

APPELLATE CIVIL.

Before Patterson J.

CORPORATION OF CALCUTTA

v.

SUSHEEL KUMAR GHOSH.*

1937

Feb. 25, 26.

Municipality—Consolidated rate—Owner out of possession—Occupier's share, if recoverable from owner—Calcutta Municipal Act (Ben. III of 1923), s. 157.

The owner of a land or building, who is out of possession, is not liable to pay the occupier's share of the consolidated rate under the Calcutta Municipal Act for the period during which he is out of possession.

In order to bring into operation s. 157, the only section of the Calcutta Municipal Act under which the entire consolidated rate can be levied from the owner, the plaintiff should show that the premises in question are ordinarily occupied by more than one person holding in severalty (or are valued at less than Rs. 200), and the allegation must be expressly made in the plaint.

APPEAL FROM APPELLATE DECREE by the plaintiff.

The facts of the case and the arguments in the appeal are sufficiently stated in the judgment.

Krishna Lal Banerji for the appellant.

Narendra Nath Chaudhuri for the respondent.

Cur. adv. vult.

PATTERSON J. This is an appeal by the plaintiff and arises out of a suit for recovery of taxes from the defendant, the plaintiff being the Corporation of Calcutta, and the defendant being the owner of certain premises situated within the town of Calcutta. The suit was for both the owner's and the occupier's share of the taxes for eight quarters, namely, from the 3rd quarter, 1929-30, up to and including the 2nd quarter, 1931-32. The existence of the arrears of taxes was

*Appeal from Appellate Decree, No. 619 of 1935, against the decree of B. M. Mitra, Second Additional District Judge of 24-Parganás, dated Dec. 18, 1934, modifying the decree of Kiran Kumar Bhattacharjya, Additional Munsif of Alipore, dated May 12, 1934.

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not disputed, but the defendant denied liability on various grounds, and especially with regard to his liability for the first five quarters during which period he was admittedly out of possession. He had purchased the premises as far back as 1926, but did not obtain possession till November 29, 1930, and then only as a result of a prolonged litigation with some at least of the persons who, during this period, were in actual possession of the premises in question. The trial Court had little difficulty in coming to the conclusion that the defendant was liable for the *owner's* share of the taxes for the whole of the period in suit, and the defendant's liability in this respect was not challenged in appeal, nor has it been called in question in this Court.

The main question canvassed before both the Courts below was whether the defendant was liable to pay the *occupier's* share of the taxes for the period during which he was out of possession, but curiously enough the question of the defendant's liability to pay the occupier's share of the taxes during the period when he *was* in possession does not appear to have been raised in either of the Courts below, and both the Courts below have found that the defendant is liable to pay not only the owner's share but also the occupier's share in respect to that period. As regards the period during which the defendant was *out* of possession, the trial Court, on a consideration of the various sections of the Calcutta Municipal Act bearing on the question, held that the defendant was liable for the occupier's share of the taxes for that period as well. The lower appellate Court, however, modified the decree of the trial Court to this extent that the defendant was held not to be liable for the occupier's share of the taxes for the period he was out of possession. Hence the present appeal by the Corporation.

The only section of the Calcutta Municipal Act under which the entire consolidated rate can be levied from the owner of the premises is s. 157, but in order

to bring that section into operation in the present proceedings it is necessary that the plaintiff should show that the premises in question are ordinarily occupied by more than one person holding in severalty. The plaint contains no such allegation, nor is any reference made to s. 157. The written statement too makes no reference to the applicability of s. 157, but raises the question of the owner's liability to pay the occupier's share of the taxes in another form, the contention in paragraph 13 of the written statement being that the Corporation not having realized the taxes from the persons whom they recognized as owners and knew to be occupiers, prior to the defendant having obtained possession through the Court, were debarred from realizing the said taxes from the defendant. Although the question of the applicability of s. 157 was not raised by the pleadings, and although no issue was framed in this connection, there *does* appear to be a certain amount of evidence tending to show that the premises were in fact occupied by more than one person holding in severalty, and the trial Court, although it did not record any clear finding on the point, *does* appear to have been of the opinion that s. 157 was applicable, and indeed no decree in respect of the occupier's share of the taxes could have been passed unless that Court was of that opinion.

In the petition of appeal to the lower appellate Court, the point was taken that the Court below was wrong in holding that the premises were held in severalty, and that the defendant was liable to pay the occupier's share of taxes, but this point does not appear to have been argued before that Court, and no finding on the point was recorded. The appeal appears to have been pressed mainly with regard to the defendant's liability to pay the occupier's share of the taxes for the period during which he was out of possession, and not with regard to the subsequent period, after he had obtained possession. This contention was acceded to by the lower appellate

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Court, but the judgment of that Court is certainly open to the criticism that it proceeded rather on equitable grounds, instead of on a strict application of the provisions of the statute to the ascertained facts.

The learned advocate for the appellant has, however, attacked the judgment of the lower appellate Court not so much on the ground that it is based at least to some extent on equitable considerations, but on the ground that the lower appellate Court was wrong in holding, as it appears to have held, that the provisions of s. 157 could not be invoked, by reason of the fact that the Corporation had not made out a case based on that section in their plaint. On behalf of the appellant it is argued, although it was nowhere alleged in the plaint, that the premises in question were ordinarily occupied by more than one person holding in severalty, and although the plaint contains no specific reference to s. 157, nevertheless the fact that the occupier's share of the taxes was sought to be realized from the owner in addition to the owner's own share was a sufficiently clear indication of the fact that the Corporation's claim in respect of the occupier's share was based on s. 157. It is further contended on behalf of the appellant that, having regard to the previous correspondence and to the evidence adduced at the trial, the defendant had sufficient notice of the basis of the Corporation's claim in respect of the occupier's share of the taxes.

I am unable to accept these contentions, and I am of opinion that the lower appellate Court was right in refusing to allow the provisions of s. 157 to be invoked by the Corporation. Section 157 only comes into operation if certain facts are proved, and those facts *ought* to have been, but *were* not, clearly indicated in the plaint. The fact that some evidence bearing on the question of occupation by more than one person holding in severalty was adduced at the trial is not, in my opinion, sufficient to remedy this

initial defect, more especially as some at least of the persons in occupation of the premises were persons holding not in severalty but jointly, and were moreover the persons who had set up a title adverse to that claimed by the defendant, and against whom the defendant ultimately obtained a decree. It has, on the other hand, been pointed out on behalf of the respondent that in the view of the matter taken by the lower appellate Court, the Corporation was properly speaking not entitled to recover the occupier's share of the taxes from the owner, even in respect of the period that elapsed after the owner had obtained possession. The lower appellate Court has, however, allowed the decree of the trial Court to stand in respect of that period, and it has been suggested on behalf of the respondent that this is a case in which relief should be given to the respondent under the provisions of O. XLI, r. 33 of the Code of Civil Procedure. I am, however, not prepared to accede to this request as it seems to me that O. XLI, r. 33, is not applicable in the circumstances of the present case, more especially as the respondent could have, but has not, preferred a cross-appeal. As I have said already, the judgment of the lower appellate Court is in some respects open to criticism, but the only ground on which it has been seriously attacked, namely, the ground relating to the applicability of s. 157, has failed for the reasons already indicated.

The appeal, therefore, fails, and is accordingly dismissed with costs.

Leave to appeal under s. 15 of the Letters Patent is refused.

Appeal dismissed.

A. A.

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