

BOMBAY HIGH COURT

Bhagwant Genuji Girme

Vs.

Gangabisan Ramgopal

Cross First Appeal Nos. 245 and 311 of 1937

(Macklin and Wassoodew, JJ.)

20.03.1940

JUDGMENT

Wassoodew, J.

1. These are two cross-appeals from a decree of the First Class Subordinate Judge at Ahmednagar in a suit to recover damages for breach of contract in the amount of ₹ 9,422-15-3/- from the defendants. The alleged contract related to the collection of toll on public roads in the Ahmednagar District, one on the Ahmednagar-Poona road and the other Ahmednagar-Manmad road. The right to collect that toll for one year commencing from April 1, 1933, was publicly auctioned by the Collector on March 2, 1933. It is the plaintiff's case that on, the eve of that auction he with the defendants entered into a partnership to acquire the lease of the tolls from Government and to collect the toll for the benefit of the partnership. It was also agreed according to him that the partners should not bid against one another. It is said that at the auction the lease of these two tolls was secured for the partnership, the bidders being the plaintiff and defendant No. 1 for the Nagar-Poona road, and defendants Nos. 1 and 2 for the Nagar-Manmad road. The highest bids offered were ₹ 9,925/- for the former and ₹ 14,000/- for the latter. It was further alleged that subsequent thereto the partners considered it advisable to allow the tolls to be worked by one amongst them to whom it was agreed to assign the lease from Government, provided he was the highest bidder at a re-auction held among the partners themselves, and that accordingly the next day a re-auction, which is described in the record of these proceedings as 'Uchhat', was held, and the plaintiff was declared the highest bidder for the two tolls, he offering ₹ 16,575/- for the Manmad road and ₹ 9,90.1/- for the Poona road. The latter was less by ₹ 24 than the amount originally bid at the public auction held by the Collector. There was a profit of ₹ 2,551/- on the former transaction which was divisible among the partners. According to the plaintiff that profit was distributed among the partners according to their respective shares and was paid partly in cash at the rate of ₹ 90/- per share and partly in the form of promissory notes executed by the plaintiff in favor of the partners, there being a counter-writing by the latter not to charge interest on the promissory-notes and to accept repayment of the amount stated therein by instalments. In

pursuance of that agreement a document reciting the arrangement arrived at was executed in favor of the plaintiff on the same day by defendants Nos. 1 and 2 who with the plaintiff were recognized as the ostensible bidders at the public auction by the Collector.

2. The controversy in these appeals principally centres round the legality and admissibility of that document. The material terms of that writing can be shortly stated. After reciting the fact of the bidding at the auction the document (exhibit 56) proceeds to say:--

(We) Yeshwant Bapuji Kulkarni (defendant No. 1) and Bhagwant Genuji Girme (defendant No. 2) give up all our rights in the said contracts. Now (the said) Yeshwant Bapuji Kulkarni and Bhagwant Genuji Girme have got no right over the (tolls of the) said two roads. Gangabisan Ramgopal (plaintiff) should make Wahivat in his capacity as sole owner (of the said contracts) and in the course of such Wahivat, should take all the income of the toll-Nakas in his right as owner and he should bear all the expenses. The responsibility of any profit or loss rests on the sole head of the plaintiff. The profit derived at the private auction has been given by Gangabisan Ramgopal to (defendant No. 1) Yeshwant and (defendant No. 2) Bhagwant. There is no dispute left in that connection.

Thus Yeshwant Bapuji Kulkarni (defendant No. 1) and Bhagwant Genuji Girme (defendant No. 2) have given up their right over the (tolls of the) two roads. (The plaintiff) Gangabisan should make Wahivat in his right as sole, owner and should take the income of the Nakas, pay the instalments due to the Government in the prescribed time, act according to the conditions of the toll contracts, and deposit 10 per cent (immediately). Security bonds-Kabulayats-have to be passed in favor of the Government. They should be completed by the respective persons in whose names the contracts are made with Government, and the sureties needed therefore should be Madhav Gangadhar Bagde (defendant No. 3), Dada-bhai Velji (defendant No. 4), Narayanrao Sopanrao Boravke and GaneshlaLRadha-kisan (plaintiff's nephew).

If the plaintiff fails to pay the instalments due to Government and if the original contractors at the auction are constrained to pay the same, then the original contractors at the auction shall be entitled to recover the monies from Gangabisan Ramgopal with interest...

In connection with Government work the original contractors should make signatures from time to time on applications and at other times when such signatures are necessary and should be in person present whenever that is necessary. The cost incidental to such acts should be borne by Gangabisan.

3. It is alleged by the plaintiff that the defendants committed breach of that agreement inasmuch as the latter did not act in accordance with the undertaking given by them to approach the Collector with an application to recognize the plaintiff as their assignee and to permit the plaintiff to work the tolls in conformity therewith. It is suggested that defendants Nos. 1 and 2 themselves made the deposit of ten per cent required under the terms of the auction with Government for the Manmad road and refused to cooperate with the plaintiff in regard to the Poona road by acknowledging before the Collector the plaintiff's sole right under the terms of their agreement to

work it notwithstanding the fact that there was a joint bid by the plaintiff and defendant No. 1 at the public auction. On that account, the plaintiff has stated that although he was able to work the Poona toll till July 9, 1933, the Collector on account of the disagreement between the plaintiff and defendant No. 1 re-auctioned the toll, that at that re-auction it was purchased by a third person, one Dalchand, and that in consequence of the defendant's breach the plaintiff suffered loss to the extent to which he has claimed damages in this action. Those damages have been thus calculated by him:-

₹ a.p. 8,962-2-3/- for loss of profit on the working of the two tolls. 450-0-0 being the amount paid to the defendants in terms of the agreement. 10-13-0 as interest on the amount paid to the defendants from the date of payment till the date of suit which was filed on August 7, 1933. 9,422-15-3

4. Separate defenses were filed to this action. There was a common defense by the first two defendants. The latter, after denying the alleged bidding in partnership at the public auction held by the Collector, and that the plaintiff was the highest bidder at the 'Uchhat', admitted that they had entered into a private agreement with the plaintiff for the working of the tolls, that in consideration of the agreement the latter undertook not to charge any toll on their own vehicles passing along those two roads, and that the written agreement which they had executed was illegal being forbidden by law and opposed to public policy. They also maintained that the agreement was inadmissible in evidence for want of registration, and that the plaintiff alone had committed breach, first in not making the deposit, and, secondly, in not passing a writing as agreed upon exempting their vehicles from the payment of toll during the year of the lease. They unequivocally denied the allegation in regard to the private sale or 'Uchhat' and the cash payment of the supposed profit made at that time and the alleged consideration for the promissory-note executed by the plaintiff in their favor. It was suggested that in regard to the Ahmednagar-Poona road the plaintiff was unable to pay the ten per cent as his share of the bid, and that in consequence he had to resort to borrowing from the defendants upon the promissory-notes in question.

5. The other defendants denied altogether the allegations made by the plaintiff and their liability to the plaintiff's claim.

6. The learned trial Judge has disbelieved the defendants in all material respects, and awarded the claim to damages to the extent of ₹ 8,962-2-3/- from the first two defendants. He has held that notwithstanding the false denial by defendants Nos. 3 to 5 of the alleged partnership for the venture, in question they are in no way liable for the failure of the plaintiff to be able to work the tolls. He has therefore disallowed the claim of the plaintiff to a refund of the amount paid to them as their share of the profit of the partnership. Accordingly the plaintiff was given a decree for the balance of the claim with four per cent interest from the date of the suit till realization from defendants Nos. 1 and 2. The suit against defendants Nos. 3 to 5 was dismissed with costs, The plaintiff was allowed costs of the claim as decreed against defendants Nos. 1 and 2.

7. It may be noted that in the course of the trial the plaintiff had applied for amendment of his pleadings in October, 1935, by which he prayed that he should be permitted to claim accounts of

the working of the Manmad toll from the defendants. The trial Court for reasons recorded rejected that application for amendment. The plaintiff made a second application for amendment for enlarging the claim that was originally made. That application also met with the same fate as its predecessor.

8. As I have said these are cross-appeals against the decree of the lower Court, one by defendant No. 2 who maintains that the decree for damages was wrongly passed against him, and the other by the plaintiff to obtain a decree against defendants Nos. 3 to 5 for the full amount of his claim and also a declaration that the lower Court's order rejecting his application to amend the plaint was wrong and illegal. It is also claimed that the rate of interest allowed on damages is too low.

9. The plaintiff has paid Court-fees on a total sum of ₹ 8,962/- in his appeal. On that account a preliminary objection was raised on the ground that the total claim made against defendants Nos. 3 to 5 and also defendants Nos. 1 and 2 being ₹ 19,000/-, according to the grounds of objection in the memorandum of appeal the plaintiff should be ordered to pay Court-fees on that amount before his appeal is heard. In explanation counsel for the plaintiff-appellant has pointed out that he desires no more in his appeal against the defendants than a declaration that his application to amend the plaint and claim a higher amount was wrongly rejected and that only if he succeeded on that ground he could be called upon to pay the additional Court-fees upon the amended plaint. We have accepted that explanation of counsel in regard to the valuation of the claim in appeal. Consequently we do not see any reason to call upon him to make up the alleged deficiency in the Court-fees.

10. It will be convenient to dispose of first the defense contentions affecting the legality and the admissibility of the document exhibit 56. The learned trial Judge has dealt with the former contention although it was raised before him in a different form. It was stated that the case of illegality was based on the provisions of Section 23 of the Indian Contract Act, the plea being that, inasmuch as under the terms of the kabulayat or lease from Government an assignment was not permitted except with the previous permission of the Collector, the agreement to assign the lease, for which the defendants had successfully bid at the public auction, was contrary to the provisions of the law and therefore against public policy. The term in the Government kabulayat dealing with the assignment by the lessee of tolls is contained in Clause 17 thereof and it provides as follows (vide exhibit 153):-

The said contractor his heirs executors administrators and assigns shall not sub-let assign transfer or mortgage the whole or any portion of the rights or property the subject of these presents without the written permission of the said Collector previously obtained. The learned trial Judge relying upon *Bhikanbhai v. Hiralal*¹ *Gangadhar v. Damodar*² and *Nukala Venkatanandam v. Immidisetty Dhanaraju*³ which were cited before him, has held that the clause against sub-letting or assignment except in a particular manner would not render the agreement (exhibit 56) void, for the sub-letting is not absolutely prohibited and is not opposed to any provisions

¹1900 I.L.R. 24 Bom. 622; S.C. 2 Bom. L.R. 483

³(1928) 117 I.C. 298

²1896 I.L.R. 21 Bom. 522

of the law, and redress is provided by the imposition of a penalty under the terms of that kabulayat. That view seems to be correct and is supported by authority. In several

instances where notwithstanding the fact that an agreement to enter into partnership with strangers has been forbidden in leases of this description, the Courts have refused to treat the agreement of partnership as void on the ground that it was forbidden by law. In this connection I might refer to *Kersan v. Gatlu Shivaji*⁴ *Nazaralli Sayad Imam v. Babamiya Dureyatimsha*⁵ and *Radhey Shiam v. Mewa Lal*⁶. The first was a case of taking of a partner in the sale of liquor, and that act was not regarded as illegal although under the liquor license issued under the AbkarAct (Bom, V of 1878) the taking of a partner was prohibited. In *Nazaralli Sayad Imam v. Babamiya Dureyatimsha* a partner was taken by a forest contractor, and upon objection taken to the agreement of partnership, it was held that although the terms of the agreement prohibited the taking of a partner, the fact that the forest officer could revoke the license the licensee's act in taking a partner could not be regarded as against the law or defeating the provisions of any law. Here Clause 21 of the kabulayat taken from a lessee of tolls (exhibit 153) empowers the Collector to revoke the lease or to impose penalty against breach of any of the covenants by the lessee. Therefore even if there was a breach of the kabulayat in executing the document exhibit 56, which I apprehend it is not, that would be offending against the covenants in the lease and not against the provisions of the law as contemplated by Section 23 of the Indian Contract Act.

11. The learned Counsel has however not rested his attack on that infirmity alone; for he has said that the combination of the plaintiff and the five defendants not to bid against one another has necessarily resulted in loss to public revenue and is therefore illegal. It is argued that the object of the agreement being to profit at the expense of the public revenues, the agreement is opposed to public policy and therefore void. The law will always encourage freedom to contract. As ordinarily understood, 'public policy' is that principle under which freedom of contract or private dealings is restricted by law for the good of the community. Sir Lawrence Jenkins C.J. in *Govind v. Pacheco*⁷ in dealing with the objection raised against a contract on the ground of public policy quoted with approval the principle enunciated in *Fraser v. Hill*⁸ "that it must be found as a fact, that the transaction in its inception amounted to or involved an illegality or was of such a nature that if permitted it. would defeat the provisions of the law." That was a suit brought to recover a sum of money not accounted for, but due for the sale of liquor under a license obtained in the name of the defendant, who was set up as an agent of the plaintiff to take the liquor contract from Government. The plaintiff was working the contract through the defendant who had passed a power-of-attorney to him. The contention of the defendant was that the power-of-attorney was invalid in law and that the contract was against law or that it was calculated to defeat the provisions of law and opposed to public policy. Reference was also made to the case of *Janson v. Driefontein Consolidated Mines, Limited*⁹ particularly the observations of Lord Davey, that "public policy is always an unsafe and treacherous ground for legal decision", and it was held that there was nothing in the contract which would justify the Court in saying that there was infringement of public policy. I might also refer to the classical definition of public policy in *Egerton v. Brownlow*¹⁰ (*Earl*)

⁴1912 I.L.R. 37 Bom 320; S.C. 15 Bom. L.R. 227

⁶1928 I.L.R. 51 All. 506

⁸(1853) 1 Macq. 392

⁵(1915) I.L.R. 40 Bom. 64; S.C. 17 Bom. L.R. 701

⁷(1902) 4 Bom. L.R. 948

⁹1902 A.C. 484

¹⁰(1853) 4 H.L.C. 196

"Public policy", stated Lord Truro, " is that principle of the law which holds that no subject can

lawfully do that which has a tendency to be injurious to the public, or against the public good". Undoubtedly it is a variable thing and, as pointed out in *Naylor, Benzon & Co. v. Krainiche Industrie Gesellschaft*¹¹ " it must fluctuate with the circumstances of the time." But it is still an untrustworthy ground for legal decision and it must be resorted to within the prescribed limits. In other words, as stated in *Janson v. Driefontein Consolidated Mines, Limited*, the Court cannot invent a new head of public policy.

12. It is conceded in argument that the partnership formed solely with a view to take toll contracts at a public auction is in itself not illegal, and that Government, if it does not encourage bidding by firms or partnership concerns, grants joint leases to two or more persons to work tolls in partnership. It needs no demonstration that such partners who agree to take tolls for the benefit of their firm would naturally agree not to bid against one another. In fact the Collector in this instance has sanctioned leases to two persons. For example, the Nagar-Poona road was allowed to be bid by two persons jointly, and so also the Nagar-Mantnad road, the lease of which was granted to defendants Nos. 1 and 2 and presumably they had agreed to work that toll in partnership. There is no authority in support of the view that a combination of persons not to bid against one another at a public sale offends against public policy. The authority is in support of the contrary-view. In *Doorga Singh v. Sheo Pershad Singh*¹² there was a claim by some of the co-sharers in a mouzah to set aside a sale for arrears of revenue, and it was found as a fact that one of the co-sharers at the sale held to recover the arrears had dissuaded certain intending bidders from bidding at such sale. But even on that assumption the Court held that in the absence of misrepresentation or concealment the fact that others were deterred from bidding for the property would not necessarily constitute an act of fraud.. In *Hari Balkrishna v. Naro Moreshvar*¹³ this Court following *Doorga Singh v. Sheo Pershad Singh* held that an agreement between two or more bidders not to bid against one another at a public auction would not be against public policy- [see also *Mahomed Meera Ravuthar v. Savvasi Vijaya Raghunadha Gopalar*¹⁴, It has been argued that those cases could be distinguished on the facts for they were sales between private individuals relating to private property. It is difficult to see how a combination which is legal in one case would be illegal merely because Government is a party to the sale, or that the proceeds of the sale would be credited to public revenues. I do not think that the principle of public policy could be made to apply in its result to a combination of persons who agree not to bid against one another at a public sale held for farming out public revenues.

13. In this case it is not possible to say upon the facts that in the absence of such combination Government would have got a higher bid. There are many factors which may be said to work in favor of Government by reason of such combination. Although the partners combining are bound to abstain from bidding against one another, they could still afford to offer a higher bid by reason of their combination against those prepared to out-bid them. It is perfectly conceivable that in certain cases such a combination might result in possible loss to public revenue. But that fact would not make the act, which is perfectly legitimate, opposed to public policy. It has not been suggested that the parties to this combination caused intimidation or coercion or perpetrated falsehood in keeping off bidders. The only charge which is possible to level against them is that the combination discouraged competition amongst the partners themselves. But the combination on that

¹¹[1918] 1 K.B. 331

¹³1893 I.L.R. 18 Bom. 342

¹²1889 I.L.R. 16 Cal. 194

¹⁴(1899) L.R. 27 I.A. 17

account could not be regarded as other than innocent. Consequently I would not uphold the ground urged for setting aside the agreement.

14. The next important question is whether the agreement would require registration. That question is not free from difficulty. In the consideration of that question we are asked to note the precise basis of the plaintiff's claim. It is said by Mr. Thakor for the plaintiff that the agreement is not the basis of his claim, and that the cause of action is founded on the agreement between the partners in the winding up of the partnership defining the conditions under which each partner should act with the partnership property. We have given careful consideration to that aspect of the case presented to us, but we think it extremely difficult upon the pleadings to regard the agreement in the winding up, which is other than the agreement contained in exhibit 56, as the basis of the claim to damages. Now, in setting out his cause of action the plaintiff has in the plaint expressly referred to the farkat (exhibit 56), executed by defendants Nos. 1 and 2. He then proceeds to state that in pursuance of that farkat: the plaintiff was ever ready and willing to act according to its terms and that the defendants had committed breach thereof. In paragraph 3 of the plaint he refers to the obligation of the defendants to do all in their power to promote the plaintiff's right to work the tolls in terms of the farkat. He says that the cause of action arose at Ahmednagar when the defendants broke their contract pertaining to the road known as the Nagar-Manmad road. It is clear therefore that the plaintiff had based his cause of action upon the breach of a specific agreement which is no other than the farkat in question exhibit 56.

15. Mr. Coyajee for the second defendant-appellant has contended that the document (exhibit 56) amounts to an assignment of an interest in Immovable property inasmuch as the levy of toll on roads is a benefit arising from land and therefore immovable property within the meaning of Section 2, Clause (6), of the Indian Registration Act. Accordingly he maintains that it is compulsorily registrable under the provisions of Section 17, Clause (1) (5), of that Act. We were referred to three cases, *Sikandar v. Bahadur*¹⁵ *Surendra Narain Singh v. Bhai Lal Thakur*¹⁶ and *Venkaji Babaji Naik v. Shidramapa Balapa Desai*¹⁷ in support of the view that the right to recover tolls on a public road or a highway is Immovable property. The definition of 'Immovable property' in the Indian Registration Act is not exhaustive, and it includes "any benefit to arise out of land." In *Sikandar v. Bahadur* the question before the Court was in regard to the right to recover market dues upon a piece of land which belonged to certain Zamindars, and the lease was for a term of three years. The Court had to consider whether the right to recover market dues upon a given piece of land which was the property of the alleged lessors was a benefit to arise out of land within the purview of Section 3 of the Indian Registration Act, and it upheld that claim because the right to collect dues upon a given spot was such a benefit.

16. In *Surendra Narain Singh v. Bhai Lal Thakur* a suit was brought for rent of a hat on the basis of a verbal settlement for three years at an annual rent, and it was held that a hat being a benefit arising out of land was within the definition of Immovable property and that the lease of that hat came within Section 107 of the Transfer of Property Act. The claim it may be noted was by the plaintiff as proprietor of a share in the land on which the hat stood, or rather a part proprietor of the hat itself. What, a hat precisely is, is explained

¹⁵1905 I.L.R. 27 All. 462

¹⁷(1894) I.L.R. 19 Bom. 663

¹⁶1895 I.L.R. 22 Cal. 752

in *Hem Chandra Roy Chaudhury v. Krishna Chandra Saha Sardar*¹⁸ It appears to be akin to a market and is a term commonly in use in Bengal. The headnote to that case says that in Bengal there appears to be no such thing as a market franchise or a right to hold a market, conferred by grant from the Crown, nor can such right be acquired by prescription. The right to hold a market

is an incident of the ownership of land and a proprietor may set up a market in proximity to his neighbour's market without infringing the maxim sic utere tuo ut alienum non laedas. That again therefore was a case of an exercise of a claim by a proprietor of the soil.

17. Turning then to the last case cited on the point, *Venkaji Babaji Naik v. Shidramapa Balapa Desai*, it will be observed that that was a claim to recover assessment from tenants by the proprietor of the land on a bond under which the mortgagee was to receive the annual income of the mortgaged land and to pay out of that amount Government judi and assessment, retaining the balance for interest. ‘

18. Those cases in the view I take do not afford any guide in deciding the present question, for they are cases where the right transferred was an incident of the ownership in property. Here the right in question is a right conferred by a lease or kabulayat to recover toll for a period of one year from carriages or vehicles passing over a particular public road. Now if it was, an ordinary case of an owner of a private road allowing the public to use it on payment of rent or road tax, it could easily be supposed that he was exercising a right as owner; for the claim to recover rent or fee would be one of the incidents of ownership in property, and that a transfer or assignment of such a right would undoubtedly be a transfer or assignment of Immovable property. The question we have to consider is whether the Government's right to recover toll from vehicular traffic on public roads can be treated on the same footing.

19. Now, a public road or a highway, as generally understood, means a road legally set apart for the use of the public for ever. In Bombay under Section 37 of the Bombay Land Revenue Code public roads vest in Government like any other property, " except in so far as any rights of any persons may be established in or over the same." The public as a general rule have a right to use a public way and it would be an infringement of that right if that use were prohibited or restricted. There is nothing in Section 37 of the Bombay Land Revenue Code which is inconsistent with the general rule. Now the imposition of toll on the public using a highway or a public road would prima facie be a restriction of that right. Although by reason of Section 37 of the Bombay Land Revenue Code, the soil in the road may vest in Government, that vesting does not confer on Government the right to levy tolls. The claim to levy toll by Government is based on a statutory right and in Bombay it is conferred by the Tolls on Roads and Bridges Act (Bom. III of 1875). The question therefore is, if toll is collected by Government under the Statute, whether that collection is dependent also on their right as proprietor of the soil in the road, or, in other words, whether it is an incident of the ownership of the road under Section 37 of the Bombay Land Revenue Code. As I have said, in my opinion it would be illegal to recover toll by reason merely of the vesting of public roads in Government under Section 37 of the Bombay Land Revenue Code and the levy is independent of the Government's proprietorship. It is said that ' toll' according to the definition in the Oxford Dictionary is a " a tax or duty paid for making use of a public road " and therefore it is a benefit accruing

¹⁸1920 I.L.R. 47 Cal. 1079

to Government upon the use of the road which vests in them. It seems to me that that argument is not well founded. Section 3 of the Tolls on Roads and Bridges Act is in the following terms:

The Provincial Government may cause such rates of tolls, not exceeding the rates mentioned in the schedule annexed to this Act, to be levied upon any road or bridge which has been or shall hereafter be made or repaired at the expense of the Crown or from

funds collected under the provisions of Bombay Act III of 1869 or other funds levied under the authority and subject to the general control of the Provincial Government, and may place the collection of such tolls under the management of such persons as may appear to it proper;...

It may be true to say that Government recover the toll for reason of the use of the road. But it would not necessarily follow that the toll itself is a benefit arising out of the proprietorship of Government in the road. In my opinion the expression "the benefit to arise out of land" necessarily implies the benefit which would arise out of the incidents of ownership in the land. In the view I take the right to recover toll is not an incident of ownership. Wharton's Law Lexicon (14th Edn.) defines 'toll' under two heads:-

(1) A liberty to buy and sell within the precincts of the manor, which seems to import as much as a fair or market.

(2) A tribute or custom paid for passage.

Now a tribute under the latter head might be independent of the proprietorship in the road although it may be for the use of the road. It is perfectly conceivable, as Section 3 of the Tolls on Roads and Bridges Act points out, that the consideration for the tribute or toll is the maintenance of the road. It is possible to refer to instances of tax collected by Government which has connection with Immovable property, but is independent of the Government's ownership of that property. For instance, the levy of a tax by Government or local authority on pilgrims who visit a sacred place is made possible by reason of the sanctity attached to that place which might vest in private individuals or public trustees. It would not follow that it is an incident of the Government's or local authority's ownership of that place or a benefit arising out of that place in the sense in which that expression is used in Section 2, Clause (6), of the Indian Registration Act. Similarly, the right to recover property tax in Bombay from private houses out of the income thereof is independent of the ownership of the houses or property; and if such a right to tax were fanned out, it could not be said that it is a benefit arising out of the proprietorship of the land or an incident of the ownership in it. In that view of the matter I am of the opinion that the right to levy toll under the Tolls; on Roads and Bridges Act is independent of the ownership of Government in the soil of the road. It is therefore not Immovable property; and consequently the writing which purports on the face of it to be an assignment or extinguishment of the rights of the lessees of the tolls would not be compulsorily registrable under Section 17, Clause (i) (6), of the Indian Registration Act.

20. It is therefore needless to consider the other grounds of exemption from registration urged before us for the plaintiff, although, upon a superficial examination of those grounds, I do not think it is possible to uphold them. It was said that because Government have executed an, unregistered kabulayat in respect of the Manmad Toll an assignment or relinquishment of the right to collect toll acquired under that kabulayat would be excluded by the provisions of Section 17, Clause (1) (b), of the Indian Registration Act. Apart from the provisions of Section 90 of the Indian Registration Act which exempt from compulsory registration certain documents to which Government is a party, assuming that the subject-matter of the kabulayat is Immovable property,

and that it is possible to say that a lease for one year affecting that property is excluded by the provisions of Section 17 (I) (d), it is difficult to agree that an assignment of an interest in such a lease or a relinquishment of the rights thereunder is excluded by Section 17(1) (b). Nor is it possible to suppose, as suggested, that the use which the plaintiff seeks to make of that document is for a collateral purpose particularly when the claim is based upon the breach of the essential terms thereof. It is sufficient for the present purpose to say that the infirmities sought to be attached to that document do not in fact exist and that the document was rightly admitted in evidence as the foundation of the plaintiff's claim.

21. [At this point the judgment went into the question whether the defendants, as alleged by the plaintiff, had committed breach of the agreement contained in exhibit 56, and confirmed the trial Court's judgment both as regards their liability and the quantum of damages awarded]

22. There is one other point upon which there is some controversy. The trial Court has allowed four per cent interest on the amount of damages assessed in these proceedings. While it is contended on behalf of the plaintiff that according to the mofussil practice the rate of interest awarded is too low, it is suggested for defendant No. 2 in his own appeal that the lower Court erred in law in awarding interest before judgment. In support of the latter contention we were referred to *Ratanlal v. Brijmohan*¹⁹, There the plaintiffs, acting as defendants' brokers, sued to recover damages with interest on account of the defendants' repudiation of certain transactions consequent on their denial that they had instructed the plaintiffs to act as brokers in the matter of certain purchase of linseed. The plaintiffs were awarded damages from the defendants. In regard to the; claim to interest the learned Chief Justice in his judgment made the following observations (p. 706):-

This being a pure case of damages I do not think we can give interest before judgment.

In his concurring judgment Mirza J. observed as follows (p. 708):- " No interest can be allowed on damages;

It is difficult to say upon that statement alone whether the Court regarded it as a rule of law that no interest could ever be given before judgment in a case of damages. In an earlier case, *Coorla Mills v. Vallabhdas*²⁰, where there was also a claim for damages for breach of contract in respect to sale of certain bales of bed-sheets, Mr. Justice Marten (as he then was) in considering the specific issue on the point remarked as follows (p. 1187):-

The plaintiff claims interest prior to the suit, but this cannot, I think, be allowed. As the sum awarded by me represents damages at date of breach, I do not think that Clause 3 of the contract extends to interest on such damages. But interest from date of the suit stands on a different footing. In the subsequent unreported

¹⁹ AIR 1931 Bom 386 : (1931) 33 BOM LR 703

²⁰ AIR 1925 Bom 547 : (1925) 27 BOM LR 1168 : 94 Ind. Cas. 575

proceedings in Harichand's case, interest on damages was awarded by the Appeal 'Court under Section 34 of the Civil Procedure Code, from the date of the suit, and Mr. Justice Fawcett stated that in his opinion it was desirable that where a party improperly delayed the ascertainment of damages for three or four years, he should be penalized in this way,

and that the main objection advanced by the defendants to take delivery had no substance in it.

It is contended for the plaintiff that having regard, to the provisions of Section 34 of the Civil Procedure Code the Court has wide discretion in granting interest on damages and that the discretion has been properly exercised in this case in view of the conduct of the defendants. The provisions of that Section are as follows:-

Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment...

The question is whether the expression " decree for the payment of money " must be restricted in its operation to a claim to ' liquidated damages'. Apart, from authority the plain language of the Section leaves the question of granting or refusing interest on damages to the discretion of the Court. The effect of the provisions of Section 34 has been considered in all its aspects by the High Courts of Madras and Calcutta. In *Ramalingam v. Gokuldas Madaoji & Co*²¹, it was held that the word ' money' in Section 34 should not be understood in the limited sense of an ascertained sum. The reasoning underlying the judgment of Spencer J. is thus expressed (p. 1022):-

I see no reason why a successful party should be made to suffer because his claim is not decided soon after the filing of his plaint... The date of instituting the suit is the date upon which the rights of parties are ordinarily determined....

Mr. Justice Venkatasubba Rao in agreeing with that view has made the following remarks (p. 1023):-

No distinction is made in the Section between an ascertained sum of money and unliquidated damages. As a question of construction, I find it difficult to accept the suggestion that the word ' money ' in the Section should be understood in the limited sense of an ascertained sum. The expression ' decree for the payment of money' is very general and to give it due effect, it must be construed as including a claim to unliquidated damages. The Court is not bound to give interest, for, it must be noted, that the Section gives a discretion to give or refuse interest; and whatever the nature of the claim is, whether it is a claim to a fixed sum of money or to unliquidated damages, the Court is bound in every case to exercise a sound discretion.

²¹1926 A.I.R. Mad. 1021

Reference has been made by the learned Judge to the conflicting views expressed in *J.W. Crewdson v. Ganesh*²² and *Pannalal v. Radhakissen*²³ It was remarked in the latter case that interest on damages from the date of the suit is within the discretion of the Court under Section 34 and that on the Original Side of the Calcutta High Court it was usual to grant interest on unliquidated damages from the date of the suit. In the former case where a contrary view prevailed it was observed, that there was no distinction in principle between a claim to interest for the period previous and that subsequent to the suit. That reasoning in my view weakens the authority in *J. W. Crewdson v. Ganesh*, for there is a recognisable distinction, between the two claims. As pointed out by Venkatasubba Rao J. the claim prior to the suit has to be determined upon the general law while in the other case a discretion has to be exercised by reference to Section 34 of the Civil Procedure Code. The view adopted in *Coorla Mills v. Vallabhdas* illustrates the practice followed on the Original Side of this Court. There is no reason why that practice should not be followed on the Appellate Side. In *Ratanlal v. Brijmohan* no authority has been cited for the view that in a pure case of damages no interest should be allowed, although as I have observed it is within the discretion of the Court under Section 34 of the Civil Procedure Code. No reference was made to those provisions and perhaps it is possible to infer that the Court in the circumstances of the case did not consider it proper in its discretion to grant the relief by way of interest. As a general rule if interest is contemplated by the contract of the parties or is permitted by statute it will be legitimate to award it. We have not been referred to any authority in support of the view that as a rule of practice no interest has been allowed on the Appellate Side prior to judgment in a suit for damages. With respect I agree with the Madras view as expounded in *Ramalingam v. Gokuldas Madaoji & Co.* and the Calcutta view in *Pannalal v. Radhakissen*. It is said that as interest is awarded as a form of damages, it is inequitable to add interest on damages. That argument is not well founded. Courts have allowed interest when there has been long delay under vexatious and oppressive circumstances in the payment of what is due under the contract (see Mayne on Damages, 10th edition, p. 151). It is after all a question of discretion of the Court. Such a discretion is expressly conferred on the Courts in India by Statute in allowing a claim to interest on damages, and there is no reason to refuse to award it if the circumstances justify. In this case there is ample material upon which the discretion could be exercised in the plaintiff's favor. Throughout these proceedings the defendants claimed to obtain an inspection of the accounts of the transactions relating to the working of the toll on the Ahmednagar-Manmad road. Apart from the inordinate delay in complying with that requisition, proper accounts were withheld and incomplete accounts were submitted to the Court. That affords justification in granting interest to the plaintiff on the sum fixed as damages which he was prevented from recovering in reasonable time. We do not think that the rate allowed in the circumstances is unduly low. We therefore maintain that rate.

23. In the result the plaintiff's appeal is dismissed with costs, and that of defendant No. 2 allowed

to the extent to which he is made liable for damages for the working of the

²²(1920) 32 C.L.J. 239

²³[1924] A.I.R. Cal. 637

Ahmednagar-Poona road toll. The lower Court's decree in other respects is confirmed. Inasmuch as defendant No. 2 has succeeded in part, we make no order as to costs in his appeal. With regard to the clause fixing liability of the first two defendants in the lower Court's decree there shall be an amendment in regard to their joint and separate liability. The figure of ₹ 8,962-2-3/- is maintained; so far as the liability of defendant No. 1 alone is concerned; but the joint liability of defendant No. 2 and defendant No. 1 in the above amount shall be limited to ₹ 4,962-2-3/-. That amount shall be recovered from them with costs in proportion as outlined in the lower Court's decree. There shall be two separate sets of costs in the plaintiff's appeal, one for defendant No. 2 and another for defendants Nos. 3, 4, 5 and 6.

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