The Municipal Corporation of Greater Bombay

Vs

M/S. Polychem Ltd.

Civil Appeal No. 1828 Of 1969

(M. H. Geg, Y. V. Chandrachud JJ)

20.03.1974

JUDGMENT

BEG, J. -

1. This appeal, by certification under Article 133(1)(c) of the Constitution, is directed against the judgment of a Division Bench of the Bombay High Court holding that, although, a vacant plot of land is rateable under the provisions of the Bombay Municipal Corporation Act 3 of 1888 (hereinafter referred to as 'the Act'), and so is land which has been built upon, yet, any part of land which is being actually built upon is not rateable until the building is finished because no tenant could take it in that condition. In other words, the Division Bench upheld what may be called the doctrine of sterility with which the land was said to have been struck during the period when a building was being actually put up on it. The appellant Corporation questions the applicability of this doctrine to rating of land in this country.

2. Before proceeding further, we may briefly give the facts and circumstances in which the question mentioned above arises. The respondent Company is the owner of 6652 sq. yds. of land, out of which 450 sq. yds., were deducted for having fallen within "the set back line". Out of the remaining area of 6202 sq. yds., 1060 sq. yds., was being built upon at the relevant time whilst the remaining 5142 sq. yds. was lying vacant during the period under consideration. As the respondent Company did not lead any evidence about the hypothetical rent of any part of land, the Assessor and Collector of Bombay Municipal Corporation determined the market value of the whole land as Rs. 62020 at Rs. 10 per sq. yd. He then calculated the hypothetical rent by taking a rate of interest of 3 1/2 per cent per annum as the reasonable return on this value so that the hypothetical annual rental value came to Rs. 2170. From 1.1.1962, the Assessor divided the plot notionally into two parts, one of 1060 sq. yds., which was being built upon, and the other 5142 sq. yds. which was lying vacant. He then assessed the probable market value of the plot which was being built upon as Rs. 10,600 at Rs. 10 per sq. yd., but, as he considered it better developed, he fixed 5 per cent per annum interest as a reasonable return on it for determining its hypothetical rent which came to Rs. 530. For the vacant land, also valued at the same rate, the market value was found to be Rs. 51,420, but the annual rate of interest to determine reasonable return was taken as 3 1/2 per cent only, as was done previously for the whole land, so that its hypothetical annual rent came to Rs. 1800. Thus, the total hypothetical annual rental value of the land for the period under consideration came to Rs. 2330 for both parts according to what is known as "the contractor's test".

3. The respondent company, aggrieved by the Assessor's fixation of rateable value, had appealed to the Small Cause Court of Bombay dismissed the appeal. The respondent company then appealed to the Bombay High Court under Section 213(D) of the Act. The appeal was summarily rejected by a

learned Single Judge of that Court. On a further appeal, a Division Bench of the High Court, after repelling a preliminary objection to the maintainability of the appeal to it by adopting the view that it was not a second appeal for the purpose of the Letters Patent, held that the part of the land which was being built upon was not rateable at all as no tenant could or would take the property in that condition. Thus, the Division Bench had applied what may be called the "doctrine of sterility". It observed :

> ... if there is no tenant who would be prepared to take the property from year to year in its then condition, evidently there can be no tax on the same.
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> As this doctrine could not apply to the vacant land, the order of the Assessing authority and the principle applied by it for rating that portion of the land were upheld by the Division Bench. No argument was addressed to us on the question whether an appeal lay to the Division Bench, in the circumstances of the case. We, therefore, refrain from considering this question.

4. Learned Attorney General submitted, on behalf of the appellant Corporation, that the Division Bench had erred in applying the English doctrine of sterility to land rateable under the provisions of the Act. It was contended that the essential distinction between the Indian and the English law, overlooked by the Division Bench, was that the basis for determining rateable value in this country was the value of the property to the owner and not to the occupier. Hence, it was urged, every kind of 'land', as defined by Section 3(r) of the Act, was rateable under Section 154 of the Act simply because it had a value to the owner of it and not because it was yielding any income or was usefully or beneficially occupied or enjoyed by a tenant or any other kind of occupant paying for the use of it. It was contended that, in so far as the rent paid by an actual tenant or that which a hypothetical tenant would presumably pay for the land, in the condition it actually was (i.e. "rebus sic stantibus"), is to be taken into account, this could be done only for the purpose of determining the value of the land to the owner and not, as it had been done in England, to its occupant. This distinction, it was pointed out, logically flows from the essentially different bases of rateability adopted in India, where even vacant land was rateable, and, in England, where vacant land was not rateable at all.

5. Another contention advanced was that, in any case, when there is no evidence about the nature or the extent of the construction on the land treated as occupied by a building in the course of construction, it was not possible to apply the principle that it was withdrawn from the sphere of rateable land merely because a building was being constructed over it. The effective reply to this argument was that it was a matter of admission between the parties that 1060 sq. yds. of the area was covered by a building in the course of construction. Our attention was drawn to the statement of facts on behalf of the appellant and also to the finding of fact that this was the area which could be treated as land which was actually being built upon. We, therefore, do not think that there is any point in remanding the case for any further finding upon this question. We will proceed on the assumption that the finding, that 1060 sq. yds. of land is covered by what is an incomplete building in the course of construction for the relevant period, is correct.

6. Learned Counsel for the respondent urged that, whatever may be the other differences, the basic principles of rating, are the same both in India and in England, as the annual rent which would be paid by a hypothetical tenant has necessarily to be determined in order to arrive at the rateable value of land. According to the respondent, it followed logically from this principle that land which could not have a hypothetical tenant could have no rateable value. The submission was that the

"contractor's test" was only one of the three modes of determining the annual rateable value. This method was, it was urged, not available at all as a substitute for a determination of the annual hypothetical rent. It was, according to the respondent and the Intervener, only a means adopted for determination of the annual hypothetical rent. The means could not, the argument proceeds, displace the object or the end itself and converted into an independent mode of assessing rateable value.

7. The learned Counsel relied upon various provisions of the Act in an attempt to correlate property taxes, of which rates were the primary class, to beneficial occupation, or, in other words, to income yielding capacity as it existed at the time when the taxes were levied, that is to say, "rebus sic stantibus".

8. Section 3(r) of the Act says :

> 3(r) "land" includes land which is being built upon or is built upon or covered with water, benefits to arise out of land, things attached to the earth or permanently fastened to anything attached to the earth and rights created by legislative enactment over any street;

and Section 3(s) says :

> 3(s) "building" includes a house, out-house, stable, shed, hut and every other such structure, whether of masonry, bricks, wood, mud, metal or any other material whatever;
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> But, Section 143 of the Act seems to make a distinction between "buildings and land" when it says that the general tax shall be levied "in respect of all buildings and land", and, thereafter, it continues to mention both. Similarly, Section 144 mentions "buildings" and "land" as though they were separate. Section 144(A) goes on to provide :
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> 144A. (1) Notwithstanding anything contained in Section 140, the general tax leviable in respect of any building used for residential purposes -
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> (a) completed, or first let out or occupied on or after the 1st day of April, 1956; and
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> (b) consisting exclusively of tenements the annual rent of each of which tenements determined as provided in sub-section (1) of Section 154, does not exceed rupees twelve hundred or such lower sum as may be generally determined by the Corporation, shall, where an application is made to the Commissioner in that behalf and for the period specified in sub-section (2), be -
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> (i) if such building is owned by or belongs to a co-operative society registered or deemed to be registered under the Bombay Co-operative Societies Act, 1925, seven-tenths of the amount leviable under Section 140 in respect of any other building excepting those referred to in Section 143;
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> (ii) if such building is owned by or belongs to any other person, eight-tenths of such amount.
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> (2)(a) If any such building was completed, or first let out or occupied on or before

the date of commencement of the Bombay Municipal Corporation (Amendment) Act, 1957, concession in general tax under this Section shall be available for the period counted from the said date of commencement upto the 1st day of April 1956.

(b) In all other cases, concession in general tax under this section shall be available for the period of ten years counted from the date on which any such building shall be completed, first let out or occupied, whichever shall be the earliest.

Explanation - For the purposes of this section, a building shall, be deemed to be completed on the date on which the permission for its occupation or use is given or is deemed to be given under Section 353-A".

Section 353A provides for a notice and completion certificate to be sent by the builder within within one month after the completion of the building and the procedure for obtaining the permission by the Commissioner for occupying such building or for the use of it after he is satisfied that the provisions of the Act and the bye-laws have been complied with. Section 353A(2) lays down :

(2) No person shall occupy or permit to be occupied any such building, or use or permit to be used the building or part thereof affected by any such work, until -

(a) the permission referred to in proviso (b) to sub-section (1) has been received, or

(b) the Commissioner has failed for twenty-one days after receipt of the notice of completion to intimate as aforesaid his refusal of the said permission.

Section 472 gives a list of continuing offences with specified daily fines. It indicates that a violation of Section 353A involves a fine of Rs. 100 per day. Hence, it was contended on behalf of the respondent, there can be no hypothetical tenant of a building of which the law prohibits any use or occupation. A building which is in the course of construction would be, it was urged, a building in an incomplete state of which no occupation was possible by an actual or hypothetical tenant of it.

9. There is no doubt that rates belong to the category of property taxes mentioned in Section 139(1) of the Act. Section 146 makes fresh taxes "leviable primarily from the actual occupier of the premises upon which the said taxes are assessed, if such occupier holds the said premises immediately from the Government or from the corporation or from a fazendar". Section 146(2) makes it clear that in other cases they are leviable as follows :

(a) if the premises are let, from the lessor;

(a) if the premises are sub-let, from the superior lessor; and

(c) if the premises are unlet, from the person in whom the right to let the same vests.

Section 146(3) lays down that :

if any land has been let for any term exceeding one year to a tenant, and such tenant or any person deriving title howsoever from such tenant has built upon the land, the property taxes assessed upon the said land and upon the building erected thereon shall be leviable primarily from the said tenant

or such person, whether or not the premises be in the occupation of the said tenant or such person.

Section 147 of the Act provides that, in a case in which the rateable value exceeds the amount of rent actually payable in respect of land occupied, the lessor is entitled to receive the difference between the rent which would otherwise be payable and what is actually payable. Similar provision is made in case of sub-tenants.

10. The actual method of valuation is provided by Section 154(1) which runs :

154(1) In order to fix the rateable value of any building or land assessable to a property-tax, there shall be deducted from the amount of the annual rent for which such land or building might reasonably be expected to let from year to year a sum equal to ten per centum of the said annual rent and the said deduction shall be in lieu of all allowances for repairs or on any other account whatever.

Section 155 provides :

155(1) To enable him to determine the rateable value of any building or land and the person primarily liable for the payment of any property tax leviable in respect thereof the Commissioner may require the owner or occupier of such building or land, or of any portion thereof, to furnish him, within such reasonable period as the Commissioner prescribes in this behalf, with information or with a written return signed by such owner of occupier -

(a) as to the name and place of abode of the owner or occupier, or of both the owner and occupier of such building or land; and

(b) as to the dimensions of such building or land, or of any portion thereof, and the rent, if any, obtained for such building, or land, or any portion thereof.

(2) Every owner or occupier on whom any such requisition is made shall be bound to comply with the same and to give true information or to make a true return to the best of his knowledge or belief.

(3) The Commissioner may also for the purpose aforesaid make an inspection of any such building or land.

Section 156 requires the maintenance of an assessment book. It says :

156. The Commissioner shall keep a book, to be called "the assessment book" in which shall be entered every official year -

(a) a list of all buildings and lands in Greater Bombay distinguishing each, either by name of number, as he shall think fit;

(b) the rateable value of each such building and land determined in accordance with the foregoing provisions of this Act;

(c) the name of the person primarily liable for the payment of the property-taxes, if any, leviable on each such building or land;

(d) if any such building or land is not liable to be assessed to the general tax, the reason of such non-liability;

(e) when the rates of the property-taxes to be levied for the year have been duly fixed by the corporation and the period fixed by public notice, as hereinafter provided, for the receipt of complaints against the amount of rateable value entered in any portion of the assessment-book, has expired, and in the case of any such entry which is complained against, when such complaint has been disposed of in accordance with the provisions hereinafter contained, the amount at which each building or land entered in such portion of the assessment-book is assessed to each of the property-taxes, if any, leviable thereon;

(f) if, under Section 169 or 170, a charge is made for water supplied to any building or land by measurement or the water-tax or charged or water by measurement is compounded for, or if, under Section 172, the halalkhor-tax for any building or land is fixed at a special rate, the particulars and amount of such charge, composition or rates;

11. It is true that the "buildings" and "lands" are mentioned separately in Sections 154 to 156 of the Act. Section 154(1) implies that the rateable value of any building or land will be calculated by determining "the amount of the annual rent for which such land or building might reasonably be expected to let from year to year". Section 156(d) shows that there may be cases in which some building or land may not be liable to pay any amount as a general tax. Hence, it was urged on behalf of the respondent, the doctrine of sterility could be applied in this country just as it was applicable in England.

12. The principles upon which lands are rated in this country have been practically settled by the decisions of this Court. But, no case was brought to our notice in which an application of these principles to land upon which a building was being constructed was involved. In other words, no case was cited by any party in which the doctrine of sterility, as indicated above, was invoked. We will, however, glance at the cases cited before deciding the question raised before us.

13. The Corporation of Calcutta v. Sm. Padma Debi ((1962) 3 SCR 49 : AIR 1962 SC 151), involved an interpretation of the provisions of Section 127(a) of the Calcutta Municipal Act, 1923, in the course of which it was observed that the criterion for determining the annual value of land for purposes of rating is : "the rent realisable by the landlord and not the value of the holdings in the hands of the tenant". A reference was made there to the decision of the Privy Council in Bengal Nagpur Railway Co. Ltd. v. Corporation of Calcuttai (74 IA 1 : AIR 1947 PC 50) affirming a decision of the Calcutta High Court in Bengal Nagpur Railway Co. Ltd. v. Corporation of Calcutta (AIR 1942 Cal 455 : ILR (1942) 2 Cal 152) on the construction of Section 127 of the Calcutta Act. The Privy Council had indicated the distinction between law in India and in England as follows :

The owner of land in England is not chargeable with rates, as owner, at all. If he leaves land vacant and unoccupied, he pays no rates. Under the Calcutta Act mere ownership carries with it a liability to pay one-half of the rate assessed on the annual value of the land.

14. In the Calcutta case which went to the Privy Council, a golf club was making use of some land with a few holes made in it for occasional practice by persons aspiring to become golfers. The Club used to pay a nominal amount for the use of the land. This Court also referred to the decision of the

House of Lords in Polar Assessment Committee v. Roberts, ((1922) 2 AC 93), to indicate : "The distinction between occupier and owner in this connection, is of primary importance. The occupation value of property may be, and often is, distinct from its value to the owner". This Court then cited the "weighty observations of Atkin, L.J., as he then was, which were approved by Lord Carson in his dissenting judgment" (at page 58) :

How then is the annual rent to be ascertained ? It is obvious that the definition presupposes that the premises are deemed to be vacant and are deemed to be capable of being let.

The respondent, however, relies upon the following passage in the judgment of this Court ((1962) 3 SCR 49 : AIR 1962 SC 151) (at page 56) :

A law of the land with its penal consequences cannot be ignored in ascertaining the reasonable expectations of a landlord in the matter of rent.

15. It was urged on behalf of the respondent that the test adopted by this Court was to find out the annual rent a hypothetical tenant would pay so as to determine rateable value from the point of view of the landlord. It did not matter, according to the respondent, from which angle the rateable value was looked at so long as the method of determining it was really the same as was adopted in England. If that was so, it was submitted, the views expressed by this Court in the Calcutta Corporation case (supra) did not militate with an application of the doctrine of sterility where facts warranted it. We think that this submission overlooks an infirmity in the doctrine of sterility itself : the assumption that what is not actually yielding rent has no annual rental value.

16. The next cause cited was Patel Gordhandas Hargovindas v. Municipal Commissioner, Ahmedabad ((1964) 2 SCR 608 : AIR 1963 SC 1742 : (1965) 1 SCJ 15), where, after reference to legislative history of rating in England and in India, this Court said (at page 628) :

It would therefore, he right to say that the word 'rate' had acquired a special meaning in English legislative history and practice and also in Indian legislation where that word was used and it meant a tax for local purposes imposed by local authorities and the basis of the tax was the annual value of the lands or buildings on or in connection with which it was imposed, arrived at in one of the three ways which we have already indicated.

The three modes were indicated in the following passage (at page 622);

It will thus be clear from the various statutes to which we have referred and the various books on rating in England that the rate always had the meaning of a tax on the annual value or rateable value of lands or buildings and this annual value or rateable value is arrived at by one of three modes, namely, (i) actual rent fetched by land or building where it is actually let, (ii) where it is not let, rent based on hypothetical tenancy, particularly in the case of buildings, and (iii) where either of these two modes is not available, by valuation based on capital value from which value has to be found by applying a suitable percentage which may not be the same for lands and buildings, and it was this position which was finally brought out in bold relief by the Rating and Valuation Act, 1925. It is clear further that it is not the Rating and Valuation Act of 1925 which for the first time applied the concept of net annual value and rateable value as the basis for levying a rate for purposes of local taxation; that basis was always there for centuries before the Act of 1925 was passed.

Here, it was held by a majority of five Judges of this Court, that a rule imposing a tax called a "rate", "directly as a percentage of the capital value", is ultra vires the Act and "the assessment based

on this manner must be struck down". The reasoning adopted was (at pages 633-34) :

If the law enjoins that the rate should be fixed on the annual value of lands and buildings, the municipality cannot fix it on the capital value, and then justify it on the ground that the same result could be arrived at by fixing a higher percentage as the rate in case it was fixed in the right way on the annual value. Further, by fixing the rate as a percentage of the capital value directly, the real incidence of the levy is camouflaged.

This case links the nature of the property tax called a rate levied for local government purposes with the mode adopted for its levy. Each mode had necessarily to be directed to finding out the annual rental value of land as that was what was taxed and not either the capital or the potential value of land.

17. Municipal Corporation of Greater Bombay v. Royal Western India Turf Club ((1968) 1 SCR 525 : AIR 1968 SC 425 : (9168) 2 SCJ 207) was cited to show that the profit from the actual user, in that particular case of some land used as a race course, was taken account. This Court said (at page 533) :

The measure in arriving at the net rateable value under Section 154(1) is what a hypothetical tenant would pay as rent and that would depend upon the amount of profits earned from race-meetings held on the race-course. To arrive at the correct amount of such profits all expenses reasonably and properly incurred which go to the making of the receipts have to be deducted from the gross-receipts.

18. In Motichand Hirachand v. Bombay Municipal Corporation ((1968) 1 SCR 546 : AIR 1968 SC 441 : (1968) 2 SCJ 275), where, as in the Royal Western India Turf Club case (supra), the provisions of the Act with which we are concerned had come up for consideration, this Court said (at page 548) :

The assessing authority for the purpose of fixing the rateable value has therefore to determine the annual rent, that is, the annual rent for which such building might reasonably be expected to let from year to year and to deduct the 10 percent statutory allowance therefrom and arrive at the net rateable value which would be equivalent to the net annual rent. The rateable value is thus taken to be the same as the net as the annual rent of the property. It is a well recognised principle in rating that both gross value and net annual value are estimated by referance to the rent at which the property might reasonable be expected to let from year to year. Various methods of valuation are applied in order to arrive at such hypothetical rent, for instance by reference to the actual rent paid for the property or for others comparable to it or where there are no rents by reference to the assessments of comparable properties or to the profits earned from the property or to the cost of construction. The expression "gross value" means the rent at which a hereditament might reasonably be expected to let from year to year. The rent which a tenant could afford to give is calculated rebus sic stantibus, that is to say, with reference to the property in its existing physical condition and to the mode in which it is actually used. The hypothetical tenant includes all persons who might possibly take the property including the person actually in occupation, even though he happens to be the owner of the property. The rent is that which he will pay in the "higgling of the market", taking into account all existing circumstances and any relevant future trends. If the property affords the opportunity for the carrying on of a gainful trade, that fact also must be taken into account. The property is assumed to be vacant and to let and the material date for the valuation is that of the proposal which gives rise to the proceedings. The actual rent paid for the property is not conclusive

evidence of value, though such actual rent may serve as an indication as to what a hypothetical tenant can afford to pay. However, if the actual rent is paid on terms which differ from those of the hypothetical tenancy it must be adjusted, if possible, to the terms of the hypothetical tenancy before it affords evidence of value. (See 'Halsbury's laws of England', (3rd ed.) Vol 32, p. 60 and onwards). It is also well recognised that while valuing the property in question every intrinsic quality and every intrinsic circumstance which tends to push the rental value up or down must be taken into consideration.

19. The Century Spg. Mfg. Co. Ltd. v. District Municipality of Ulhasnagar ((1968) 2 SCR 211 : AIR 1968 SC 859 : (1969) 1 SCJ 409), points out that Section 60 of the Bombay Municipal Act 3 of 1901, with which we are not concerned here, has left open a determination of the basis for each class of valuation to the municipality after defining annual letting value in Section 3(11) as the rent for which any land or building might reasonably be expected to be let from year to year. In this case, the imposition of a flat rate on carpet area was held to be within the provisions of the Act. It was, however, observed that the assessees could challenge, each on the facts of his particular case, the application of this method if it results in a rate not corresponding to "the annual letting value". Apart from emphasising that it is the annual letting value which has to be determined under the rating enactments, this case does not help us in deciding the question now before us.

20. Bombay Municipal corporation v. L.I.C. of India, Bombay ((1971) 1 SCR 335 : (1970) 1 SCC 791), repeats that i the criterion for fixing the rate is "the rent realisable by the landlord and not the valuation of the holdings in the hands of the tenant".

21. Guntur Municipal Council v. Guntur Town Rate Payers' Association ((1971) 2 SCR 423 : (1970) 2 SCC 803), relates to the interpretation of the provisions of the Madras District Municipalities Act 5 of 1920, where it was held that the assessment must take into account the measure of "fair rent" as determined under the Act.

22. The abovementioned authorities of this Court, which were cited before us, enable us to hold that the mode of assessment in every case must be directed towards finding out the annual letting value of land which is the basis of rating of land, and, by definition, "land" includes land which is either being built upon or has been built upon. Nevertheless, a reference to the provisions of the Act shows that, after a building has been completed, the letting value of the building, which becomes part of land, will be the primary or determining factor in fixing the annual rent for which the land which has been built upon "might reasonably be expected to be let from year to year". All that Section 154 seems to contemplate, by mentioning "land or building", is that land which is vacant or which has not been built upon may be treated, for purposes of valuation, on a different footing from land which has actually been built upon. But, relevant provisions of the Act do not mention and seem to take no account, for purposes of rating, of any building which is only in the course of being constructed although Section 3(r) of the Act makes it clear that land which is being built upon is also "land". Hence, so long as a building is not completed or constructed to such an extent that atleast a partial completion notice can be given so that the completed portion can be occupied and let, the land can, for purpose of rating, be equated with or treated as vacant land. It is only when the building which is being put up is in such a state that it is actually and legally capable of occupation that the letting value of the building can enter into the computation for rating "Rebus sic Stantibus". Although, the definition of land, which is rateable, covers three kinds of "land", yet, for the purposes of rating Section 154 recognises only two categories. Therefore, all "land" must fall in one of these two categories for purposes of rating and not outside.

23. The doctrine of sterility, in the context of the provisions we have to construe, cannot apply here. In England, what happens is that when land, which is in the process of being built upon, is equated with vacant land, which is not yielding any profit, it ceases to be rateable land. But, under the statute we have before us, all "land", whether vacant, or in the process of being built upon, or built upon, is rateable according to the well settled principles. All that can be said is that, so long as a building being constructed on some land is not in a state fit for occupation, its rateable value should not be more or less than that of land which is vacant. That, however, is not the object of the respondent in invoking the doctrine of sterility. What has happened in the case before us is that the land which was being assessed as rateable so long as it was vacant land has been treated as entirely outside the scope or sphere of rateability just because a building is being erected upon it. As we find no statutory provision which has the effect of conferring such an immunity or exemption upon land which is being built upon, we cannot upheld a conclusion which produces such a startling result.

24. The English authorities where the doctrine of "sterility" was recognised were : West Bromwich School Board v. Overseers of West Bromwich (13 QBD 929, 942), Mersey Docks & Harbour Board v. Overseers of Llaneilian (14 QBD 770); The Metropolitan Board of Works, v. The Overseers of West Ham ((1870) LR 6 QB 193); The Guardians of the Poor of the Sculcoates Union in the Borough of Kingston-Upon-Hull v. Dock Company at Kingston-Upon-Hull (189 AC 136); and the Churchwardens & Overseers of Lambeth Parish v. The London County Council (1897 AC 625, 630-631). In the last mentioned case of the London County Council relating to a park maintained by a County Council for public benefit. Lord Herschell, L.C., after holding that the public was not a rateable "occupier", said :

Once it has been found, as in this case, that the occupation cannot as a matter of law be a beneficial occupation, there is an end of the question. I say as matter of law, because that it does not give a beneficial occupation as matter of fact is nothing to the purpose. Here there is no possibility of beneficial occupation to the county council; they are incapable by law of using it for any profitable purpose; they must allow the public the free and unrestricted use of it.

25. These cases are not helpful or really applicable at all because they are based upon the concept of rating exclusively by reference to the beneficial occupation or of the income enjoyed by an occupier.

26. It was, however, pointed out by the respondent that in London County Council v. Brith (Churchwardens & Overseers of Parish) (1893 AC 562, 591), Lord Herschell, L.C., expressed some dissatisfaction with the rather wide application of the doctrine of sterility in some cases in England and explained it as follows (at page 591) :

Now, if land is "struck with sterility in any and everybody's hands", whether by law or by its inherent condition, so that its occupation is, and would be, of no value to any one, I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable, and at what amount they should be assessed; and I do not think that a building in the hands of a school board is incapable of being beneficially occupied by them and is not so occupied because they are prohibited from deriving pecuniary profit from its use. Fry, L.J., in the case of Reg. v. School Board for London (17 QBD 738) said : "The term 'sterility' has been introduced into the cases because, as a general rule, a profit is produced; but it does not by any means follow that because there is no profit there is no value. There could be no better illustration of this than in the present case". I think the learned Judge here points to the true test : whether the occupation be such as to be of value. This is

the language used by Lord Blackburn, and I have already said that the possibility of making a pecuniary profit is not in my opinion the test whether the occupation is of value.

27. We do not think, for reasons already given, that it is necessary to examine English cases or authorities on the application of doctrine of sterility in England to land which is being built upon, because, after examining the relevant provisions of the enactment before us, we have reached the conclusion that land on which a building is being constructed does not cease to be rateable simply because a construction is going on upon it. The difference between English law and the position which emerges from the statute before us is vital for deciding the question before us. The most that can be said is that land which is being built upon should not be rated like land on which a building has been actually constructed unless and until the construction has reached a stage at which some occupation of the constructed portion is also legally and actually possible so that it could be taken into account in determining the rateable value. On this aspect, we have not found any material to indicate the state of the building on land on which it was being constructed. Evidence would, no doubt, have been there if the building had reached a stage at which any part of it was completed so as to be permitted to be occupied. Therefore, we think that the land upon which a building was under construction could and should be rated in the same way as vacant land.

28. No appeal has been preferred against the rating of the vacant land. We, therefore, assume that the rental value reached, even by employing "the contractor's test", correctly determines what a hypothetical tenant would be reasonably expected to pay from year to year for the vacant land. The question whether the owner himself or a tenant is actually occupying the land is not relevant for the purpose of determining the rateable value by a reference to the hypothetical tenant. Here, the basis of rating is not the actual income from beneficial occupation, as it many be in England (even there a tendency to shift the former or traditional base in discernible), but of ownership of land which is capable of beneficial occupation. In other words, the concept of annual value of the land to the owner, though obviously linked up with its utility or annual letting value, is more comprehensive than and different from the test of the actual income yielded which has been applied in England in a number of cases.

29. Where the landlord is in actual occupation the land does not cease to have rateable value. In such a case, rateable value would be determined by asking the question : What would or could he be reasonably expected to pay from year to year if he was not the owner but wanted to take it on rent ? The standard of reasonable expectation from a hypothetical tenant, applied by contemplating a hypothetical bidding or higgling in a market, however difficult and unsatisfactory as a method of valuation, has to be resorted to in a case beset with such difficulties as the one before us. In no case, however, could the rental value of land being built upon be less than that of the same land when it was vacant.

30. We find the judgment under appeal to be erroneous as it held land which was being rated as vacant to have ceased to be subject to any rating at all simply because a building began to be made on it in 1961 by its owner. The rule of interpretation, that, where two views are reasonably or equally open, we should adopt the one which benefits the assessee, would enable us to do no more than to treat land which is actually being built upon on the same footing as vacant land so long as no structure capable of occupation and letting is completed on it.

31. The result is that we allow this appeal, and we set aside the judgment and order of the Division Bench. We also set aside the assessment order with regard to 1060 sq. yds., which was being built upon, and the order of the Small Cause Court and a learned Judge of the High Court dismissing

appeals with regard to this area of land. We send back the case to the Assessor and Collector of Bombay Municipal Corporation and direct that the whole land will be valued, for purposes of rating in the relevant year, as vacant land, just as it was being done in the period immediately preceding 1962. In the circumstances of the case, which is not free from difficulties, the parties will bear their own costs.

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