggregate sum as "total jama of Rs. 3,450 per annum," and further proceeds to state that

the jama proposed by me being the highest one, you have made settlement of the "said" hat to me for a term of three years, i.e., from 1830 B.S. to 1832 B.S., fixing the annual jama, at Rs. 3,450. I on my part execute this kabuliyat and agree to pay the jama, fixed as per kists given below at the sadar kachari of the estate.

22. It is therefore abundantly clear that, notwithstanding the differentiation between rent and license fee, the aggregate of the two has been regarded as the jama or rent. The true test in cases of this kind is to find out whether the respondent has granted sufficient control over the land of the hat so as to make the instrument (kabuliyat) a demise and not a mere license. It is argued for the respondent that sufficient reservations have been made in favour of the respondents, which shows the respondents did not part with the real control of the hat; but notwithstanding such restrictions or reservations I think the executant of the kabuliyat (Ex. A) has sufficient control over the hat during the period of the lease so as to make him a lessee in the real sense of the term. I refer to the following provisions of the kabuliyat which justifies this view : (1) I shall pay the aggregate jama of Rs. 3,450; (2) I shall maintain the boundaries of the hat as of old; (3) I shall keep the entire area of the hat always clean at my own cost; (4) I shall not be competent to raise any plea for the abatement of the jama or to escape from the duty of payment of rent and relinquish the ijara mehal during the fixed term. (5) After the expiry of the term I shall hand over possession of the hat to you without any objection; (6) I execute this meyadi ijara patta for this hat out of my own free will. The restrictions referred to are that the lessee would not be able to make alterations in the position or place of temporary shopkeepers of the hat without the lessor's permission and not to interfere with the rent of any permanent shop, plot or for the lands of permanent tenants, which shall be realized separately by the lessor. Notwithstanding these restrictions I am of opinion that the position of the executant of the kabuliyat

was that of a lessee. I am supported in this view by a decision of the House of Lords in the case of *Glenwood Sumer Co. Ltd. v. Phillips* (1904) A.C. 405. The following observations are pertinent to the present controversy:

In the so called license itself it is called indifferently a license and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not however a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

23. I also agree with my learned brother that the kabuliyat in the present case falls within the purview of the decision of B.B. Ghose and Cammiade, JJ., in *Secretary of Secy. of State Vs. Sati Prasad Garga and Others*, . It is not necessary to decide in the present case whether the cess is leviable under the second part of Section 6, Ben. Act 9 of 1880. In other words it is not necessary to decide whether profits from the hat are profits from immovable property within the meaning of the second part of Section 6. Indeed B.B. Ghose, J., one of the learned Judges who decided the case of *Secy. of State Vs. Sati Prasad Garga and Others*, refused to express a final and definite opinion upon it.

24. It has however been contended that this decision (1) of B.B. Ghose, J. is inconsistent with the decision of the Full Bench in the case of *Secretary of State v. Karuna Kanta Chowdhry* (1907) 35 Cal. 882, I think there is no efficacy in this contention, for an examination of that case will show that all that was granted to the fakirs by the landlords was the right to hold the fair annually within the limits of the estate of the landlord. It will show that the fakirs or their ijaradars had no exclusive interest in the land on which the fair was held, the land having been admittedly included in the holding of occupancy raiyats. The following observations from the judgment of Ashutosh Mookerjee, J., in the Full Bench case will at once bring into prominence the distinction between that case and the present case or the case of *Secy. of State Vs. Sati Prasad Garga and Others*, :

In determining whether a transaction was a lease or a mere license, the substance of the agreement must be considered more than the words : *Smith v. Overseers of St. Michael, Cambridge* (1860) 3 E. & E. 383. If we apply these principles to the facts of the case before us, what is the position of the parties? The lands on which the fair was held during 20 days in the year were all comprised in the holdings of agricultural tenants. The legal possession was in them. The fakirs could not acquire by any grant from the landlord an interest in the lands in super session or limitation of, or derogatory to, the interest of the cultivators. The zamindar granted them a right to hold the fair. This right they could not exercise, if the agricultural tenants objected. Substantially, they did not and could not acquire any right to the possession of the land. They could hold the fair only by consent or acquiescence of the cultivators. It is therefore impossible to say that they acquired any interest in the lands. Much less can it be said that the persons who attended the fair and sold animals, goods or articles of

merchandise, were in any sense tenants of the ijaradars. They had obviously no interest in the land. They occupied or erected stalls or booths to store their goods and to sell them, and paid what was nothing more or less than a toll to the ijaradars of the fakirs, and the amounts paid in respect of the shops could not fall within the description of annual value of the land.

25. It is obvious that the facts of the present case are essentially different. Here the land of the hat is leased for a term; an aggregate rent is payable in respect of the same; the control of the hat was in the lessees subject to certain restrictions and reservations in favour of the lessor. There was in the present case a transfer of an interest in land and therefore the sum payable to the lessor call it jama or call it license fee was "rent" payable to the lessor.

26. In this connexion I may also refer to the provision in the kabuliyats by which the lessee agreed to pay the cess if levied. I refer to this only to show that the justice of the case lies on the aide of the appellant.