(1934) 08 CAL CK 0028

Calcutta High Court

Case No: Appeal from Appellate Decree No. 1707 of 1932

Hem Chandra Das Chaudhury and Others		APPELLANT
	Vs	
The Secretary of State for India in Council and Others		RESPONDENT

Date of Decision: Aug. 24, 1934

Final Decision: Dismissed

Judgement

1. This appeal arises out of a suit which was instituted by the Plaintiffs for a declaration that the assessment of cess by the Cess Re-valuation Officer on the income from the stalls of a certain market or hat of which the Plaintiffs are tenure-holders was illegal and ultra vires, and also for refund of the amount of cess which they had paid under protest. The Courts below have dismissed the suit. The Plaintiffs are tenure-holders in respect of the lands on which the market or hat holds its sittings. The exact particulars are not available, but, as far as may be gathered, there are some stalls and also some open space on which the dealers come and sit and do their work. The hat meets two days in the week. The Plaintiffs have taken kabuliyats from several ijaradars who, under the terms thereof, collect tolls from the stall keepers and dealers of various descriptions and out of the sums so collected pay certain sums as jamas per year to the Plaintiffs, The jamas just mentioned have been treated as "rent" and the annual value being found on the basis thereof, the re-assessment has been made. We are told that prior to the re-assessment cesses had to be paid on the annual value calculated on the basis of the rents of such tenants as were actually on the land and also on the average of such raiyati rents as might be held to be realisable from the portion of the land which was untenanted. The market or hat was also in existence at the time.

2. Reading sec. 4 of the Cess Act (Beng. Act IX of 1880), it is found that the annual value 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 cultivating raiyats or by other persons in actual use and occupation. There are several difficulties in

interpreting this definition, but they need not Concern us here, because the point in controversy is a limited one. It has been formulated by the Subordinate Judge in these words:--

Where the ijaradars in the present case are in fuse and occupation of the lands and whether the amounts paid by them can be treated as rent within the meaning of sec. 4 of the Cess Act.

3. It is not urged on either side that this enunciation of the proposition, which is for our consideration, is not correct.

4. In paragraph 4 of the plaint, the Plaintiffs have averred, that the lands are non-agricultural and non-leasable and are in the khas possession of the Plaintiffs, that in the hat which is held every Thursday and Sunday various commodities are sold, that there is no permanently allotted space for the sale of the same, that temporary stalls are made and dealers do their business, that tolls are collected by the ijaradars who in accordance with their agreements pay some monies to the Plaintiffs, and that under the agreements the profits and losses belong to the ijaradars. Under each of the kabuliyats which are all for a period of a year, the right to collect tolls for some particular commodities only is granted, and it is stipulated that besides those commodities, tolls on no others would be realisable by the grantee, and a lump sum being fixed, it is made payable in five kists. The kabuliyat is described as of a temporary ijaradari settlement. The lands concerned in all the kabuliyats are the same, the boundaries in each kabuliyat covering the entire land on which the market or hat stands.

5. To the above should be added certain facts which have been found by the Court of Appeal below. In the settlement the lands are recorded as being in the khas possession of the Plaintiffs and no interest as that of the ijaradars has been recorded; there are no fixed plots or places for the several commodities which form the subject-matter of any particular kabuliyat, though certain lands are set apart for the sale of each kind of article; there are different mahals in the hat corresponding to the different commodities, specified commodities being sold in defined places set apart for the purpose and any particular commodity being sold in a particular place for a long period irrespective of the persons who might be ijaradars or stall-keepers.

6. On the pleadings and facts found as above, the question that has to be determined is whether the ijaradars can be said to be in use and occupation of the lands and whether the amounts payable by them under the kabuliyats can be treated as rents within the meaning of sec. 4 of the Act. The question will have to be decided not merely by reference to the words and expressions used in the kabuliyats but on an appreciation of a right, if any, created thereby.

7. The authority strongly relied on behalf of the Plaintiffs, as Appellants is the Full Bench decision of this Court in the case of Secretary of State v. Karuna Kanta Chowdhury I. L. R. 35 Cal. 82 S. C. : 11 C. W. N. 1053 (1907). On a careful perusal of

the decisions in that case it seems to us that there are certain points of difference between that case and the present one. These points are notably two: 1st, that in that case the assessment was made on the basis of the profits which the ijaradar, in whom the right to hold a Mela was vested, made from the stall-keepers, whereas in the present case the assessment has been made on the basis of the amount which the ijaradars pay to the Plaintiffs; and 2nd, that in that case the lands were already in the occupation of occupancy-raiyats and so the ijaradars, who under a kabuliyat obtained; the right to hold the mela for a certain time, were not, in fact, in use and occupation of the lands and could not, in fact, be put in use and occupation thereof by the landlords; whereas in the present case that element is entirely absent. It was held in that case that the profits which the ijaradars realised from the stall-keepers were not profits paid by the tenant to the landlord, nor profits paid for use and occupation. In the present case, under the terms of the kabuliyats, the ijaradars are entitled to exclude any body else from dealing with the lands in the particular manner in which he himself is entitled to do under his kabuliyat. In that sense, a limited sense though it be, the ijaradar was in use and occupation--being allowed by his kabuliyat to let in or exclude anybody he liked for sale of the particular commodities to which his kabuliyat referred, collecting such tolls as his kabuliyat permitted and using perhaps such portion of the land covered by the boundaries on which those particular commodities used to be sold. In our judgment, therefore, what the ijaradar has to pay under his kabuliyat is "rent" within the meaning of sec. 4 of the Act.

8. We think the Courts below were right in applying to this case the view taken in the case of Secretary of State v. Sati Prasad Garga I. L. R. 55 Cal 1328 (1928), the effect of the kabuliyat in that case being what we consider to be the effect of the kabuliyats in the present case. The appeal is accordingly dismissed with costs.