PATNA HIGH COURT

Ramkumari Devi

Vs

Hari Das Mukherji

A.F.A.D. No. 1816 of 1950

(Lakshmikanta Jha, C.J. and Reuben, J.)

21.12.1951

JUDGMENT

Reuben, J.

1. This appeal by the defendants is directed against a decision of the Subordinate Judge, Monghyr, confirming a decision of the Munsif, Begusarai, decreeing a suit for recovery of arrears of rent for the period Chait 1354 to Asarh 1356 Fasli and of cess for the period from 1943 4th quarter to 1949 2nd quarter in respect of a mokarrari tenure held by the appellants under the plaintiffs respondents in seven villages lying in tauzi No. 1002/ 47. The tenure forms portion of a larger mokarrari tenure created by a registered lease on the 13th August, 1916 in respect of four annas share in twelve villages appertaining to taluka Mananpur. The defendants acquired the mokarrari interest in these seven villages on the 16th September, 1943 by transfer from the successors of the original mokarraridar. Under the deed of transfer, the mokarrari jama of the transferred interest was fixed at Rs. 829-4-6 including cess. Since the transfer, the plaintiffs have treated the transferred interest as a separate mokarrari tenure and have been recovering the jama accordingly. The Courts below have found that when the tenure was created in 1916 the cess payable in respect of these villages was Rs. 48-12-6 and that by increase at successive revisions of the cess valuation in the years 1921-22, 1944-45 and 1945-46 the cess has been gradually raised to Rs. 352-7-0. They have decreed rent on the basis that the fixed rent payable is Rs. 730-8-0, that is to say, the jama of Rs. 829-4-6 less the cess in 1916. They have decreed the arrears of cess according to the amounts assessed in the cess revaluation proceedings.

2. Three points have been urged : 'Firstly', that under the terms of the mokarrari deed of 1916 the plaintiffs are entitled to realise only Rs. 829-4-6 inclusive of cess :

> 'Secondly', that having realised rent and cess at that rate for certain years in suit, the plaintiffs cannot realise arrear cess at a higher rate for those years; and

'Thirdly' that the period of limitation for recovery of arrears of cess is three years and arrears sued for and arising prior to that period are not recoverable.

3. The relevant passages in the mokarrari kabuliyat relating to the jama are as follows:

"Therefore, I, the executant.....got executed an istemrari patta.....after having fixed and got fixed an uniform annual jama of Rs. 1,693-1-4½ in the current royal coins..... including public road cess fixed from all sources.....I, the executant, in the capacity of a mokarraridar shall appropriate the entire profit of the above fixed rent of the shares in the aforesaid istemrari mokarrari mauzas which may accrue therefrom at present or in future. The said proprietors do not have and shall not have any ground for enhancement of rent etc. (wagairah) save and except getting the above fixed rent (jama mukarrar).....Be it also noted that Government revenue in respect of the mokarrari villages mentioned in this deed is payable at a time, together with the taluka Manunpur. The Government demand cannot be divided. Therefore the aforesaid proprietors have been made responsible for the payment of the Government demand. If per chance, I, the executant be compelled to pay any Government demand in respect of the said taluka Manunpur, with a view to safeguard the mokarrari right, then, I, the mokarridar shall be competent to realise the same by setting it off against the rent of the mokarrari or by instituting a suit in Court."

4. Under the Cess Act, 1880 (Bengal Act 9 of 1880) all immovable property is liable to pay a local cess assessed on its annual value at a rate which may be changed from year to year. The manner in which lands are to be valued for assessing the cess is prescribed in the Act, which contains also provisions for periodical revaluation. For the purpose of valuation interests in land are divided into three classes;

'Firstly'; Holders of estates, which would include proprietors paying revenue to Government;

'Secondly'; Cultivating raiyats, meaning thereby persons cultivating land and paying therefor rent not exceeding Rs. 100/- per annum; and

'Thirdly'; Tenure-holders, which class includes persons holding any other interest in land. As it would not be convenient for the State to collect the cess dues from all these persons, an arrangement is made whereby each proprietor will pay to Government the entire cess due in respect of the land in his estate and recover the cess paid by him from the tenure-holders and cultivating raiyats immediately holding under him. The tenure-holders similarly will recover from the persons holding immediately under them, and these persons in their turn will recover from their tenants, and so on till ultimately recovery has been made from all the persons directly holding the land. At each stage some deduction is made from the payment made to Government or to the superior landlord to meet the cost of collection. The particulars of the proportions in which the cess is to be realised and paid are contained in Section 41 of the Act.

5. It appears from this that the liability to pay cess is a statutory one. It is now well settled that as between themselves a landlord and his tenant can contract themselves out of the provisions of Section 41. The question is whether they have done so in the present case. Two important principles to be observed in determining this question were enunciated in *'Mohanand Sahai v. Mt. Sayedunnissa Bibi[1]',* Firstly, the contract under which exemption from the statutory liability is claimed must be strictly construed against the claimant and it must appear from its terms, beyond the possibility of any dispute, that the parties intended to vary the liability, as imposed by the statute. In the second place, the construction to be placed on the deed ought to be such as will render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them. Their Lordships pointed out that under the construction sought to be put on the contract the mokarridar would get the benefit of an increase in the value of the land while the proprietor would have to bear the burden of the extra cess assessed, and possibly the absurdity might be reached of the increase in cess payable by the proprietor absorbing the whole of the rent and cess recoverable by him. In the mokarrari lease which their Lordships were considering the clause fixing the rent ran as follows :

> "At varying jamas, to wit, on an annual uniform jama of Rs. 1,580/- from 1289 to 1291 (Fasli) and at an annual uniform consolidated jama of Rs. 1,585/- of the current coin from 1292 (Fasli) together with abwab, such as, salami for Dusserah and Holi, Purkha, Sair, Road Cess, Public Works Cess, and etc., all of which are included in that very sum of Rs. 1,585/-."

Their Lordships pointed out that there was nothing in the lease, expressly or by necessary implication, exempting the lessee from liability for the increased burden in the event of an increase of the cess payable. In the absence of provision in the contract for such a contingency, they held that the rights of the parties must be regulated by the statute. These principles were applied and the decision in 'MOHANAND SAHAI', 12 Cal WN 154, was followed in *'Gourchandra v. Sarat Kumari Debi[2]',* and again in *'Balwant v. Biswanath[3]',*

6. The same considerations apply to the contract before us. There is nothing in the kabuliyat expressly exempting the mokarraridar from his statutory liability. The kabuliyat provides that "the profit of the above fixed rent of the shares in the aforesaid istimarari mokarrari mauzas" will go to the mokarraridar, and the proprietors will not be entitled, on account of such increase of "rent etc. (wagairah)", to anything above the "fixed rent '(jama mukarrar)." It is evident that the 'profit' spoken of is the increasing amount by which the mukarraridar's income from the mokarrari villages is expected to exceed the fixed rent payable by him. The vague word "wagairah" refers to sources of income in the mokarrari villages other than rent. These expressions certainly do not exempt the mokarraridar from his statutory liability to pay cess. And the words "jama mukarrar" do not necessarily restrict the proprietor's statutory right to recover cess. In the subsequent passage, which I have reproduced above, it is noticeable that the

provision made is confined to Government revenue. The mokarraridar's interest would not be affected by a sale for arrears of cess. Hence, a similar provision regarding cess was not required. In these circumstances, I have no doubt that the Courts below have rightly interpreted the contract as not excusing the mokarraridar from his statutory liability to pay cess.

7. It has been faintly urged that, since up to 1943 the proprietors have been realising rent and cess at the rate of Rs. 829-4-6, they cannot now sue for cess at a higher amount. There is no force in this argument. The right to realise cess, like the right to realise rent, accrues periodically and, if the person entitled to cess for any particular period chooses, either deliberately or through misapprehension of his right, to accept in satisfaction of his dues less than he is entitled to, his act will not estop him from claiming his full dues for a subsequent period. This reply would cover also the second point urged on behalf of the appellants. The realisation for a particular period of a lesser amount than is due will not, subject to the law of limitation, prevent the person entitled from realising by suit so much of his legal dues as have not been paid.

8. This brings me to the third point. Here the argument takes two alternative forms. Firstly, it is argued that the lease is governed by the Bihar Tenancy Act and, under the definition of "rent" in Section 3 of that Act, cess is rent for the purposes of Article 2 of the Third Schedule to the Act. Whether a lease is governed by the Bihar Tenancy Act or the Transfer of Property Act is determined by the dominant purpose of the lease *'Maheshwari Prasad v. Manrajo Kuer*[4]*',* We find from the kabuliyat that the proprietors leased their entire interest in four annas share in the twelve villages, including

> "malwajahat, sair wajahat, all habab, jalkar, bankar, ahar, pokhar, reservoir, pond, mud-built and brick-built wells, toddy palm trees, and date palm trees, orchard of mango, mahua and jack fruit trees, bail, barhal, sheesham, etc., fruit bearing and non-fruit bearing trees, khadhore, beswandh, mutaharfa, bardana, korauncha, keyani, dalali hat, bazars, sair, saltpetre, populated and unpopulated houses of the tenants, all zamindari rights appertaining thereto, excluding the excise mahal, the brahmotar, sheotar and faqirana lands etc., and those excluded by religion and items forbidden by Government, the lands of the road of the railway line Simria and Kathiar lying in the said mauzas."

The lease empowered the mokarridar to

> "cultivate indigo etc., or construct houses or orchards in plant, fruit bearing and non-fruit bearing trees and the bamboo groves, make collection of rent in respect of the raiyati thika bhauli and sairat lands etc."

It is evident that the proprietors were practically parting with their proprietary rights for small fixed rent. They put the mokarraridar in their own place and the collection of agricultural rents and the bringing of land under cultivation either khas or by settlement of it with tenants, formed a minor part of the intention. The lease, therefore, is not one governed by the Bihar Tenancy Act.

9. The alternative form of argument relies on Section 47 of the Cess Act, 1890. It points out that under this section arrears of cess are recoverable "in the same manner and under the same penalties as if the same were arrears of rent", and urges that the word "manner" covers limitation and attracts the application of Article 110 of the Schedule to the Limitation Act, as there is no registered contract under which the
mokarrari tenure of the seven villages was created. Reliance is placed in support of
this argument on *'Mahant Krishna Dayal v. Mt. Sakina Bibi[5]',* as an authority, that limitation is a matter of procedure. It is noticeable that that decision is concerned with a rule of limitation prescribed by the Civil Procedure Code and not with one prescribed by the Limitation Act. The question before their Lordships was whether the 12 years limitation in Section 48 of the Code of 1908 applies to the execution of a decree passed before the Code was enacted. In answering the question in the affirmative, Chamier, C.J., accepted the view of the Judges of the Calcutta High Court that

> "the decree-holder was entitled to execute the decree in accordance with the provisions of the Code of 1882 as long as it was in force, but had no vested right in the procedure prescribed by that Code."

Jwala Prasad, J., in agreeing with him observed

> "the rule that no order for the execution of a decree shall be made after 12 years is a rule of procedure and is a part of the Procedure Code."

It is clear, therefore, that their Lordships did not intend to rule that limitation is always to be regarded as a matter of procedure. Rent may be recovered in various ways. Where the contract between the parties is governed by the Bihar Tenancy Act it can be recovered by a suit instituted, in some parts of the State, in the ordinary Civil Courts and, in other parts of the State, in the Revenue Courts. In certain circumstances it can be recovered under the provisions of the Public Demands Recovery Act. Where the contract is governed by the Transfer of Property Act, the rent may be recovered by suit in the ordinary Civil Courts, and in certain circumstances in the Courts of Small Causes. The word "manner" may reasonably be understood to cover these possibilities according to the nature of the principal contract between the parties.

10. So far as limitation is concerned, however, in the absence of special provision relating to it, it must be determined under the provisions of the Indian Limitation Act, 1908. Article 110 and Article 116 of the Schedule to the Act were referred to at the Bar, but neither of them is applicable. They relate to liabilities arising out of contract. I have held above that the liability for cess in this case is statutory. There being no specific provision in the Act for a suit for arrears of cess, it will be governed by the residuary Article, Article 120 of the schedule to the Act. A case directly in point is *'Raja Of Vizianagram v. Dindi China Thammanna[6]',* Vide also *'Secretary Of*

State v. Guru Proshad[7],

11. For these reasons, I consider that there is no merit in the appeal and it must be dismissed with costs.

Lakshmikanta Jha, C.J.

12. I agree. The suit is for recovery of cess due from the defendants from the last quarter of 1943 to the second quarter of 1949. The plaintiffs' claim for a period in excess of three years would be barred if the amount claimed be deemed to be 'rent' either within the meaning of the Bihar Tenancy Act or within the meaning of the Limitation Act. On a construction of the deed, under which the leasehold was created and relevant portions of which have been quoted by my learned brother, there is no manner of doubt in my mind that a lease for the purpose of collecting rent was created and not an agricultural lease for purposes of cultivation. If there was no agricultural lease, the cess claimed in the suit cannot be deemed to form part of the rent of the land in suit and the contention of the defendants that the special rule of limitation under Article 2 of the third schedule of the Bihar Tenancy Act applies must fail.

13. The next question is whether cess can be deemed to be rent within the meaning of the Limitation Act. I may observe that the word 'rent' has not been defined in the Limitation Act although there is provision in Article 110 providing for a period for the realization of rent. The Limitation Act provides different periods of limitation for different classes of cases and for different kinds of claims. Therefore, it is for the defendants to show under what specific provision of the Limitation Act the suit could be brought apart from Article 120 which is the residuary Article applicable to all cases which cannot be brought under one or other of the different Articles of the Limitation Act. The learned Counsel for the appellants tried to bring 'cess' within the meaning of 'rent', but I am unable to accept this contention. 'Rent' always presupposes a contractual obligation to compensate the grantor for the loss of the use of the property of which he is deprived under a contract for the benefit of the grantee. 'Cess' cannot be said to be a liability incurred under any contractual obligation : it is a statutory liability imposed under the provisions of the Cess Act and may be enhanced from time to time under the provisions of the Act. The liability for payment of cess being a statutory obligation and there being no specific provision in the Limitation Act prescribing a period of Limitation for such cases, Article 120 must apply and govern the present case. Therefore, in my opinion, no part of the claim is barred by Limitation.

Appeal dismissed.

Cases Referred.

[1] 12 Cal WN 154
[2] AIR (22) 1935 Pat 305

[3]24 Pat 307
[4]23 Pat 185 (FB)
[5]1 Pat LJ 214
[6] ILR (1937) Mad, 498
[7]20 Cal 51 (FB)