FEDERAL HIGH COURT

Sir Hari Sankar Pal

Vs

Anath Nath Mitter

(Kania, C.J.)

24.01.1949

JUDGMENT

Kania, C.J.

1. have read the judgment pre-pared by Mukherjea J. I agree with the reasoning and conclusion of the judgment and have nothing to add.

B.K. Mukherjea, J.

2. This appeal arises out of a reference made by the First Land Acquisition Collector, Calcutta, to the Calcutta Improvement Tribunal, under Section 30, Land Acquisition Act, and the controversy relates primarily to apportionment, as between the lessors and the lessees, of a certain amount of compensation money awarded in respect of premises No. 73, Clive Street, Calcutta, which was the subject-matter of compulsory acquisition under the provisions of the Calcutta Improvement Act.

3. The premises acquired, which comprises an area of 2 cottas and 8 chattacks of land together with buildings standing thereon, is situated in the business quarter of the city and at all material times it was the property of one Sm. Krishna Adarini Dasi, who held it in the restricted rights of a Hindu female heir, the reversioners being her three sons, to wit, Nripendra Lal Mitter, Jatindra Lal Mitter and Manindra Lal Mitter. On 15th December 1905, Krishna Adarini, along with her three sons, executed an indenture of lease in respect of the said premises in favour of one I.M. Solomon on certain terms and conditions set out therein. The lease was to be for a term of 40 years expiring on 31st December 1945; and these 40 years were divided into four decennial periods, the rent payable by the lessee being fixed at a progressively increassing rate for each succeeding decennial period. For the first period of 10 years, the rent was payable at the rate of ₹ 145/- a month ; for the second it was ₹ 165/., during the third decennial period the rent was fixed at ₹ 180/- per month and the maximum rent of ₹ 195/- a month was fixed for the fourth and last of these decennial periods.

4. The only other provision in the lease that is material for our present purpose is the one relating to apportionment of the compensation money in case the premises were acquired under the provisions of the Land Acquisition Act or any other legislative enactment of a like character and

the provision is worded as follows:

> It is hereby agreed and declared between and by the parties hereto that if the demised premises or any portion thereof are acquired for public purposes under the Land Acquisition Act or any other Act which may be passed by the Local or Imperial Legislative Council the compeneation payable in respect of such acquisition shall be apportioned between the lessor and the lessee in the manner following, that is to say that the lessor shall be entitled to such portion of the compensation as will represent twenty-five times of the said respective rent payable under these presents or a proportionate part thereof according to the portion of the demised premises which will be acquired and the lessee shall get the residue of such compensation.

5. It appears that on 5th February 1907, Solomon transferred his leasehold interest in premises No. 73, Clive Street, to one Mr. P.C. Kar and the latter in his turn assigned the same to the present appellants Sir Hari Sankar Paul and Hari Narayan Paul by a deed of assignment dated 18th February 1927. In the year 1939, a proceeding was started by the First Land Acquisition Collector, Calcutta, for acquisition of these premises at the instance of the Trustees for the Improvement of Calcutta, acting under the Calcutta Improvement Act, and the requisite declaration was published in the official gazette on 10th August 1939. The Collector made his award on 2nd September 1940 and a total sum of ₹ 76,400 was allowed as compensation for the land and the building. Krishna Adarini was dead at that time and so also were her three sons; and the sons of these sons, who are the respondents before us in this appeal, had the lessor's interest vested in them. As there was dispute between the lessors and the lessees regarding the apportionment of the compensation money, the Collector made a joint award in favour of both the lessors and the lessees and referred the dispute regarding apportionment to the Calcutta Improvement Tribunal under the provision of Section 30, Land Acquisition Act.

6. This reference gave rise to apportionment case No. 156 of 1940 of the Calcutta Improvement Tribunal and it was heard by the President himself without the aid of assessors. The main controversy between the parties centred round the interpretation to be put upon the clause mentioned above by which the parties agreed that in case of compulsory acquisition of the premises, the proprietors would be entitled to twenty-five times "the said respective rents" as mentioned in the lease and the residue was to go to the lessee. The contention of the lessees was that the words mentioned above referred to the monthly rents which the lessees were to pay under the terms of the document, whereas the lessors argued that they could not but mean the rents payable for the whole year upon the capitalised value of which the compensation payable to the proprietors would depend. The learned President of the Tribunal accepted the contention of the lessees and held that the proprietors were entitled to twenty-five times the monthly rent that was payable at the date of the declaration and the result was that they were given a sum of ₹ 4,875 only as their share of the total compensation money and the lessees were held entitled to the remainder amounting to more than ₹ 70,000.

7. Against this decision, an appeal was taken to the Calcutta High Court by some of the proprietors, who are respondents 1 to 4 in this appeal and who represent one-third share in the proprietary interest. The other cosharer proprietors were made respondents to the appeal. The

appeal was heard by a Division Bench consisting of Mitter and Khundkar JJ., and by their judgment dated 12th December 1944 the learned Judges allowed the appeal and reversed the decision of the Improvement Tribunal. On a construction of the relevant clause in the indenture of lease mentioned above, it was held by the High Court that the expression 'rent' as used in that clause meant and referred to yearly rent and not to monthly rent; and the lessors were consequently entitled to twenty five times the annual rent which would amount to ₹ 58,600. As, however, the appeal was filed not by all the proprietors but by some of them who had an one-third share in the proprietary right, the appellants were declared entitled to a sum of ₹ 19,500 only which was one-third of the total sum of ₹ 58,500 and no relief was given to the non-appealing pro-prietors with regard to whom the decision of the Improvement Tribunal was left intact. The result was that though the decision of the High Court was against the lessees, they indirectly got two-thirds of the increased amount, which according to the judgment of the High Court, the lessors were entitled to under the terms of the lease.

8. It appears that on or about 10th January 1945, the other proprietors, who did not join in filing the appeal but figured merely as respondents therein, presented an application for review of the judgment, on the ground that even though they did not file any appeal, relief could and should have been given to them under the provisions of Order 41, Rule 33, Civil Procedure Code, inasmuch as the case of the applicants restel entirely on the same footing as that of the appealing proprietors and the entire decision of the Improvement Tribunal was pronounced to be wrong. This application was allowed by the High Court, and purporting to act under Order 41, Rule 33, Civil P. C., the learned Judges declared that the entire sum of ₹ 58,500 should be paid as lessors' share of the compensation money to all the heirs of Nripendra Lal, Manindra Lal and Jatindra Lal. This subsequent judgment is dated 27th August 1945.

9. Against these two judgments, the lessees filed two applications for leave to appeal to the Privy Council which were consolidated by an order of the High Court and leave to appeal was granted on 6th May 1946. Before the records were transmitted to England, the powers of this Court were enlarged under Act I [1] of 1948 and in accordance with the provisions of this Act, the records came to this Court and the appellants lodged their petition of appeal on 9th August 1948.

10. On the case being called on for hearing, a preliminary objection was raised on behalf of the respondents challenging the competency of the appeal. It is argued by Mr. Ghosh for the respondents that Section 71, Calcutta Improvement Act (Bengal Act V [5] of 1911) makes an award of the Tribunal, final, subject to the restricted right of appeal to the High Court that is given by the Calcutta Improvement (Appeals) Act. Not only no right of appeal to the Privy Council is given by the express words of the Calcutta Improvement Act, but the Act being a self contained statute which expressly excludes the operation of Section 54, Land Acquisition Act, the provisions of appeal to the Privy Council which have been introduced into the general Act by subsequent amendments could not be incorporated by reference into the Calcutta Improvement Act. In this connection, reliance has been placed by the learned advocate upon the decision of the Judicial Committee in *Secretary of State for India in Council v. Hindusthan Co-operative Society Ltd*[1]. which prima facie seems to support his contention. Mr. Gupta appearing in support of the appeal has, on the other hand, contended that the decision referred to above, which purports to be based on an earlier pronouncement of the Judicial Committee in *Bang-goon Botatoung Co. v.*

Collector of Rangoon[2] is confined in its operation to cases where the award relates to the amount of compensation money allowed to the claimants and not where there is a dispute as to title between the claimants inter se in regard to the acquired property. This, it is said, is the view expressed by the Judicial Committee itself in the subsequent case of *Secretary of State for India v. Chelikani Rama Rao*[3]. It is true that the Calcutta Improvement (Appeals) Act does not provide for an appeal to the Privy Council; but what is said is, that as soon as the matter reaches the High Court under the right of appeal given by the Calcutta Improvement (Appeals) Act, the procedure, orders and decrees of the High Court including the incident of further appeal from its judgments to the Privy Council would be determined by the ordinary rules of the Civil Procedure Code.

11. The point is certainly not free from doubt and it may be necessary for us at some time or other to decide it finally after a careful examination of the different decisions of the Judicial Committee bearing upon it. For our present purpose, having regard to the decision we have arrived at on the merits of the case, a decision on this preliminary point would not be essential and we prefer to keep it open.

12. On the merits of the case, the contentions put forward on behalf of the appellants are of a two fold character. It is contended, in the first place, that the High Court placed a wrong interpretation upon the clause in the lease relating to apportionment of compensation money in case of compulsory acquisition of the premises and that the expression "the said respective rent" occurring in the clause could not mean the annual rent as has been held by the learned Judges. It is pointed out that the same words used in the clause immediately following the clause in question unmistakably refer to monthly rents and in no part of the document has yearly rent been mentioned at all.

13. The second argument advanced is that even if the High Court was right in the interpretation it put upon the clause mentioned above, the learned Judges acted illegally and in excess of their jurisdiction in giving relief to the non-appealing proprietors under Order 41, Rule 33. Civil Procedure Code on an application for review presented subsequently to the delivery and signing of the judgment which expressly refused this relief.

14. As regards the first point raised by the appellants, the primary rule of construction undoubtedly is that the words and sentences used in a document must receive their plain and natural meaning. The Court would certainly have to look to the instrument as a whole, for, if there is any inaccuracy or inconsistency in it, attempt should be made to ascertain and give, effect, if possible, to the intention of the framers of it as could be gathered from the entire document. It is argued by Mr. Gupta that we cannot assume any intention on the part of the executants of a document apart from the language used in it; nor can we when there is no ambiguity in the words used, refuse to interpret them in their ordinary sense simply because such construction may lead to hardship or an apparent injustice. These propositions, as general rules of construction, need not be disputed but they are not of much assistance for our present purpose. The whole controversy in this case centres round the point as to whether on a proper construction of the words used in the disputed clause, the lessors' share of the compensation money in case of compulsory acquisition of the property, is to be computed at twenty-five times the monthly rent or the rents that would be payable for the whole year. The clause relating to apportionment of compensation money, in case the premises is compulsorily acquired, comes as one of the covenants in the lease and it appears just above the clause which lays down the condition under

which the lessors would have the right of re-entry in case of default in the payment of rent. The appellants lay stress on the fact that the expression "the said respective rents" occur in both the clauses and the argument is that it must have the same meaning in both of them. In the latter clause the words obviously refer to the monthly rents payable for particular decennial periods under the terms of the lease, for the clause itself relates to the time of payment and it gives the landlord a right of re-entry in case the rents remain unpaid for a period of one month after they become due. The earlier clause which concerns us in the present case is, however, not one which regulates either the mode or time of payment of the rents reserved by the lease. It has no relation to payment of rent, nor it is one of the usual covenants that occur in a lease. It is intended to provide for a future contingency which might or might not happen. The question of rent is material here solely for the purpose of determining the value of the lessors' interest if and when the land is compulsorily acquired, and the object is not, as in the clause that follows, to ensure due payment of rent at particular dates. Thus, though the same words are used in both the clauses, they would not necessarily have the same meaning.

15. It is true, as the appellants point out, that in several parts of the document the expression "monthly rent" has been used; but that is because the rent has to be paid monthly under the terms of the lease. It is significant, however, to note that the words "monthly rent" do not occur in the disputed clause at all. It cannot be said, therefore, that the words being unambiguous, no question of interpretation, strictly speaking, arises.

16. The intention of the parties in introducing a clause of this character in the lease was undoubtedly to lay down beforehand how the lessors' interest was to be valued in case the property became the subject-matter of a land acquisition proceeding while the lease was still subsisting. One of the accepted methods of valuing property is to capitalise the annual rental of the land at so many years' purchase. The number of years' purchase would undoubtedly vary with the nature of the property and the character of investment; but whatever figure might be taken for the purpose of capitalising the rent, it is the annual rent that is capitalised and not the monthly rent. The idea of valuing property by capitalising the monthly rental is something opposed to common sense and is unheard of in business transactions. It is a well established rule of construction that in construing a will, statute, or any written instrument, absurdity and repugnancy are always to be avoided. The intention of the parties in the present case, as appears from the language of the document, is that they wanted to fix the value of the proprietors' interest by capitalising the rent reserved by the lease at twenty-five years' purchase; and this is quite a normal thing in the city of Calcutta, particularly where the property is of commercial importance. The rent in such cases invariably means the annual rent and it should be taken in that sense unless there are express words in the clause which would exclude such construction. In our opinion, though the words "annual rent" have not actually been used, the language is sufficiently flexible to admit of that construction, The view taken by the Calcutta High Court, therefore, seems to us to be right and the first contention of the appellants must fail.

17. As regards the second point raised by the appellants, it cannot be disputed that in a proper case the appellate Court can, under the provision of Order 41, Rule 33, Civil Procedure Code, vary or reverse a decree or order of the Court below even in favour of a party who has not preferred any appeal or cross-objection. These powers indeed should be cautiously used with due regard to the circumstances of each individual case, but no rigid rule can be laid down fettering the discretion of the Court in such matters which the Legislature has, for best of reasons, left

unfettered. In the case before us, although the appeal was by some of the proprietors and was in respect of that portion of the Tribunal's award which affected them, the ground urged in support of the appeal was common to all the proprietors and it challenged the propriety of the entire decision of the Improvement Tribunal. The High Court accepted the appellants' contention and reversed the decision of the Tribunal and in allowing the appeal, it was certainly within its powers to reverse the decree with regard to the non-appealing proprietors as well who figured as respondents in the appeal, if it considered such order or decree to be necessary for doing complete justice between the parties and to avoid inconsistent decisions in the same proceeding. We cannot say that the interference by the learned Judges has not been in this case in exercise of a sound judicial discretion. The question, however, still arises as to whether the High Court could exercise these powers under Order 41, Rule 33, Civil Procedure Code subsequent to the disposal of the appeal on an application for review of judgment when in the judgment itself these powers were not exercised. Mr. Gupta argues that no such powers could be exercised by the High Court on an application for review, and he relies upon the decision of the Privy Council in *Chhajju Ram v. Neki*[4] where it was held by Viscount Haldane that the expression "any other sufficient reason" in Order 47, Rule 1, Civil Procedure Code should be interpreted to mean "a reason sufficient on grounds at least analogous to those specified immediately previously." In this case, the Punjab Chief Court had granted an application for review on the ground that the judgment proceeded on an incorrect exposition of law. This, it was held, was not a sufficient ground within the meaning of Order 47, Rule 1, Civil Procedure Code, and the Court had no jurisdiction to order a review because it was of opinion that a different conclusion of law should have been arrived at.

18. That a decision is erroneous in law is certainly no ground for ordering review. If the Court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it. When, however, the Court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47, Rule 1, Civil Procedure Code No reference to the provisions of Order 41, Rule 33, Civil Procedure Code occurs in the judgment of the High Court which was delivered on 12th December 1944. After holding that the landlords were entitled to twenty-five times the yearly rent as their share of the compensation money, the judgment of the High Court goes on to say that the appellants, who had one-third share of the proprietary right vested in them, would be entitled to one-third of the total amount which the lessors would get on that computation. It is said then that the proprietors to the extent of the remaining two-thirds share, as they have preferred no appeal, were not entitled to claim the benefit of this decision.

19. Order 41, Rule 33, Civil Procedure Code, is a purely enabling provision which enables the appellate Court to exercise certain powers in favour of a party who has not filed the appeal if the circumstances of the case and the interests of, justice so require. The powers being discretionary, no Court can be compelled to make an order under this rule; but if the appellate Court, while it allows the appeal, refuses to make any order in favor of a non-appealing party, whose position is identically the same as that of the successful appellant, without applying its mind to the provisions of Order 41, Rule 33, Civil Procedure Code and without considering whether it should or should not exercise its powers under that rule, we do not think that the Court is incompetent to rectify its omission and reconsider the matter if and when it is brought to its notice by way of an

application for review.

20. There are no materials in the record to show that any point under Order 41, Rule 33, Civil Procedure Code, was raised before the learned Judges when they heard the appeal. The judgment, at any rate, does not throw any light on that point. The application for review has not been printed in the paper book and we cannot ascertain what exactly were the grounds put forward in support of the same. The subsequent order made on the application for review is of a summary character and gives no indication of the reasons which induced the learned Judges to reconsider their previous decision. From such materials as we have got, we are bound to say that in fact there was an omission on the part of the Court to consider the clear provision of Order 41, Rule 33, Civil Procedure Code, when the original judgment was passed; and such omission, which appears on the face of the judgment, would constitute a sufficient ground analogous to those mentioned in Order 47, Rule 1, Civil Procedure Code, and the Court was not incompetent to reconsider the matter if it so desired. The result, therefore, is that we do not feel justified in interfering with the decision of the High Court. The appeal will stand dismissed with costs.

Fazl Ali, J.

21. I agree.

Patanjali Sastri, J.

22. I agree.

Mahajan, J.

23. I agree.

Cases Referred.

1A.I.R. (18) 1931 P.C. 149
239 I.A. 197
3 A.I.R. (3) 1916 P.C. 2l
4A.I.R. (9) 1922 P.C. 112