ESHOOR DOSS v. VENKATA-SUBBA RAU.

SUBRAMANIA AYYAR, J.—I also agree in the conclusion that the plaintiff fully understood that the contract was for the payment of differences only. I have nothing to add to the reasons for this conclusion so fully stated by the late Mr. Justice Muttusami Ayyar or to the observations of PARKER, J., in his judgment. The appeal fails and should be dismissed with costs.

Branson & Branson, attorneys for appellant.

Wilson & King, attorneys for respondent.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Best.

1895. April 1, 2, 19.

EDWARD CLARKE (DEFENDANT), APPELLANT,

v.

THE CHAIRMAN, OOTACAMUND MUNICIPAL COUNCIL (PLAINTIFF), RESPONDENT.*

District Municipalities Act (Madras)—Act IV of 1884, ss. 47, 63—Land tax—Land unappropriated to buildings.

A municipal council under the Madras District Municipalities Act has no power to levy a tax on any land exceeding seven and-a-half per cent. on the annual value of such land.

The meaning of the term "lands unappropriated to any building" in Madras District Municipalities Act, section 63, clause (2) considered.

SECOND APPEAL against the decree of T. Weir, District Judge of Coimbatore, in appeal suit No. 33 of 1894, reversing the decree of A. F. Elliot, Acting Subordinate Judge of Nilgiris, Ootacamund, in original suit No. 67 of 1893.

The plaintiff, who was the Ootacamund Municipal Council, sued by its chairman to recover Rs. 559-14-0 alleged to be due from the defendant, in respect of three half years ending the 30th September 1893, on account of a tax imposed under the Madras District Municipalities Act, section 63, clause (2). The defendant denied that the land in question was unappropriated to any

* Second Appeal No. 1738 of 1894.

building, and claimed that he was only liable to assessment in respect of his land under sections 47 and 50.

The Subordinate Judge held that the lands in question were not unappropriated to any building within the meaning of the Act and dismissed the suit.

The District Judge reversed the decree of the court of first instance and passed a decree as prayed, holding that the lands in question were unappropriated to any building, and that the imposition of the tax was not *ultra vires*. As to the first point he expressed the opinion that the expression "appropriated to buildings" signified "set apart for the use and enjoyment of the buildings."

The defendant preferred this second appeal.

Mr. *G. P. Johnstone* for appellant.

Mr. *J. G. Smith* for respondent.

COLLINS, C. J.—This is an appeal from a decree passed by the District Judge of Coimbatore reversing a decree of the Acting Subordinate Judge (Mr. Elliot) of Ootacamund.

The suit was brought by the chairman of the Municipal Council of Ootacamund against Mr. Edward Clarke, the owner of certain lands whithin the municipal limits, called Bishopsdown and Belmont, for certain taxes levied under the authority of the Madras Act IV of 1884.

The municipal council on the 3rd of March 1892 resolved that a tax on all lands unappropriated to buildings be imposed according to area under section 63, clause (2) of the above Act, and that it be fixed for 1892-93 at Rs. 1-8-0 per acre or 4·76 pies per 80 square yards. The council allege that about 248·83 acres of the defendant's holding comes within the definition of land unappropriated to any building and therefore becomes subject to the tax of Rs. 1-8-0 per acre.

Two questions arise:—(1) Has the municipal council power to levy a tax on any land exceeding 7½ per cent. on the annual value of such land? (2) Is the defendant's 248·83 acres unappropriated land within the meaning of section 63, clause (2)?

The first question depends upon the construction of Act IV of 1884, sections 47 and 63, clause (2).

Chapter III is headed "taxes and tolls, and mode of realizing "them," and section 47 enacts that "the taxes and tolls to be "levied, for the purposes of this Act, shall be as follows":—clause (ii).—"A yearly tax on lands and buildings, not exceeding

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"7½ per centum on the annual value of such lands and buildings." Section 48 authorizes the council to raise funds with the approval of the Governor in Council from any of the sources mentioned in section 47 at a rate or rates not exceeding those specified in section 47.

Section 50 enacts that, when the municipal council shall have determined, with the approval of the Governor in Council, to levy any tax or tolls, it shall be notified in a particular manner and such tax or tolls shall be levied in the manner hereinafter provided. Section 63 is the section declaring how such tax or tolls shall be levied; it enacts that if the municipal council notify, under section 50, that an annual tax shall be levied on buildings and lands, the chairman shall impose such tax at the rate specified in such notification on all buildings and lands, with certain exceptions immaterial to this case.

Clause (2) states that "in the case of any lands unappropriated "to any building, or occupied by native huts, the chairman may, "subject to the approval of the municipal council, impose such "tax at an annual rate, not exceeding annas four for every eighty "square yards of such lands, in lieu of the rate specified in the "said notification."

It is contended by the plaintiff that clause (2) authorizes the chairman to impose a tax of annas four for every 80 square yards amounting, it is said, to over Rs. 15 per acre on all lands unappropriated to any building, or occupied by native huts, even though the sum levied be far in excess of the sum to be levied under the authority of section 47, clause (ii).

I think this contention cannot be supported. Section 47 limits the yearly tax on lands and buildings to 7½ per centum on the annual value of such lands and buildings. No land, therefore, can be taxed beyond 7½ per cent. on the annual value of such land.

In section 63, clause (i), the tax is to be levied on buildings and lands (the words used in section 47 are lands and buildings) and such tax shall be imposed at the rate specified in the notification under section 50.

Sub-section (2) deals with lands unappropriated to any building, or occupied by native huts, but the words in section 47 are large enough to include all land in the municipality. It may be that sub-section (2) was drafted for the purpose of enabling the municipality to deal with the waste land in the municipality in the

occupation of persons not being owners thereof, and the words "or occupied by native huts" lend some colour to the suggestion; it is to be observed, that section 64 enacts that the tax imposed under section 63 shall be payable by the owners of such "buildings "and lands" using the words in section 63, clause (1), and omitting the description in clause (2).

It would be unreasonable to hold that it was the intention of the legislature, after enacting that a tax should be levied on lands and buildings not exceeding 7½ per cent. on their annual value, to allow the chairman of the municipality to tax lands at a rate greatly exceeding the amount provided for in section 47. If the chairman taxes what is termed "lands unappropriated to any "building, or occupied by native huts" he is controlled by section 47 and in whatever sum he assesses the amount of the tax, such tax must not exceed the amount specified in section 47.

It was stated at the bar that clause (2) of section 63 remained a dead letter as far as the Ootacamund Municipality was concerned for many years and it would seem that former chairmen exercised a wise discretion in forbearing to put in force a section which undoubtedly is very difficult to construe consistently with the plain intention of the legislature as evidenced by section 47.

I am of opinion that the action of the municipality in taxing the lands of the defendant in the manner described in the plaint was *ultra vires*.

This finding is sufficient to dispose of the appeal and renders it unnecessary to consider the second ground; but I must not be taken to agree with the District Judge in his construction of the words "lands unappropriated to any building."

This appeal must be allowed and the decree of the District Judge set aside and that of the Subordinate Judge restored and the respondent must pay the appellant his costs in this and the lower Appellate Court.

BEST, J.—The question for decision in this appeal is whether the District Judge of Coimbatore is right in holding the lands in question to be "unappropriated to any building" and consequently liable to be taxed under clause (2) of section 63 of the District Municipalities Act No. IV of 1884 (Madras).

Section 47 of the Act states what "the taxes and tolls to be "levied, for the purposes of this Act, shall be" and among them is (clause (ii)) "a yearly tax on lands and buildings not exceeding

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"7½ per centum on the annual value of such lands and buildings." Section 48 authorizes the municipal council "with the approval "of the Governor in Council" to raise funds for the purposes of the Act from all or any one or more of the sources before mentioned, at a rate or rates not exceeding those specified in the last preceding section. Section 50 provides for notification of the rates at which such taxes or tolls are to be levied, and also directs that they "shall be levied in the manner hereinafter provided," *i.e.*, in section 63, clause (1), which is as follows :—"If the municipal "council notify, under section 50, that an annual tax shall be levied "on buildings and lands in the municipality, the chairman shall "impose such tax at the rate specified in such notification, on all "buildings and lands, excepting lighthouses, public piers, wharfs, "jetties," and certain other buildings and places set apart for charitable or religious purposes with which the present appeal is in no way concerned.

Clause (2) of the same section is as follows :—"In the case of "any lands unappropriated to any building, or occupied by native "huts, the chairman may, subject to the approval of the municipal council, impose such tax at an annual rate, not exceeding "annas four for every eighty square yards of such lands, in lieu "of the rate specified in such notification."

No doubt, as observed by the Judge, the tax to be imposed under this last clause is directed to be in lieu of the rate to be specified in the notification issued under section 50, but that circumstance does not warrant the conclusion that it may be in excess of the 7½ per centum on the annual value which is the maximum fixed by clause (ii) of section 47.

Clause (2) of section 63 appears to have been intended for mitigation of the tax on small holdings. It gives power to the chairman, with the approval of the municipal council, to impose on lands "unappropriated to any building, or occupied by native huts," a tax at a rate different from that sanctioned by Government as the ordinary rate to be charged on lands and buildings within the municipal limits. In this connection it is to be remarked that the remaining clause (3) of the same section directs that "the chairman shall exempt from tax under this section any "building or land, the annual value whereof is less than rupees "six if it be the owner's sole property liable to tax under this "Act."

It is unreasonable to suppose that it was intended to confer on the chairman and councillors without the sanction of Government (such sanction not being provided for in clause (2) of section 63) the power of assessing lands at a higher rate than that sanctioned by the Governor in Council under section 48 which happens in the case of the Ootacamund Municipality, the respondent in the present case, to be the maximum rate chargeable under the Act, namely, 7½ per cent.

If the above view of clause (2) of section 63 is correct, as I think it is, it is not very material for the purposes of taxation under the Act whether the plaint lands are held to be, or not to be, "appropriated" to the houses to which they respectively belong; for, under clause (1) of the same section, both buildings and lands are chargeable with the tax at the rate notified under section 50, which, as already observed, is in this particular municipality the highest possible under the Act. But in my opinion, the land which forms the compound of a house and is let with the house when the house is let, is appropriated to that house, and the mere fact of the owner obtaining profit therefrom by selling laterite and granite quarried from such land, or the milk of cattle grazed thereon, or firewood obtained from trees grown on the land, does not render the land unappropriated to the buildings; nor will the fact of a portion of the land being planted with tea necessarily make it land unappropriated to the house. In the present case, however, it is admitted that 15 acres of the Belmont property, which is cultivated with tea are reserved when the house is let; and of the Bishopsdown property, some 5 acres are admittedly leased to tenants separately. These portions may be held to be no longer appropriated to the buildings called respectively 'Belmont' and 'Bishopsdown,' but the other lands cannot be so considered merely because, instead of using them as pleasure grounds, the owner utilizes them for the purpose of grazing cattle, &c., with a view to pecuniary profit. If, in consequence of the profit thus derived, the annual value of the lands is enhanced, it is open to the municipality to assess the land at such enhanced value, but that is no reason for taxing it under clause (2) of section 63 at a rate higher than is permissible under the Act.

I would therefore allow this appeal, and, setting aside the decree of the lower Appellate Court, restore that of the Court of

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First Instance, and direct the plaintiff to pay defendant's costs throughout.

Barclay, Morgan & Orr, Attorneys for respondent.

APPELLATE CIVIL.

Before Mr. Justice Best and Mr. Justice Subramania Ayyar.

1859. Feb. 14, 19.

PULLAMMA, (DEFENDANT No. 6), APPELLANT,

v.

PRADOSHAM AND OTHERS (PLAINTIFF'S HEIRS AND DEFENDANTS NOS. 7, 8 AND 9), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *ss.* 280 to 283—*Limitation Act—Act XV of* 1877, *sched. II, art.* 11—*Mortgage.*

Land having been granted to several persons jointly, disputes arose among them with reference to its allotment. The disputes having been settled by arbitration, one of the grantees sold his share to the plaintiff. Before the arbitration, another of the grantees mortgaged 7 acres of the land to A, who did not become a party to the arbitration. A subsequently obtained a decree on his mortgage and proceeded to execute it by attachment. The plaintiff intervened in execution, but in 1884 the Court passed an order stating that the plaintiff's land was not attached, and in fact his possession then remained undisturbed. A subsequently executed his decree and purchased the land brought to sale by the Court. The plaintiff's possession was disturbed under colour of this purchase, and he now sued in 1889 to recover the land sold to him:

Held, (1) that the order of the 1st of March 1884 was not an order within the meaning of Civil Procedure Code, section 283, and accordingly that the suit was not barred by the one year's rule of limitation;

(2) that the plaintiff's vendor had, after the arbitration, a good title against both A and his mortgagor, and that the plaintiff was entitled to recover.

SECOND APPEAL against the decree of G. T. Mackenzie, District Judge of Kistna, in appeal suit No. 546 of 1891, affirming the decree of O. V. Nanjundayya, District Munsif of Masulipatam, in original suit No. 685 of 1889.

Suit to recover certain land. Certain persons, including the plaintiff's vendor and defendant No. 5, had certain lands allotted to them and disputes arose among them with regard to the allotment. During the continuance of these disputes defendant

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* Second Appeal No. 799 of 1893.