(1924) 10 BOM CK 0016

Bombay High Court

Case No: Second Appeal No. 61 of 1923

Ladhuram Manormal Marwadi		APPELLANT
	Vs	
Sale Mahomed Illiyas Memon		RESPONDENT

Date of Decision: Oct. 29, 1924

Acts Referred:

- Contract Act, 1872 - Section 69

Citation: (1925) 27 BOMLR 95

Hon'ble Judges: Lallubhai Shah, J; Kincaid, J

Bench: Division Bench

Judgement

Lallubhai Shah, Kt., Acting C.J.

1. The few facts relating to this second appeal are these. On March 9, 1882, a document which is described as Kararnama, was executed by Kashi Bahiru Patil to Hormasji Burjorji in respect of land which is described as Prat Bandi No. 49, Pot No. 1, measuring three acres and two gunthas, the assessment of the land being Rs. 0-15-3. Another document was executed by Hormasji Burjorji on the same day, which is described as a rent-note. It will be sufficient to refer to the terms of this rent-note for the purposes of this appeal. After the description of the land, the document contains the following terms:-

This rent-note is passed in respect of the whole land as such. The rent in respect of the land as is included within the boundaries as mentioned above shall be paid by us from this day every year annually at the rate of Rs. 19 per year immediately on the completion of the respective year and in case there happens to be any default in payment as above, then we shall be paying interest on the overdue sum of rent, at the rate of two per cent, per month. In case we happen be sell to any the buildings standing on that land or if they are given away by way of gift to any one, then you should recover the rent as mentioned above from such person (transferee); you shall not have the right to recover more rent and you should not take it. We shall go

on paying rent as mentioned above as long as we and our heirs make use of the said land abiding by the terms of this Karar; we shall enjoy the buildings and the Agar and the Gardens etc. in this land in any way we like and if any one sets up his claims against this land, it is you who are to ward off the same and we shall not be caused any trouble in that behalf.

2. The tenant Hormasji Burjorji put up a bungalow on this land, and he remained in possession of the land on the terms stated in this document. He transferred his rights to the present plaintiff, and the present defendant claims to be a purchaser from the original owner Kashi Bahiru Patil.

3. In about 1915, the Government increased the assessment of this land to Rs. 59-8-6, apparently on the basis of its being a building site. The present defendant filed a suit in the Court of Small Causes to recover the increased assessment for three years from the plaintiff, and the plaintiff filed the present suit in March 1921 for a declaration that Kashi Bahiru Patil or any persons claiming through him had no right to ask for more than Rs. 19 a year as rent for the land in suit. The defendant pleaded that as the assessment was increased, the plaintiff was liable to pay the full amount of the assessment

4. On a construction of the rent-note the learned trial Judge came to the Conclusion that the plaintiff was entitled to the declaration sought, and that the defendant was not entitled to J recover anything more in respect of this land than Rs. 19 a year. Accordingly the trial Court granted the declaration asked for.

5. The defendant appealed to the District Court and the learned District Judge considered the point whether the respondent (plaintiff) was entitled to the declaration sought by him under the document of March 9, 1882. He found that point in the affirmative, and subject to a slight verbal alteration he confirmed the decree of the trial Court.

6. The defendant has appealed to this Court, and it is urged on his behalf that as there was no express agreement between the parties in 1882 as to who should pay the assessment and the assessment now levied is far in excess of the amount fixed as rent, in equity he should not be required to pay the assessment in respect of this land to the Government for the benefit of the plaintiff. It is urged that the plaintiff as the occupant of the land should ultimately bear the burden of this increased assessment, and that the terms of the document do not in any way come in the way of that equitable course being adopted. Reliance i" placed on behalf of the appellant upon the observations in Ranga v. Suba Hegde ILR (1880) 4 Bom. 473. In that case in respect of the land originally held on a permanent tenure the mulvargdar or superior holder was held not entitled to raise the rent against the mulgainidar on the ground that the assessment on the land had been enhanced at the Government survey. It appears from the facts in that case that the increased assessment did not exceed the amount of the rent fixed. The learned pleader for the appellant has

argued that the ground upon which the Court allowed the local fund cess to be levied from the tenant in addition to the fixed rent would equally apply to a case of this kind.

7. On behalf of the respondent it is urged that the rent is fixed under the documents that were executed between the parties in 1382, and, according to the terms of the contract entered into, the defendant is entitled to recover Rs. 19 per year as rent and nothing more. It is argued that it is a necessary implication of these terms that the assessment was to be payable by the landlord or the superior holder. It may be mentioned here that it is an admitted fact that from 1882 up to 1915 the small assessment of Rs. 0-15-3 in respect of this land was paid by the landlord and not by the tenant. In support of his contention, the learned pleader for the respondent relies upon the decision in Babshetti v. Venkataramana I. L. R. (1879) 3 Bom. 154(1879) P. J. 248. A reference ''has been made also to the decision in The Secretary of State v. Fernandes I. L. R. (1907) Mad. 375.

8. It seems to us that the decision in this case must depend upon the construction of the documents that were passed between the parties in 1882. It is clear that the rent was fixed at Rs. 19. There is no express reference to the payment of assessment and the uniform course of conduct of the parties from 1882 to 1915 shows that the assessment was intended to be paid by the landlord. At that time the parties did not anticipate and did not provide for such increase as was made in the assessment in 1915. Having regard to the terms of the documents, it seems to us that so long as the assessment does not exceed Rs. 19, the landlord must bear the burden of that increase in the assessment. But when the assessment is increased to such an extent that it exceeds Rs. 19, a situation arises in respect of which it must be admitted that the documents are silent, and it is difficult to hold, as a necessary implication of the terms of the documents, that even though the assessment may be enhanced beyond Rs. 19, still the landlord was to pay such enhanced assessment for the benefit of the tenant or the actual occupant of the land.

9. Having regard to the ratio decidendi in the two cases decided by this Court, to which we have already referred, it seems to us that the correct view to take with reference to the increased assessment, so far as it is in excess of Rs. 19, is that the burden must ultimately fall on the actual occupant, i. e., the tenant, whom the plaintiff now represents. It is quite true that in the Madras case the increased assessment was slightly in excess of the amount of the rent fixed, but the decision was with reference to a different point The question there was whether the Government would be entitled to get the benefit of Section 69 of the Indian Contract Act, and the question that arises for our consideration in this appeal did not arise, and was not considered, in that case. Among the other decisions which have been referred to, no case, in which the enhanced assessment has exceeded the amount of the fixed rent, has been brought to our notice. We have referred to the judgment in Babahetti v. Yen-kataramanam. On referring to the paper book, it appears that

the enhanced assessment did not exceed the rent fixed under the document : and the decision is based upon the express terms of the particular document. We do not think that the decision can be treated as an authority for the contrary view in this case, where we have to interpret the document in question, in which there is no express provision as to the payment of assessment. In this particular case there is a substantial excess over the rent fixed, and it would not be equitable to hold that the landlord should pay the enhanced assessment for the benefit of the tenant. At any rate in the present case, on the terms of the contract between the parties, and the nature of the agreement, it cannot be said that it has been provided between them that the landlord shall pay such excess and we cannot treat it as necessarily implied by the terms of the agreement.

10. We, therefore, vary the decree of the lower Court by adding that the declaration granted by the lower Court will be subject to the proviso that the excess of the assessment, including the local fund cess, over Rs. 19, shall be payable by the plaintiff to the defendant.

11. Having regard to the result of the case we direct that each party should bear his own costs throughout.