(1954) 07 BOM CK 0014

Bombay High Court

Case No: Special Civil Application No. 1071 of 1954

Maharana Jaywantsinhji Ranmalsinhji Thakore Saheb of Sanand	APPELLANT
Vs	
The State of Bombay	RESPONDENT

Date of Decision: July 27, 1954

Acts Referred:

- Stamp Act, 1899 - Section 46

Citation: (1954) 56 BOMLR 1054

Hon'ble Judges: M.C. Chagla, C.J; Dixit, J

Bench: Division Bench

Judgement

M.C. Chagla, C.J.

The petitioner is a talukdar of Sanand and Koth Estate and he requires by this petition that the Collector of Ahmedabad where his villages are situated should give him necessary assistance in recovering the local fund cess from his tenants as provided by the Bombay Land Revenue Code. This petition affects the lands leased to 53 tenants and we have before us the kabulayat executed by these tenants and the kabulayat provided for payment by the tenant of a certain amount as darbari haq which is the same as rent, and also whatever local fund cess which the landlord would be liable to pay. It appears that the petitioner was recovering from his tenants both the rent and this local fund cess, but in 1954 when the petitioner attempted to recover the local fund cess from his tenants, the tenants refused to pay this cess on the ground that they had been instructed by the talatis and other officers of the State of Bombay that they were not liable to pay to the petitioner this cess. Thereupon on March 27, 1954, the petitioner addressed a letter to the Collector of Ahmedabad and called upon him to render him assistance to recover this cess under the provisions of Section 86 of the Land Revenue Code. The Collector replied on the same day stating that according to Section 86 of the Land Revenue

Code assistance could be granted for recovery of land revenue or rent only, and as the petitioner was seeking assistance for recovery of local fund cess from his tenants, the assistance asked for could not be granted and therefore the application of the petitioner was not admitted. On receiving this reply the petitioner came to Court with this petition.

2. Now, turning to the legal provisions, we must first turn to the Local Boards Act, and Section 93 of that Act empowers the State Government to levy a cess of 3 annas on every rupee. Section 90 provides that the cess shall be levied, so far as may be, in the same manner, and under the same provisions of law, as the land revenue. Section 98 provides :

The provisions of law relative to the assistance to be given to superior holders and owners of water-courses for the recovery of their dues from their tenants and occupants under them, or from persons authorized to use their water-courses, shall be applicable to all superior holders, whether of alienated or unalienated land, and to all owners of water-courses in respect of the recovery of the said cesses from their tenants, occupants or persons authorised to use their watercourses, and shall be applicable also to occupants of land under the Bombay Land Revenue Code, 1879, for the recovery of the said cesses from their tenants or joint occupants.

Therefore, by this section the provisions of the Land Revenue Code have been made applicable to enable the landlord to recover this cess from their tenants or the joint occupants. Turning to the provisions of the Land Revenue Code, Section 85 provides :

Superior holders shall, upon written application to the Collector, be entitled to assistance, by the use of precautionary and other measures, for the recovery of rent or land revenue payable to them by inferior holders, or by co-sharers in their holdings under the same rules, except that contained in section 137, and in the same manner as prescribed in Chapter XI for the realization of land revenue by the State Government.

Section 87 lays down the procedure as to how the application has to be made and how the Collector has to proceed on such application being made. Sub-section (1) of Section 87 provides that when an application is made to the Collector, he shall cause a written notice thereof to be served on the inferior holder or co-sharer fixing a day for inquiry into the case. Sub-section (2) provides :

On the day so fixed he shall hold a summary inquiry, and shall pass an order for rendering assistance to the superior holder for the recovery of such amount, if any, of rent or land revenue as appears to him upon the evidence before him to be lawfully due.

Sub-section (3) confers a certain discretion upon the Collector and that discretion is that if it appears to the Collector that the question at issue between the parties is of

a complicated or difficult nature, he may in his discretion either refuse the assistance asked for, or, if the land to which the dispute relates, has been assessed under the provisions of this Act, grant, assistance to the extent only for the assessment so fixed upon the Maid land. Now, the contention of the petitioner is that unless the Collector is of the opinion that the question at issue between the parties is of a complicated or difficult nature, it is incumbent upon him under Sub-section (2) to pass an order rendering assistance to the petitioner, and it is pointed out that when the application was made by the petitioner under Sub-section (1) of Section 87 the Collector did not refuse assistance on the ground that the issue between the parties was of a complicated or difficult nature, but refused assistance on the ground that what the petitioner was seeking to recover was not rent but local fund cess. It is urged that the Collector in sending his reply obviously overlooked the provisions of Section 98 of the Local Boards Act and confined his attention only to Section 86 of the Bombay Land Revenue Code. Therefore, the refusal on the part of the Collector was not due to any exercise of discretion on his part, but was due to his taking the view that the petitioner was not entitled to the relief at all. It is rather curious to note that it is only in the affidavit of Mr. Bakhle that he points out in para. 7 that when the question which arises between the parties is of a complicated or difficult nature as appears to be the case in these proceedings, it would be within the discretion of the Collector to refuse or grant assistance u/s 87(3). But it is not for Mr. Bakhle to decide that the question which arises between the parties is of a complicated or difficult nature. The statute confers that discretion upon the Collector, and as we have already pointed out, the Collector has not exercised that discretion and has not formed the opinion that the matter is of a complicated or difficult nature. On the contrary, judging by the very short and brusque reply sent by him, he felt no difficulty in coming to the conclusion that the petitioner was not entitled to the relief because what he was claiming was not rent but local fund cess.

3. Our attention has also been drawn by Mr. Palkhivala to the rather inconsistent attitude taken up by the Government on the right of landlords to recover local fund cess from their tenants. At one time Government''s view was that where rent was paid by tenants as a crop share, there could be no separate levy for local fund cess, but where rent was paid in cash, local fund cess at the rate of 3 annas in a rupee of assessment would be payable by the tenants. A little later the view taken by Government was that where cash rent equal to or less than the assessment was paid, the local fund cess would be payable by the person who paid such rent. As in this case the rent payable by the tenant is more than the assessment, the Government have taken the view that the petitioner is not entitled to the collection of the cess. But in the affidavits made and on the submissions made by the Advocate General, the view that is now put forward by the State is that under no circumstance on a proper construction of the relevant provisions of the Tenancy Act is the landlord entitled to recover any cess from the tenant. Therefore, the position is clear that if the landlord is lawfully entitled to recover local fund cess from the

tenant and if the tenant refuses to pay, the landlord is entitled to obtain assistance from the Government for the recovery of this cess in the same manner and to the same extent as he would be entitled to for the recovery of rent, and that assistance can only be denied to him provided the Collector comes to the conclusion that the question raised and at issue between the parties was of such a complicated character that it would not be right to compel the tenants to pay the amount claimed but that the parties should be referred to litigate their rights in a civil Court. But the right of the petitioner to claim assistance can only arise provided he satisfies us that he is entitled to claim this local fund cess from the tenants, and the contention of the Advocate General is that on a true construction of Section 11 of the Tenancy Act the landlord is not so entitled.

4. Now, turning to Section 11, it provides :

Notwithstanding any agreement, usage or law, it shall not be lawful for any landlord to levy any cess, rate, vero, huk or tax or service of any description or denomination whatsoever from any tenant in respect of any land held by him as a tenant other than the rent lawfully due in respect of such land.

Before we construe Section 11 it would be perhaps advisable once again to look at the general scheme of the Tenancy Act with regard to the rights of the tenants and also the rights of the landlords. The broad scheme of the Act is that a landlord is not entitled to charge any rent in excess of the maximum rent which Government may fix u/s 6(1). If the rent fixed under the agreement between the landlord and the tenant does not exceed this maximum, there is nothing in the law to prevent the landlords from recovering such a rent subject to one important qualification, and that qualification is that notwithstanding the fact that the rent is less than the maximum it is open to the tenant to complain that even so the rent is not reasonable, to apply to the Mamlatdar for fixation of reasonable rent, and to get the reasonable rent fixed, but until such an application is made by the tenant and until the reasonable rent is fixed, the obligation of the tenant u/s 7 to pay the fixed rent continues. The only other qualification upon the right of the landlord to recover rent is Section 9 which prohibits him from receiving rent in terms of service or labour. It is against this background that we must look at and construe Section 11. The marginal note to Section 11, which may be looked at in order to understand the drift of the section is, "Abolition of all cesses, etc." and what is rendered unlawful and what is prohibited is the levying by the landlord of any cess, rate, vero, huk, tax or service of any description or denomination whatsoever from any tenant. But it is pertinent to note that the Legislature has made it clear that the landlord is entitled to recover rent lawfully due from the tenant and what is prohibited is the landlord charging the tenant something more than or other than the rent which he is lawfully entitled to recover.

5. Now, it has been urged by Mr. Palkhivala and with considerable force that proper emphasis must be placed upon the expression used by the Legislature, viz. "levy"

and it is pointed out that this expression is advisedly used in contradistinction to the expression used by the Legislature in other parts of the Act, viz. "to recover or to receive", and what is urged is that the Legislature wanted to make a clear distinction between receiving and recovering a cess, rate, etc. and the levying of a cess, rate, etc., and Mr. Palkhivala''s submission is that the mischief aimed at by Section 11 is not the recovering by the landlord of a cess which the landlord may be liable to pay in law and in respect of which he may transfer his liability upon the tenant, but the mischief, it is suggested, is the imposing by the landlord himself upon the tenant any cess, rate, etc. in addition to the rent lawfully reserved under the lease. We do not think it is seriously disputed that prior to the Tenancy Act many landlords imposed various cesses or rates or huks or taxes upon their tenants, and it seems to us clear that the intention of the Legislature was that there should be no liability upon a tenant to pay anything more than the rent reserved under the lease subject to the maximum laid down in Section 6. It is rather significant to note that in the definition of "rent", rendering of personal services or labour is excluded, so that if a tenant were to agree with his landlord to render any service as consideration for the demise, that would not constitute "rent", and therefore in Section 11 there is a specific ban upon the landlord imposing any service of any description upon the tenant. As service is looked upon under the Act as something outside the region of rent, the Legislature had specifically to deal with it and it has prohibited the imposing of any service upon the tenant by the landlord. It is difficult to understand, if what the Advocate General says is correct that the intention of the Legislature was not merely to prevent the landlord from imposing a cess, etc. himself but from collecting or recovering or receiving any cess from the tenant, why the simple expression "recover" or "receive" was not used in preference to the expression "levy". In Sub-section (3) of Section 9 the Legislature has provided :

Notwithstanding anything contained in any agreement, usage, decree or order of a Court or any law no landlord shall recover or receive rent in terms of service or labour after a period of twelve months from the date of coming into force of this Act.

Therefore, in that section there is a clear ban against the landlord recovering or receiving rent in terms of service. It was open to the Legislature equally to provide that the landlord shall not recover or receive any cess, etc, from the tenant. But the Legislature advisedly has used a different expression and every canon of construction requires that when in the same statute in two sections which are in such close juxtaposition the Legislature uses two different expressions when the same expression would have served the purpose, the Legislature must have intended to convey something different by using a different expression. Therefore, we are inclined to take the view urged by Mr. Palkhivala that what is prevented by Section 11 is the imposing by a landlord of a cess upon the tenant. As in this case the cess is not imposed by the landlord but is imposed by the Government and the landlord is liable to pay the cess, Section 11 has no application to this cess. In this

connection one might again look at the marginal note "Abolition of all cesses". There is again force in Mr. Palkhivala''s contention that what Section 11 intended to achieve was the abolition of all cesses imposed by the landlord and that is why the marginal note is so worded. But Section 11 could not possibly have been intended to refer to a cess imposed by Government because that cess was not intended to be abolished. If the only intention was that a cess imposed by Government should not be recoverable by the landlord from his tenant, then the marginal note would not have been "abolition of all cesses" but "non-recoverability of all cesses by the landlord".

6. It is further urged that even assuming the expression "levy" covers recovery or realisation as suggested by the Advocate General, in this particular case what the landlord is recovering is not cess but rent. The agreement mentions the amount of the cess and the landlord becomes entitled to receive from the tenant an amount, corresponding to the cess which he is liable to pay under the agreement. But what the landlord in law receives from the tenant and what the tenant in law pays to the landlord is not a cess but is the rent reserved under the agreement. It is rightly pointed out that the consideration paid by the tenant in this case for the use and occupation of the land was two-fold. One was the payment of an amount which is described as rent and the second was the payment of the local fund cess. The payment of the local fund cess was as much a part of the consideration as the amount described as rent, and it is pointed out that when one turns to the definition of "rent" in the Act it means any consideration in money or kind or both paid or payable by a tenant on account of the use or occupation of the land held by him, and it is suggested that there can be no dispute whatsoever in this case that the tenant agreed to pay the local fund cess as consideration for the use and occupation of the land. There was no obligation on him to pay the local fund cess, the obligation was upon the landlord, he took over the obligation upon himself because he wanted the land, and the landlord insisted upon the tenant paying the local fund cess as part of the consideration. It is also pointed out how anomalous the situation would be if a tenant who agrees to pay rent which includes the local fund cess but does not mention it would not come within the mischief of Section 11, but a landlord who makes it clear in his agreement that he is receiving part of the amount as rent and the other part as local fund cess would come within the mischief. As against this argument it is urged by the Advocate General that what the landlord recovers from the tenant by way of cess is not any profit which he derives from the land. There is a liability upon him to pay the cess and that liability is being discharged by the tenant, and therefore it would not be correct to say that this payment by the tenant of the local fund cess is a profit which he derives out of the land.

7. For this proposition strong reliance is placed upon a judgment of a full bench of this Court in In re Gangaram Narayandas Teli I.L.R (1915) 39 Bom 434 : s.c. 17 Bom. L.R. 820. It must be confessed that the facts of that case were very similar to the facts we are considering. A question arose under the Stamp Act and there was an

agreement whereby the lessee agreed to pay to the lessor Rs. 100 as rent plus Rs. 16-8-0 on account of Government assessment, and the question that came for decision before the full bench was whether the stamp duty should be levied on Rs. 100 or Rs. 116-8-0, and that question had to be decided on a consideration as to whether what was reserved as rent under the agreement was Rs. 100 or Rs. 116-8-0, and the full bench held that the Government assessment did not form part of the profits and therefore the stamp duty was leviable only on Rs. 100, the annual rent under the Stamp Act, This decision has come in for very strong criticism at the hands of Sir Dinshah Mulla both in the Transfer of Property Act and in the Stamp Act. But however inclined we may be to agree with the criticism of Sir Dinshah Mulla, we would be bound by a decision of the full bench unless we could distinguish that case or for some reason we are satisfied that that decision is not binding upon us, The reasoning which led this Court to come to this conclusion is to be found in the judgment of the learned Chief Justice at p. 437. He quotes the definition of "rent" in Woodfall on Landlord and Tenant (25th edn.) and he says that it is a retribution or compensation for the lands demised (p. 330):

Rent must always be a profit.... This profit must also be certain, or capable of being reduced to a certainty by either party, and must issue out of the thing granted, and not be part of the land, or thing Itself....

The learned Chief Justice applies this test to the case before him and he says (p. 437).

...it appears to us that the only profit for the lands demised which the landlord would realize is the half of the produce, and that Rs. 16-8-0 is not part of the profit. It is a liability attaching to the thing itself in the hands of the lessor.

With very great respect, it is difficult to understand why the discharge by the tenant of the obligation of the landlord to pay assessment in respect of this very land was not a profit derived by the landlord from the levy. Surely, if the landlord was relieved of his obligation to pay assessment by reason of the lease and that obligation was undertaken by the tenant, it was a profit which the landlord derived by letting out the land. Therefore, even applying the definition of Wood-fall the decision seems to be, with very great respect, obviously erroneous. But this decision is based upon a concession made by the Government Pleader who appeared before the full bench, and that concession was that if this assessment was paid direct to Government by the tenant, then it could not be deemed as part of the rent. We fail to understand why, how and under what circumstances the Government Pleader came to make this concession. If the judgment was based on a concession, which concession is on the face of it insupportable, then it would not be a decision binding upon us.

8. Now, when we turn to a decision of the Madras High Court, it is clear that far from this concession being justified in law, the Madras High Court has taken the view in Reference under Stamp Act, Section 46 I.L.R.(1883) Mad. 155 that even where the

land revenue is to be paid direct by the lessee to the Government, the payment by the lessee would be part of the rent and the stamp duty must be calculated not only upon the rent which the landlord actually receives in his hand but upon the whole amount, viz., the rent which he receives and the amount which the lessee pays to the Government. Therefore, the decision of the Madras High Court, which is also on a stamp reference and also of a full bench, is directly contrary to the judgment of this Court. But it will be noticed that the Bombay full bench was not construing any definition of "rent" given by statute but was applying the general principles of English law and was relying upon the definition of "rent" given by Woodfall in his well-known treatise of Landlord and Tenant. What we are concerned with here is to construe the definition of "rent" given in the statute itself, and on that construction the full bench decision is of no assistance and is not a binding authority upon us. When we again turn to the definition, it is clear that anything that is a consideration for the use or occupation of the land is rent except the rendering of personal services, and as we have already pointed out, it cannot be disputed in this case that the payment of local fund cess by the tenant to the landlord was part of the consideration for the use and occupation of this land. If that is the true position, it seems to us that Mr. Palkhivala is right when he says that what the landlord was recovering even in that wider sense was not cess but rent, and if that rent was below the maximum laid down in Section 6(1), then it was lawful rent and there is nothing in the Tenancy Act which prevents the landlord from recovering rent lawfully reserved under the lease.

9. Now, we would have proceeded, after having heard careful and elaborate arguments both by Mr. Palkhivala and the Advocate General, to decide this question one way or the other. But the Advocate General has drawn our attention to the fact that in this petition the tenants are not represented. Mr. Palkhivala contends that as all that he seeks is a mandamus against the Collector, if we are satisfied that there is a statutory duty cast upon him we must issue the mandamus and no other party is entitled to be heard. Now, the matter is not so simple as that. The statutory duty of the Collector only arises provided there is a liability upon the tenants to pay the cess to the landlord, and the contention of the Government is that there is no such liability. Therefore, before we can proceed to issue a mandamus and indeed before we can proceed to decide that there is any statutory duty upon the Collector to render assistance to the petitioner, we must be satisfied that there is a liability upon the tenant to pay this cess to the landlord. It is only on that liability arising that the further question as to the statutory duty of the Collector will arise. It seems to us that we cannot impose this liability upon the tenants and requisition against them the coercive machinery of the State without hearing the tenants on the proper construction of Section 11 and upon their liability to pay this cess. We have set out as fully as possible the arguments advanced on both sides so that when the matter reaches hearing again, as we are proposing to adjourn it, it may not be necessary to rehearse all the arguments over again.

10. We think it is entirely necessary in this case that notices should be given to all the tenants who would be affected by this decision, and therefore we would adjourn this matter for a fortnight. On that day if the tenants appear we will hear their advocate. If none of the tenants appear, we will hear counsel on either side if they wish to supplement their arguments in any way. Otherwise we will proceed to give judgment.

11. Per Crmiam. This matter has now come up before us, having been adjourned on the last occasion to enable the tenants to appear if they were so advised. The tenants have been served and no tenant is appearing to contend that there is no liability to pay the local cess. For the reasons given in our judgment, we will, therefore, proceed to make the necessary order, and the order which we make is that the Collector will dispose of the application made by the petitioner for assistance in the light of this judgment according to law, bearing in mind the provisions of Section 87 of the Land Revenue Code.

12. The State to pay the costs of the petition.