APPELLATE CIVIL.

Before Graham and Mitter JJ.

SECRETARY OF STATE FOR INDIA IN COUNCIL

v.

BHUPALCHANDRA RAY CHAUDHURI.*

1929

June 13.

Cess—Hât—License—Lease—Demise—Collections—Rent—License fee—Control—Reservations—Construction—Exclusive right of occupation—Injunction—Ferries—Cess Act (Beng. IX of 1880), ss. 4, 5, 6.

Where the land of *hat* was leased for a term, an aggregate rent was payable in respect of the same and the control of the *hat* was in the lessees subject to certain restrictions and reservations in favour of the lessor,

held that there was a transfer of an interest in land and therefore the sum payable to the lessor for the *hat*—call it *jama* or call it license fee—was rent payable to the lessor, and cess could be assessed and collected thereon from the lessor more so as the lessee had in his *kabuliyat* agreed to pay the cess if levied.

If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself.

Glenwood Sumber Co., Ltd. v. *Phillips* (1) and *Secretary of State for India* v. *Sati Prasad Garga* (2) followed.

It is not necessary in this case to decide whether profits from the *hat* are profits from immovable property within the meaning of the second part of section 6 of Bengal Act IX of 1880.

Secretary of State for India v. *Karuna Kanta Chowdhry* (3) explained and distinguished.

The true test in cases of this kind is to find out whether the landlord has granted sufficient control over the land of the *hat* so as to make the instrument (*kabuliyat*) a demise and not a mere license.

SECOND APPEAL by the Secretary of State for India in Council, defendant.

The facts of the case, out of which this appeal arises, are briefly as follows:—The plaintiff was assessed to cess in respect of his income from certain *hats*, ferries and *khutagaries*. He brought a suit

*Appeal from Appellate Decree, No. 1110 of 1927, against the decree of D. L. Vaughan Stevens, District Judge of Dinajpur, dated Feb. 2, 1927, affirming the decree of Haripada Majumdar, Subordinate Judge of Dinajpur, dated Nov. 5, 1925.

(1) [1904] A. C. 405. (2) (1928) I. L. R. 55 Calc. 1328.
(3) (1907) I. L. R. 35 Calc. 82.

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against the Secretary of State for correcting the cess valuation rolls, for a permanent injunction restraining the defendant from collecting these cesses and for a refund of the amounts paid with interest. His case was that the collections from these sources were not rent and so were not liable to pay cess.

The defendant maintained the contrary. He also urged that the suit was barred by limitation and raised certain minor points. The trial court granted an injunction and part of the refund claimed without interest. He held that the correction of the cess roll was not his business. The defendant appealed, but lost again in the court of the District Judge who confirmed the decision of the learned Subordinate Judge. Thereupon, this Second Appeal was preferred by the defendant in the High Court.

The Senior Government Pleader (*Mr. Surendranath Guha*) and the *Assistant Government Pleader* (*Syed Nasim Ali*), for the appellant.

Mr. Brajalal Chakravarti and *Mr. Jatindramohan Chaudhuri*, for the respondent.

Cur. adv. vult.

GRAHAM J. This is an appeal by the defendant, the Secretary of State for India in Council, against a decision of the District Judge of Dinajpur confirming a judgment and decree of the Subordinate Judge of Dinajpur. The suit was for a permanent injunction restraining the defendant from the assessment and collection of cesses in respect of the plaintiff's income derived from certain *hats*, ferries, and *khutaqaries*, and for a refund of the sum of Rs. 1,032 and odd annas already realised by the defendant on these accounts together with interest thereon.

The plaintiff's case was that the collections made from these sources are not liable to pay cess, and that the assessment was *ultra vires*.

The defendant on the other hand pleaded that, having regard to the terms of the *kabuliyats*, which were put in evidence, read with the provisions of the

Cess Act (Bengal Act IX of 1880) the assessment was valid and lawful. He also contended *inter alia* that the suit was barred by limitation.

The trial court found that the assessment was illegal, granted the injunction prayed for, and partially decreed the claim for refund.

On appeal, by the defendant, that decision was affirmed by the District Judge. The Secretary of State has now preferred this Second Appeal.

Both the courts below have found in favour of the plaintiff on the issue of limitation, and no argument has been addressed to us upon that point. The question which arises for decision is whether it has been rightly held that these collections are not liable to pay cess. In order to decide the matter reference is necessary to the relevant sections of the Cess Act, and to the *kabuliyats* in question.

Dealing first with the Act, the preamble makes it clear that the cess is to be levied on immovable property. Sections 5 and 6, which deal with the method of assessment, read as follows:—

"5. From and after the commencement of this Act "in any district or part of a district, all immovable "property situate therein, except as otherwise in "sections 2 and 8 provided, shall be liable to the "payment of a road cess and a public works cess."

"6. The road cess and the public works cess shall "be assessed on the annual value of lands and on the "annual net profits from mines, quarries, tramways, "railways and other immovable property ascertained "respectively as in this Act prescribed."

"Immovable property" is defined in section 4 of the Act in these terms " 'immovable property' includes "lands and all benefits to arise out of land.....but "does not include crops of any kind, or houses, shops "or other buildings."

"Annual value" is thus defined: " 'annual value "of any land, estate, or tenure' means the total rent "which is payable, or, if no rent is actually payable, "would, on a reasonable assessment, be payable, during "the year by all the cultivating *raiyats* of such land,

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"estate or tenure, or by other persons in the actual use "and occupation thereof."

"Tenure" is defined as including every interest in land, whether rent paying or not, save and except an estate as defined in the Act.

Coming now to the *kabuliyats*, reference may first be made to exhibit A1, of which a translation has been placed before us. This document is described as a *meyadi ijara kabuliyat* (*i.e.*, for a fixed term) executed in favour of Bhupalchandra Ray Chaudhuri (plaintiff in this case) in respect of a *hat*, and the executant binds himself to pay Rs. 190 annually as land tax (rent) for the land of the *hat*, and Rs. 3,260 annually as license fee for realising tolls of the *hat*, *i.e.*, to pay a total *jama* of Rs. 3,450 *per annum*. Certain conditions are then stated, breach of any of which will entail the right of the lessor to re-enter into possession of the land. The liability of the lessee to pay the fixed road cess of the *hat* as per valuation is mentioned, and schedules are annexed giving the boundaries of the land, and the instalments of the rent payable.

We are informed that a number of *kabuliyats* were filed in the case, and that the one just referred to above (exhibit A1) is peculiar in this respect that it is the only one in which any distinction has been made between the amount payable as rent of the land, and the amount paid as annual license fee for realising tolls. In the other *kabuliyats*, we are informed, the total *jama* has been given as a lump sum without any such distinction being made. This apparently was the form of *kabuliyat*, which had hitherto been used, an example of which is exhibit A, executed at the settlement of 1920, in which the total annual *jama* is stated to be Rs. 3,400.

It may be mentioned here that, so far as the ferries and *khutagaries* are concerned, the case is not pressed on behalf of the appellant. It is necessary, therefore, to consider only the question of the *hat*.

It is contended, on behalf of the appellant, that, having regard to the terms of the *kabuliyats* and to

the relevant sections of the Cess Act, and in particular to section 6 of the Act, the appellant is entitled to levy cess upon these collections, both under the first part of section 6 as well as under the second part thereof. The *kabuliyats*, it is argued, clearly indicate that they give a right to the use and occupation of the land, and the assessment should, therefore, be upon that basis. The distinction made in exhibit A1 between the annual rent and the license fees is, it is urged, merely a device for the purpose of evading the tax. In any view, however, even if the first part of section 6 does not apply, the appellant, it is contended, is entitled to realise the cess under the second part of the section, as these are profits derived from the land.

In support of these contentions, reliance has been placed on a recent decision of this Court, *Secretary of State for India* v. *Sati Prasad Garga* (1), which was decided about a year after the decision of the court of appeal below in this case. In that case, where the facts were similar except that the total *jama* was stated as in exhibit A without any differentiation between the rent and license fees, it was held *inter alia* that, if any right to a piece of land is granted, and a *hat* is held thereon, the income of the *hat* is liable to be assessed with cesses, but that in the case of a mere license to hold a *hat* on a piece of land, the said income is not so assessable. Further, that where *hats* are periodically held on lands of which possession is given to *ijaradars*, who have executed *kabuliyats* in favour of the landlords promising annual *jamas* payable to the latter for the same, the income of such *hats* is liable to be assessed with cesses.

So far as the sum of Rs. 190 mentioned in exhibit A1 as rent of the land is concerned it was only faintly argued before us on behalf of the respondent that this could be treated as free from any liability to pay cess, and it was conceded that this item is covered by the decision of this Court referred to above, which is binding upon us.

(1) (1928) I. L. R. 55 Calc. 1328.

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It was argued, however, that that decision is erroneous and ought not to be followed on the ground that it is in conflict with a previous decision of this Court, *Secretary of State for India* v. *Karuna Kanta Chowdhry* (1), which followed an earlier decision *Umed Rasul Shaha Fakir* v. *Anath Bandhu Chowdhuri* (2). These two cases have been referred to and relied upon in the judgment of the Subordinate Judge in this case, *Sati Prasad Garga's* case (3), not having, as already stated, at that time been decided. It is clear that these two earlier cases are distinguishable from the case (3) decided by B. B. Ghose and Cammiade JJ. Both of those cases related to a *mela*, which was held upon the land only for a period of about one month in the year, whereas here the land is taken on lease for the purpose apparently of holding a permanent *hat* on one day or more per week. Again, in *Umed Rasul Shaha Fakir's case* (2), it was found that income-tax had been paid on the profits derived from the *mela*, and the case proceeded upon that footing, while in *Karuna Kanta's* case (1) there was an intermediate tenancy which was liable to pay the cesses.

Both these cases were considered by B. B. Ghose J. in his judgment in *Secretary of State* v. *Sati Prasad Garga* (3).

The real question, as stated by that learned Judge, was whether the grant in question was a mere license, or a lease of property, and the same question arises here. The learned advocate for the respondent would have it that the *ijaradars*, as their name implies, are mere licensees, and that they cannot be assessed at all events in respect of the Rs. 3,260 representing license fees. But the matter cannot be determined merely by reference to the expressions used in the *kabuliyats*. Looking to the substance of the matter, and upon a true construction of these documents, there seems to me to be no doubt that they come within the purview of the first part of section 6 of the Cess Act. That

(1) (1907) I. L. R. 35 Calc. 82. (2) (1901) I. L. R. 28 Calc. 637.
(3) (1928) I. L. R. 55 Calc. 1328.

indeed was the conclusion of both the learned Judges in *Secretary of State for India* v. *Sati Prasad Garga* (1), although it was held that the second part of the section would also apply. That decision, as I have already said, is binding upon us.

With regard to the *kabuliyat*, exhibit A1, I do not think that the distinction, which is sought to be made therein between the portion of the money paid as rent and the portion paid for license fees, can make any difference, since it seems to be reasonably clear that this is merely a device for the purpose of evading payment of the cess. On a true construction of the *kabuliyats*, it seems plain that they are in fact leases of the land with the object of using it for holding a *hat* thereon, and further that the amount realised, which is described in most of these documents as the annual *jama* or rent, is profit derived from the land, and as such is liable to pay cess.

In the result the appeal succeeds in part and the assessment in respect of the income derived from the *hat* must be held to be valid and legal. The judgment and decree of the court of appeal below, in so far as it has granted an injunction restraining the realization of cesses from the defendant upon income derived from this source, are, accordingly, set aside. The amount of the refund, which has been decreed, *viz.*, Rs. 450-12, will also be modified in accordance with this decision, and the plaintiff will obtain a refund only of such portion of this sum as has been paid on account of the ferries or *ghats*, and the *khutagaries*.

The Secretary of State for India is entitled to his costs throughout, in proportion to his success.

MITTER J. I agree with my learned brother that this appeal should be allowed to the extent indicated in his judgment. The matter in controversy turns on the question whether the *kabuliyats*, of which exhibit A (which is most favourable to the respondent) is a type, is to be regarded as a lease or demise of the *hat* or a mere license to collect tolls. I have no doubt,

(1) (1928) I. L. R. 55 Calc. 1328.

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on the construction of exhibit A, that, so far as the sum of Rs. 190 is concerned, it is distinctly stated that it is *rent* for the *hat* and it has not been seriously disputed that that sum is assessable to cess. The larger sum of Rs. 3,260 has been stated as license fee for realising tolls of the *hat*. Whatever the form of the statement may be, what is the substance of it? It is nothing less than the *jama* or rent paid for the occupation of the *hat*. That is apparent from the document itself which, after differentiating between land tax or rent for the land of the *hat* and the license fee, proceeds to describe the aggregate sum as "total "*jama* of Rs. 3,450 *per annum*," and further proceeds to state that "the *jama* proposed by me being the "highest one, you have made settlement of the said "*hat* to me for a term of three years, *i.e.*, from "1330 B. S. to 1332 B. S., fixing the annual *jama* at "Rs. 3,450. I on my part execute this *kabuliyat* and "agree to pay the *jama* fixed as *per kists* given below "at the *sadar kachari* of the estate." It is therefore abundantly clear that, notwithstanding the differentiation between rent and license fee, the aggregate of the two has been regarded as the *jama* or rent. The true test in cases of this kind is to find out whether the respondent has granted sufficient control over the land of the *hat* so as to make the instrument (*kabuliyat*) a demise and not a mere license. It is argued for the respondent that sufficient reservations have been made in favour of the respondents, which shows the respondents did not part with the real control of the *hat*, but notwithstanding such restrictions or reservations I think the executant of the *kabuliyat* (exhibit A) has sufficient control over the *hat* during the period of the lease so as to make him a lessee in the real sense of the term. I refer to the following provisions of the *kabuliyat* which justifies this view: (1) I shall pay the aggregate *jama* of Rs. 3,450; (2) I shall maintain the boundaries of the *hat* as of old; (3) I shall keep the entire area of the *hat* always clean at my own cost; (4) I shall not be competent to raise any plea for the abatement of

the *jama* or to escape from the duty of payment of rent and relinquish the *ijara mehal* during the fixed term. (5) After the expiry of the term, I shall hand over possession of the *hat* to you without any objection; (6) I execute this *meyadi ijara patta* for this *hat* out of my own free will. The restrictions referred to are that the lessee would not be able to make alterations in the position or place of temporary shopkeepers of the *hat* without the lessor's permission and not to interfere with the rent of any permanent shop plot or for the lands of permanent tenants, which shall be realised separately by the lessor. Notwithstanding these restrictions, I am of opinion that the position of the executant of the *kabuliyat* was that of a lessee. I am supported in this view by a decision of the House of Lords in the case of *Glenwood Sumber Co., Ltd.* v. *Phillips* (1). The following observations are pertinent to the present controversy :—

"In the so-called license itself it is called "indifferently a license and a demise, but in the Act "it is spoken of as a lease, and the holder of it is "described as the lessee. It is not, however, a question "of words but of substance. If the effect of the "instrument is to give the holder an exclusive right of "occupation of the land though subject to certain "reservations or to a restriction of the purposes for "which it may be used it is in law a demise of the land "itself."

I also agree with my learned brother that the *kabuliyat* in the present case falls within the purview of the decision of B. B. Ghose and Cammiade JJ. in *Secretary of State for India* v. *Sati Prasad Garga* (2). It is not necessary to decide in the present case whether the cess is leviable under the second part of section 6 of Bengal Act IX of 1880. In other words, it is not necessary to decide whether profits from the *hat* are profits from immovable property within the meaning of the second part of section 6. Indeed Mr. Justice B. B. Ghose, one of the learned Judges who

(1) [1904] A. C. 405.

(2) (1928) I. L. R. 55 Calc. 1328.

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decided the case of *Secretary of State for India* v. *Sati Prasad Garga* (1), refused to express a final and definite opinion upon it.

It has, however, been contended that this decision (1) of Mr. Justice B. B. Ghose is inconsistent with the decision of the Full Bench in the case of *Secretary of State for India* v. *Karuna Kanta Chowdhry* (2). I think there is no efficacy in this contention, for an examination of that case will show that all that was granted to the *fakirs* by the landlords was the right to hold the fair annually within the limits of the estate of the landlord. It will show that the *fakirs* or their *ijaradars* had no exclusive interest in the land on which the fair was held, the land having been admittedly included in the holding of occupancy *raiyats*. The following observations from the judgment of Mr. Justice Ashutosh Mookerjee in the said Full Bench case will at once bring into prominence the distinction between that case and the present case or the case of *Secretary of State for India* v. *Sati Prasad Garga* (1): "In determining whether "a transaction was a lease or a mere license, the "substance of the agreement must be considered, more "than the words: [*Smith* v. *Overseers of St. Michael*, "*Cambridge* (3)]. If we apply these principles to the "facts of the case before us, what is the position of the "parties? The lands on which the fair was held "during 20 days in the year, were all comprised "in the holdings of agricultural tenants. The "legal possession was in them. The *fakirs* could "not acquire by any grant from the landlord an "interest in the lands in supersession or limitation of, "or derogatory to, the interest of the cultivators. The "*zemindar* granted them a right to hold the fair. "This right they could not exercise, if the agricultural "tenants objected. Substantially, they did not and "could not acquire any right to the possession of the "land. They could hold the fair only by consent or "acquiescence of the cultivators. It is, therefore,

(1) (1928) I. L. R. 55 Calc. 1328.
(2) 1907) I. L. R. 35 Calc. 82.
(3) (1860) 3 E. & E. 383 (390); 121, E. R. 486 (489).

"impossible to say that they acquired any interest in "the lands. Much less can it be said that the persons "who attended the fair and sold animals, goods or "articles of merchandise, were in any sense tenants of "the *ijaradars*. They had obviously no interest in the "land. They occupied or erected stalls or booths to "store their goods and to sell them, and paid what was "nothing more or less than a toll to the *ijaradars* of "the *fakirs* and the amounts paid in respect of the "shops could not fall within the description of " 'annual value of the land'."

It is obvious that the facts of the present case are essentially different. Here the land of the *hat* is leased for a term; an aggregate rent is payable in respect of the same; the control of the *hat* was in the lessees subject to certain restrictions and reservations in favour of the lessor. There was in the present case a transfer of an interest in land and therefore the sum payable to the lessor—call it *jama* or call it license fee—was "rent" payable to the lessor.

In this connection I may also refer to the provision in the *kabuliyats* by which the lessee agreed to pay the cess if levied. I refer to this only to show that the justice of the case lies on the side of the appellant.

Decree modified.

G. S.