

(1956) 09 CAL CK 0001

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1006 of 1949

Kameswar Singh
Maharajadhiraj of
Darbhanga

APPELLANT

Vs

Provakar Mahanti and
Another

RESPONDENT

Date of Decision: Sept. 3, 1956**Acts Referred:**

- Cess Act, 1880 - Section 52, 54, 58

Citation: 61 CWN 223**Hon'ble Judges:** P.K. Sarkar, J; Lahiri, J**Bench:** Division Bench**Advocate:** Amiya Kumar Mookerjee, for the Appellant; Apurbadhan Mukherjee and Kasi Kanta Moitra for Atul Patra, for the Respondent**Final Decision:** Dismissed

Judgement

Lahiri, J.

Section 58 of the Cess Act entitles the holder of an estate to recover a sum equal to double the amount due to him under sections 56 and 57 of the Cess Act when such installment is not paid to him within one month of the date on which such installment is payable. Basing his claim upon this section, the plaintiff who is the appellant in this appeal instituted a suit for the recovery of primary education cess for the years 1946 and 1947 due under the Bengal (Rural) Primary Education Act (Bengal Act VII of 1930). The plaintiff claimed the penalty to which, according to him, he was entitled u/s 58 of the Cess Act on the allegation that the installment due from the defendants had not been paid or tendered by them within the time allowed by section 58 of the Cess Act. There is no dispute that the defendants are holders of a rent-free tenure under the plaintiff and that they failed to pay the education cess at the rate of Rs. 37|10|9 per year due to the plaintiff. If the dues of the plaintiff be calculated at the single rate of Rs. 37|10|9 his total

claim will come up to Rs. 84|12|3 with interest at the rate of 61/4 per cent, per annum, but if they are calculated at the double rate u/s 58 of the Cess Act the total claim will be double the amount. After the institution of the suit the defendants remitted a sum of Rs. 115/- to the plaintiff towards his dues by postal money order which was accepted by the plaintiff; but the plaintiff prosecuted the suit for the recovery of the balance of his claim which was calculated at the double rate. The Courts below have held that the plaintiff is entitled to recover only at the single rate, and as the plaintiff had already received more than the amount to which he was legally entitled they have dismissed the suit, and against the decrees made by the Courts the plaintiff has brought this second appeal for the recovery of the balance to which, according to him he is entitled. The only question which requires consideration in this second appeal is whether the plaintiff is entitled to recover the penalty u/s 58 of the Cess Act. Both the Courts below have rejected the plaintiff's claim to recover the penalty u/s 58 of the Cess Act, 1880, on the ground that section 58 presupposes the publication of the notice and extract of valuation roll by the Collector u/s 52 and publication of the notice by the holder of the estate u/s 54, but no such formality is necessary under the Bengal (Rural) Primary Education Act of 1930 which only requires by section 31 that the Collector shall cause a notification to be published and a proclamation to be made announcing the imposition of Education Cess and a service to be effected on the holder of every estate of a notice showing the amount of primary education cess payable in respect of his estate and the date from which such primary education cess will take effect.

2. In other words, according to the view taken by the Courts below, the only notice required to be published for the imposition of education cess is the notice u/s 31 of the Bengal (Rural) Primary Education Act and that the notices under sections 52 and 54 of the Cess Act are not necessary. I am entirely unable to accept this view as correct, and in fact, Mr. Apurbadhan Mukherjee appearing for the respondents has not also made any serious attempt to support it. The fallacy of this view is this: Education Cess is an additional imposition on immovable property which has already been assessed to road and public works cesses according to the provisions of the Cess Act and it is assessed on the annual value of land determined under the Cess Act--Vide section 29 of the Bengal (Rural) Primary Education Act, 1930. It is only after road and public works cesses have been assessed on the land in the manner contemplated by the Cess Act that the education cess can be imposed. For the assessment of road and public works cesses in respect of rent-free lands, publication of notices under sections 52 and 54 of the Cess Act is essential. Therefore, the publication of those notices is the essential pre-requisite of the imposition of the education cess. The reasons given by the Courts below are, therefore, not sufficient, in my opinion, to exclude the application of section 54 of the Cess Act. I have, however, still to examine whether section 58 of the Cess Act is attracted by section 32 of the Bengal (Rural) Primary Education Act. Section 32 is in the following terms:

"Subject to the provisions of this chapter, the provisions of the Cess Act, 1880, shall apply as far as possible to the assessment, levy, payment and recovery of the primary

education cess."

3. Upon a plain construction of this section, the application of the provisions of the Cess Act to the assessment, levy, payment and recovery of primary education cess is restricted by two phrases: (a) "Subject to the provisions of this chapter" (i.e. Chapter IV of the Primary Education Act) and (b) "As far as possible". Under the Cess Act the liability of an owner of rent-free land arises on the publication of the notice and the extract from the valuation roll by the Collector u/s 52, and in cases to which section 54 applies, on the publication of the notice under that section by the holder of the estate (See section 56). u/s 57 the holder of rent-free land is liable to pay the cesses to the holder of the estate in two equal installments or in one payment on such days or day as may be fixed by the Board of Revenue. By Rule 112, the Board of Revenue has fixed the latest dates of payment of such installments or installment. Then, section 58 of the Cess Act provides that if an installment of cesses due on any rent-free land is not paid within one month of the date on which it is payable, the holder of the estate shall be entitled to recover a sum equal to double the amount of such installment "due to him under sections 56 and 57" with interest at the rate of 6 1/4 per cent, per annum. The penalty recoverable u/s 58 of the Cess Act is, therefore, double the amount of the installment due under sections 56 and 57 of the Cess Act. Section 30(1) of the Bengal (Rural) Primary Education Act provides amongst other things that primary education cess shall be paid at the same time as the road and public works cesses are paid under the Cess Act. As a result of this provision, primary education cess is payable according to the same installments as are provided for by the Rule framed under section 57 of the Cess Act. The installments in default in the present case can, therefore, be said to be due u/s 57 of the Cess Act. In order to come u/s 58 of the Cess Act, however, it is not enough that the installments should be due u/s 57; it is also necessary that they should be due u/s 56 of the Cess Act. Now, an installment of primary education cess cannot, in my opinion, be said to be due u/s 56 of the Cess Act because the assessment of primary education cess takes place not under the Cess Act but under sections 29 and 30 of the Bengal (Rural) Primary Education Act and it is therefore, due under sections 29 and 30 of the Bengal (Rural) Primary Education Act and section 57 of the Cess Act.

4. The next question is whether I can incorporate the provisions of section 58 of the Cess Act into the Bengal (Rural) Primary Education Act by making necessary adaptations, i.e., by substituting the words "due under sections 29 and 30 of the Bengal (Rural) Primary Education Act" for the words "due u/s 56" occurring in section 58 of the Cess Act. Mr. Amiga Kumar Mookerjee appearing in support of the appeal has argued that I can make the adaptation under the expression "as far as possible" used in section 32 of the Bengal (Rural) Primary Education Act. The expression "as far as possible" is a restrictive provision; it means that the provisions of the Cess Act will not apply where they are found inapplicable.

5. It does not authorise the Court to make adaptations which will have the effect of enlarging the scope of section 58 of the Cess Act. Since a restrictive provision cannot be

utilised to enlarge the scope of a statutory provision, I have reached the conclusion that I cannot introduce the provisions of section 58 of the Cess Act into the Bengal (Rural) Primary Education Act with necessary adaptations.

6. An additional difficulty to the application of section 58 of the Cess Act arises from sections 61 and 62 of the Cess Act which provide that that section shall be applicable to every amount which is payable by the owner of rent-free land after the fulfillment of the requirements of sections 52, 53 and 54 and that section will not apply before the fulfillment of the requirements contained in sections 52, 53 and 54. Section 62 further provides that if any installment of cess has become payable before the fulfillment of the requirements of sections 52, 53 and 54, the holder of the estate has only the right to recover the installment in default together with interest at the rate of 61/4 per cent, per annum. The combined effect of sections 61 and 62 of the Cess Act is to disentitle the holder of the estate from recovering the penalty contemplated by section 58 before the fulfillment of the requirements of sections 52, 53 and 54 and to confine his rights only to the recovery of the installment in default together with the statutory interest.

7. In the present case, there is neither any allegation nor proof that the requirements of sections 52, 53 and 54 of the Cess Act were fulfilled, and so the right of the holder of the estate is limited only to the recovery of the installment at the single rate together with the statutory interest.

8. Mr. Amiya Kumar Mookerjee invited our attention to the decision in the case of [Sree Sree Iswar Gopinath Deb Thakur and Another Vs. Kameswar Nath and Another](#), where G. N. Das, J. sitting singly held that if primary education cess has been properly levied, but has not been paid according to the installments fixed under the Act, the Zamindar is entitled to recover the penalty provided for by section 58 of the Cess Act. In that case the claim of the Zamindar to recover the penalty u/s 58 was resisted on two grounds.--(a) that as no road cess was payable in respect of the land, education cess was also not recoverable u/s 29(1) of the Bengal (Rural) Primary Education Act, and (b) that the levy of the education cess was not possible because of the non-service of the notice u/s 54 of the Cess Act. His Lordship rejected both the contentions and concluded with the following words:

"As I have already held that the primary education cess was properly leviable and as the same has not been paid according to the installments fixed by the Act the plaintiff was entitled to recover the property as stated in section 58 of the Cess Act."

9. No argument was advanced before him that even if primary education cess was recoverable in a particular case the penalty contemplated by section 58 of the Cess Act was not recoverable because the language of section 58 of the Cess Act was inapplicable to the recovery of primary education cess which was due under sections 29 and 30 of the Bengal (Rural) Primary Education Act, nor was His Lordship's attention drawn to the provisions of sections 61 and 62 of the Cess Act. and His Lordship had no occasion to

apply his mind to these aspects of the question. If these points had been raised before him, I have no doubt his decision would have been otherwise. For these reasons, with the utmost deference to the learned Judge for whom I have the highest respect I cannot follow his decision,

10. Mr. Apurbadhan Mukherjee appearing for the respondents also argued that the words "assessment", "levy", "payment" and "recovery" occurring in section 32 of the Bengal (Rural) Primary Education Act attracted only the procedural portions of the Cess Act relating to those four subjects and as section 58 of the Cess Act conferred a substantive right on the holder of the estate the provisions of section 58 of the Cess Act were not attracted by section 32 of the Bengal (Rural) Primary Education Act. The application of the Cess Act to the assessment, levy, payment and recovery of primary education cess is limited by the two restrictive phrases to which I have already referred and if a particular provision does not come under one or other of those restrictive phrases. I do not think that I shall be justified in importing any greater restriction, into the language of section 32. If any provision of the Cess Act is not contrary to the provisions of Chapter IV of the Bengal (Rural) Primary Education Act, and if it is possible to apply it to the Bengal (Rural) Primary Education Act. it will apply irrespective of the question whether it deals with substantive right or with procedure. As in the present case, the language of section 58 of the Cess Act is not adapted to the recovery of primary education cess, I have held that it does not apply thereto; but beyond this I am not prepared to hold that section 58 is inapplicable because it deals with substantive rights. For the reasons given above, I would affirm the decrees made by the Courts below though I do not agree with their reasons. In the result, the appeal should be dismissed, but in the circumstances of the case without any order as to costs. The order as to costs made by the Courts below will stand.

P.K Sarkar, J.

I agree.