(1934) 09 PAT CK 0017

In the Patna High Court

Sourendra Mohan Sinha and Another APPELLANT

Vs

Secy. of State RESPONDENT

Date of Decision : 27-09-1934

Acts Referred:
Cess Act, 1880 — Section 4
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1934 Patna 701

Hon'ble Judges : Mohamad Noor, J;Luby, J

Bench : Full Bench

Judgement

Mohamad Noor, J.—This is an appeal against a decree of the District Judge of Bhagalpur confirming that of the Munsif of that place whereby the appellants'' suit for a declaration that a certain assessment of local cess was illegal and ultra vires and for other incidental reliefs was dismissed.

The facts are these: The plaintiffs are the sixteen annas proprietors of Lakhiraj Punsia bearing tauzi Nos. 1183-C and 1044-B, in thana Amarpur. It appears that a hat is held twice a week on their land, and as is usual collections are made on their behalf from traders who resort to the hat for selling goods. The Revenue Authorities have included the income so derived in assessing the cess on the plaintiffs.

2. The plaintiffs instituted the suit for a declaration that under the law the assessment was ultra vires as no local cess could be assessed on that income and asked for a refund of Rs. 9-15-0, which they had paid by way of local cess and also for an injunction against the defendant not to realise the assessed amount in future. Both the Courts below have dismissed the suit on two grounds: first, that the notice served upon the defendant u/s 80, Civil P.C., was at variance with the plaint and therefore insufficient; and, secondly, that the assessment was not ultra vires. The plaintiffs have appealed. The learned Government pleader has supported the decrees of the Courts below on these grounds.

3. I take up the second point first. The learned Government pleader has

contended that there is a finding of fact that the assessment was on the ground rent and not on the profit from the hat. I however do not think that there is any finding of fact that the assessment was really on the ground rent or that any ground rent was being realized by the plaintiffs from the traders who resorted to the hat. Had there been any such finding it would have been vitiated on account of the fact that there is not an iota of evidence on the record to support that finding. The only evidence on the record is that of the plaintiffs'' circle officer who has described the nature of the collections made and this shows that it is not rent. People go to the hat, some of them spread their merchandise on the ground and sell it; others roam about in the hat and hawk the articles which they have for sale. Both classes of traders pay some money to the plaintiffs for carrying on their business on their land.

4. The Courts below have used the expression "ground rent" simply because the Revenue Authorities have done so. In fact, the plaintiffs themselves both in the notice and in the plaint admitted that the land was asses. sable to ground rent. Whether a particular sum of money collected from persons who use a zamindar''s land is or is not rent is a mixed question of law and fact. It is not disputed and the evidence is one-sided that traders come and sell their commodities on the land and pay something to the plaintiffs and that the same set of traders do not necessarily come on every hat day and there is not even a suggestion that any land is settled with them for any period of time. The question therefore is whether such a payment is rent.

5. If it is not rent under the law, it will not become so because the Revenue Authorities have treated it as such. Even the defendant in his written statement did not claim that the assessment was on ground rent. He simply raised a question of law that hat income was profit from Immovable property and as such assessable.

The question whether collections from a hat are assessable to cess has been the subject matter of judicial decisions in the Calcutta High Court as well as in this Court. First of all I refer to Umed Rasul Shaha v. Anath Bandhu (1901) 28 Cal 637. There the appellant had obtained from the plaintiff and pro forma defendants a right to hold a fair on certain land once a year when there was no crop upon it.

6. The Collector assessed his profit to cess and realized this from the plaintiff. The plaintiff in his turn sued the appellant to recover the amount from the appellant. The question raised was whether the income derived from a Mela was assessable to cess. It was held that it was not. The plaintiff of that suit relied upon Rule 33 of the Bengal Board of Revenue. It ran thus:

The benefit, which a zamindar receives from a fair or hat in the shape of payment for the occupation of land by dealers or traders is assessable to cess. When a fair (SIC) held on land appertaining to an estate, it is to be valued under Ch. 2, Bengal Act 9 of 1880, as part of the estate to which it belongs. But when, as in some cases in the Darjeeling District, a fair or hat is held on land reserved solely for such purposes, and which does not form part of an estate, it should be valued under Ch. 5 of the Act u/s 79; the annual valuation of such lands is not necessary.

Note.--Profits derived from the rent of shops and other miscellaneous revenue derived by zamindars from hats and fairs should not be excluded from the cess valuation of the land on which they are situated; valuation should not however be made on trade profits or on benefits derived by traders (Board''s cess proceeding of 12th November 1898, No. 2, collection 10, file 96 of 1897).

7. Their Lordships held the rule to be ultra vires. It is to be noticed that this Bengal rule corresponds to Bihar and Orissa rule No. 56 (Rule 51 in the paper book is a mistake). There is however some difference, the most important being that instead of the use of the words "benefit which the zamindar receives" in the Bengal rule, the words "Rent on Revenue" are used in the Bihar and Orissa rule. But it is obvious that by the change of name the nature of the thing is not altered. The decision was however based on the proposition that as the Mela income was assessable to Income Tax it was not assessable to cess. This view was not accepted in a later case in connexion with mines in Munindra Chandra Nundi v. Secy. of State (1907) 34 Cal 257, where it was held that both cess and Income Tax can be levied on royalties from mines and was disapproved by a Full Bench in Secy. of State v. Karuna Kanta (1338) 35 Cal 82.

8. The Full Bench case was of cess on income from Mela and it was held there that the profits of Mela were not paid by tenant to landlord, nor for the use and occupation of land, and, consequently, were not rent and did not fall within the definition of "annual value of land" in Section 4, Cess Act; and that an assessment of cesses made by the Collector on the basis of such profits was illegal and ultra vires. It was also held that cattle sellers and stall-keepers who resorted to the fair were not tenants, but licensees.

It is to be noted that since these decisions of the Calcutta High Court under which this province was up to the year 1911, the Cess Act, has been amended for several purposes and an extensive amendment was made by the Bihar and Orissa Council in 1916 (Act 1 of 1916). It is a well settled principle of law that the (SIC) must be taken to be aware of the interpretation of the statute enacted by them by the Courts; and if they find that the interpretations by Courts of justice are not in conformity with their intention they should amend it to bring it in conformity with their intention.

9. The Full Bench decision of the Calcutta High Court has been mentioned in the note u/s 4: see p. 4 of Bihar and Orissa Cess Manual. Government must be taken to be aware of that decision. They have taken no step to amend the Act. The question has come up before this Court also in Secy. of State v. Ramasray Singh 1933 Pat 430. In that case the Revenue Authorities assessed certain raiyats who made collections from those who resorted to Sonepur fair for carrying out trade

upon their land. The question whether such collections were rent or not was specifically raised and the Bench to which one of us was a member, decided that the persons who hold the hat and keep the cattle on the land were not lessees.

10. They were mere licensees who had been granted license to come upon the land and to sell their cattle, etc. The difference between a lessee and a licensee has been pointed out in the case of Khudan Lal v. Nafiauddin 1933 Pat 36, and the Full Bench decision of the Calcutta High Court in Secy. of State v. Karuna Kanta (1338) 35 Cal 82, was followed Kulwant Sahay, J., who was one of the members of the Bench in Secy. of State v. Ramasray Singh 1933 Pat 430, held that what was realized on account of sale of goods in a hat is not rent and therefore could not be taken into account in determining the amount of assessment under Sections 7, 2 and 3 Ben. Ten. Act. It is obvious therefore from the statement of the plaintiff that he was not realising anything by way of rent.

11. The Court below had absolutely no basis to find, if they have found, that it was ground rent on which assessment had been made. Now, apart from the question of decided cases, in my opinion the law itself is very clear. Section 6, Cess Act of 1880, provides:

The local 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; and the rate at which such cess shall be levied for each year shall be determined for such year in the manner in this Act prescribed:

"Annual value" has been defined in Section 4 which says:

"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:

12. The collections made from the persons who come to carry on business on land are not rent nor money paid for use and occupation of the land. They do not hold land under the landlord. Therefore the money does not come within the meaning of "annual value of the land" and is not assessable u/s 6, Cess Act. The Courts below have doubled whether the decision in Secy. of State v. Karuna Kanta (1338) 35 Cal 82, is of any force in this province in view of the Board''s. Rule No. 51. The Board have been given power of making rules u/s 106 Cess Act. This section does not authorize the Board of Revenue to make that income assessable to cess which is not assessable under the Act itself. The Board have not power to add to the Act or subtract anything from it. The rules must be rules for the purposes of carrying out the Act. The simple question is whether such income, which the plaintiffs are getting admittedly from the hat, is assessable to cess under the Act itself.

13. If it is so, the matter ends there. If it is not it cannot be made assessable by

any order of the Board of Revenue. The utmost that can be said is this: that the Board of Revenue have interpreted the Act to mean that such incomes are assessable. But those interpretations however binding they maybe, on the Revenue Authorities, are not binding on the Courts.

The next question for our consideration is whether the notice given is sufficient. The defect found is that the relief, as mentioned in the notice, does not tally with the relief claimed in the suit. The main reliefs for which the notice was given were:

1. That it be declared that the assessment of cess upon the profits of the hat in Lakhiraj. Punsia is ultra vires. 2. That the cess valuation be rectified upon assessment of the land on the basis of a reasonable rent to be fetched. 3. That the order of the Board of Revenue as well as the Subordinate Courts be set aside so far as the assessment is concerned.

It is clearly indicated that the plaintiffs wanted to be relieved from the assessment. The learned Munsif held the notice to be invalid on two grounds: first, that Kanti Chandra Roy who gave notice was not authorized to give that notice. That point has been decided by the learned Additional District Judge in favour of the plaintiffs.

14. The second ground was the one I have stated, namely that the plaint did not tally with the notice. Two of such differences have been mentioned. One is that relief No. 3 of the notice is not mentioned in the plaint. Relief No. 3 of the notice is:

That it be declared that Rule 51, Cess Act, is not applicable and if it be held to be applicable it is ultra vires.

The learned Munsif says that this does not find place in the plaint. It is obvious that this was absolutely superfluous in the notice. What Section 80 requires is that the notice should contain the cause of action, etc., and the relief claimed. The notice fulfills the requirements of law, and if the fact that a particular rule was ultra vires was mentioned in the notice and omitted from the plaint, the notice does not become invalid on that ground.

15. The next objection of the learned Munsif is that the relief (c) of the plaint which seeks to recover Rs. 9-15-0 and asks for an injunction is not covered by the notice. It has been held and it is obvious from the plain meaning of Section 80, Civil P.C., that the notice need not be practically a copy of the plaint. The notice should be such as to give substantial information to the Government, the basis of the claim and the relief which the plaintiffs seek. It is obvious from the notice taken as a whole that the plaintiffs wanted to have it declared by the Court that the assessment of cess on their zamindari on the income of the hat was ultra vires and that the relief which they wanted to seek was that they should be relieved of that assessment. It was not incumbent upon the plaintiffs to give in detail all the forms in which they would seek the relief.

16. Two paragraphs of this notice, in my opinion, were sufficient, to give the defendant all the information which Section 80 requires a plaintiff to give, namely reliefs Nos. (1) and (3), as given in the notice. In the suit the plaintiffs want, apart from the declaration of the illegality of the assessment, a (SIC) against the defendant, not to realise that cess and this is incidental to the declaration. In my opinion the plaint is substantially the same as the notice. It was perhaps realised by the plaintiffs that the Civil Court could not set aside the order of the Revenue Authorities, but could only stop the defendant from realizing the cess. Instead of seeking the relief exactly in the form in which it was mentioned in the notice, the plaintiffs have sought it in the form in which it can be given by a Civil Court.

17. There is however one matter which can be said to be not covered by the notice, namely the prayer for refund of Rs. 9-15-0. I find no authority that for this addition in the plaint which was not covered by the notice, the entire suit of the plaintiffs should be dismissed. It was open to the plaintiffs to amend their plaint at any stage and proceed, with the suit without a prayer for refund. As a matter of fact, we are asked to strike out from the prayer, portion so much of it as it relates to the refund of Rs. 9-15-0. I would direct that this be done. The result is that the appeal is partly allowed, and the plaintiffs'' suit is decreed. They will get all the relief which they have claimed except the relief which I have ordered to be struck out. The defendant will bear the costs of the suit throughout.

Luby, J.

18. I agree.