APPELLATE CIVIL.

Before Khaja Mohamad Noor and Luby, JJ.

1934.

September, 27.

SOURENDRA MOHAN SINHA

v.

SECRETARY OF STATE FOR INDIA.*

Cess Act, 1880 (*Beng. Act IX of* 1880), *section* 6—*collections made from persons who resort to* hat *on zamindar's land, whether is assessable to cess—question whether such sums are rent is a mixed question of law and fact.*

Whether a particular sum of money collected from persons who use a zamindar's land is or is not rent is a mixed question of law and fact.

Collections made from persons who come to carry on business on the zamindar's land are neither rent nor money paid for use and occupation of the land. Such persons do not hold land under the landlord and are not lessees. Therefore, money received from such persons does not come within the definition of " annual value of the land " in the Cess Act, 1880, and is not assessable to cess under section 6 of the Act.

Secretary of State for India v. *Karuna Kanta Choudhry*(1) and *Secretary of State for India* v. *Ramasray Singh*(2), followed.

Umed Rasul Shaha Fakir v. *Anath Bandhu Choudhuri*(3) and *Manindra Chandra Nandi* v. *The Secretary of State for India*(4), referred to.

Appeal by the plaintiffs.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

P. R. Das and *J. C. Sinha*, for the appellants.

Government Pleader, for the respondent.

* Appeal from Appellate Decree no. 162 of 1931, from a decision of Ram Chandra Chaudhury, Esq., Additional District Judge of Bhagalpur, dated the 3rd November, 1930, affirming a decision of Syed Muhammad Ibrahim, Munsif of Bhagalpur, dated the 22nd December, 1928.

(1) (1907) I. L. R. 35 Cal. 82, F. B.
(2) (1933) I. L. R. 12 Pat. 701.
(3) (1901) I. L. R. 28 Cal. 637.
(4) (1907) I. L. R. 34 Cal. 257.

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KHAJA MOHAMAD NOOR, J.—This is an appeal against a decree of the District Judge of Bhagalpur confirming that of the Munsif of that place whereby the appellants' suit for a declaration that a certain assessment of local cess was illegal and ultra vires and for other incidental reliefs was dismissed.

The facts are these. The plaintiffs are the sixteen-annas proprietors of lakhiraj Punsia bearing tauzi nos. 1183C and 1044B in thana Amarpur. It appears that a *hat* is held twice a week on their land, and as is usual collections are made on their behalf from traders who resort to the *hat* for selling goods. The Revenue authorities have included the income so derived in assessing the cess on the plaintiffs. The plaintiffs instituted the suit for a declaration that under the law the assessment was ultra vires as no local cess could be assessed on that income and asked for a refund of Rs. 9-15-0 which they had paid by way of local cess and also for an injunction against the defendant not to realise the assessed amount in future.

Both the Courts below have dismissed the suit on two grounds: first, that the notice served upon the defendant under section 80 of the Code of Civil Procedure was at variance with the plaint and, therefore, insufficient; and, secondly, that the assessment was not ultra vires. The plaintiffs have appealed. The learned Government Pleader has supported the decrees of the Courts below on these grounds.

I take up the second point first. The learned Government Pleader has contended that there is a finding of fact that the assessment was on the ground rent and not on the profit from the *hat*. I, however, do not think that there is any finding of fact that the assessment was really on the ground rent or that any ground rent was being realised by the plaintiffs from

the traders who resorted to the *hat*. Had there been any such finding it would have been vitiated on account of the fact that there is not an iota of evidence on the record to support that finding. The only evidence on the record is that of the plaintiffs' circle officer who has described the nature of the collection made and this shows that it is not rent. People go to the *hat*, some of them spread their merchandise on the ground and sell it; others roam about in the *hat* and hawk the articles which they have for sale. Both classes of traders pay some money to the plaintiffs for carrying on their business on their land. The Courts below have used the expression 'ground rent' simply because the Revenue authorities have done so. In fact, the plaintiffs themselves both in the notice and in the plaint admitted that the land was assessable to ground rent. Whether a particular sum of money collected from persons who use a zamindar's land is or is not rent is a mixed question of law and fact. It is not disputed, and the evidence is one-sided, that traders come and sell their commodities on the land and pay something to the plaintiffs and that the same set of traders do not necessarily come on every *hat* day and there is not even a suggestion that any land is settled with them for any period of time. The question, therefore, is whether such a payment is rent. If it is not rent under the law, it will not become so because the Revenue authorities have treated it as such. Even the defendant in his written statement did not claim that the assessment was on ground rent. He simply raised a question of law that *hat* income was profit from immoveable property and as such assessable.

The question whether collections from a *hat* are assessable to cess has been the subject-matter of judicial decisions in the Calcutta High Court as well as in this Court. First of all I refer to *Umed Rasul Shaha Fakir* v. *Anath Bandhu Chowdhuri*(1). There

(1) (1901) I. L. R. 28 Cal. 637.

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the appellant had obtained from the plaintiff and pro forma defendants a right to hold a fair on certain land once a year when there was no crop upon it. The Collector assessed his profit to cess and realised this from the plaintiff. The plaintiff in his turn sued the appellant to recover the amount from the appellant. The question raised was whether the income derived from a *mela* was assessable to cess. It was held that it was not. The plaintiff of that suit relied upon rule 33 of the Bengal Board of Revenue. It ran thus :—

" The benefit, which a zamindar receives from a fair or *hat* in the shape of payments for the occupation of land by dealers or traders, is assessable to cess. When a fair or *hat* is held on land appertaining to an estate, it is to be valued under Chapter II of Bengal Act IX of 1880 as part of the estate, to which it belongs. But when, as in some cases in the Darjeeling district, a fair or *hat* is held on land reserved solely for such purposes, and which does not form part of an estate, it should be valued under Chapter V of the Act under section 79; the annual valuation of such land is not necessary.

Note.—Profits derived from the rent of shops and other miscellaneous revenue derived by zamindars from *hats* and fairs should not be excluded from the cess valuation of the land on which they are situated; valuation should not, however, be made on trade profits or on benefits derived by traders (Board's cess proceedings of the 12th November, 1898, no. 2, collection 10, file 96 of 1897).

Their Lordships held the rule to be ultra vires. It is to be noticed that this Bengal rule corresponds to Bihar and Orissa rule no. 56 (rule 51 in the paper book is a mistake). There is, however, some difference, the most important being that instead of the use of the words " benefit which the zamindar receives " in the Bengal rule, the words " Rent on Revenue " are used in Bihar and Orissa rule. But it is obvious that by the change of name the nature of the thing is not altered. The decision was, however, based on the proposition that as the *mela* income was assessable to income-tax it was not assessable to cess. This view was not accepted in a later case in connection with mines in *Manindra Chandra Nundi* v. *The Secretary of State for India*(1) where it was held that both cess

(1) (1907) I. L. R. 34 Cal. 257.

and income-tax can be levied on royalties from mines and was disapproved by a Full Bench in *Secretary of State for India* v. *Karuna Kanta Chowdhry*(1). The Full Bench case was of cess on income from *mela* and it was held there that the profits of *mela* were not paid by tenant to landlord, nor for the use and occupation of land, and, consequently, were not rent, and did not fall within the definition of "annual value of land" in section 4 of the Cess Act; and that an assessment of cesses made by the Collector on the basis of such profits was illegal and ultra vires. It was also held that cattle-sellers and stall-keepers who resorted to the fair were not tenants but licensees.

It is to be noted that since these decisions of the Calcutta High Court under which this province was up to the year 1911 the Cess Act has been amended for several purposes and an extensive amendment was made by the Bihar and Orissa Council in 1916 (Act I of 1916). It is a well settled principle of law that the legislature must be taken to be aware of the interpretation of the statute enacted by them by the Courts; and if they find that the interpretations by Courts of Justice are not in conformity with their intention they should amend it to bring it in conformity with their intention. The Full Bench decision of the Calcutta High Court has been mentioned in the *Note* under section 4 (*see* page 4 of Bihar and Orissa Cess Manual). Government must be taken to be aware of that decision. They have taken no step to amend the Act. The question has come up before this Court also in the *Secretary of State for India* v. *Ramasray Singh*(2). In that case the Revenue authorities assessed certain raiyats who made collections from those who resorted to Sonepur fair for carrying out trade upon their land. The question whether such collections were rent or not was specifically raised and the Bench, to which one of us was

(1) (1907) I. L. R. 35 Cal. 82, F. B.
(2) (1933) I. L. R. 12 Pat. 701.

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a member, decided that the persons who hold the *hat* and keep the cattle on the land were not lessees. They were mere licensees who had been granted license to come upon the land and to sell their cattle, etc. The difference between a lessee and a licensee has been pointed out in the case of *Khudan Lal* v. *Nafizuddin*(1), and the Full Bench decision of the Calcutta High Court in *Secretary of State for India* v. *Karuna Kanta Chowdhry*(2) was followed. Kulwant Sahay, J., who was one of the members of the Bench in *Secretary of State for India* v. *Ramasray Singh*(3) held that what was realised on account of sale of goods in a *hat* is not rent and therefore could not be taken into account in determining the amount of assessment under sections 7, 2 and 3 of the Bengal Tenancy Act. It is obvious, therefore, from the statement of the plaintiff that he was not realising anything by way of rent. The Courts below had absolutely no basis to find if they have found that it was ground rent on which assessment had been made. Now, apart from the question of decided cases, in my opinion the law itself is very clear. Section 6 of the Cess Act of 1880 provides:

"The local cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other immoveable property, ascertained respectively as in this Act prescribed;

and the rate at which such cess shall be levied for each year shall be determined for such year in the manner in this Act prescribed:"

"Annual value" has been defined in section 4 which says:—

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

(1) (1932) 13 Pat. L. T. 648.
(2) (1907) I. L. R. 35 Cal. 82, F. B.
(3) (1933) I. L. R. 12 Pat. 701.

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The collections made from the persons who come to carry on business on land are not rent nor money paid for use and occupation of the land. They do not hold land under the landlord. Therefore, the money does not come within the meaning of 'annual value of the land' and is not assessable under section 6 of the Cess Act.

The Courts below have doubted whether the decision in *Secretary of State for India* v. *Karuna Kant Chowdhry*(1) is of any force in this province in view of the Board's rule no. 51. The Board had been given power of making rules under section 106 of the Cess Act. This section does not authorize the Board of Revenue to make that income assessable to cess which is not assessable under the Act itself. The Board have no power to add to the Act or substract anything from it. The rules must be rules for the purposes of carrying out the Act. The simple question is whether such income, which the plaintiffs are getting admittedly from the *hat*, is assessable to cess under the Act itself. If it is so, the matter ends there. If it is not, it cannot be made assessable by any order of the Board of Revenue. The utmost that can be said is this: that the Board of Revenue have interpreted the Act to mean that such incomes are assessable. But those interpretations, however binding they may be on the Revenue authorities, are not binding on the Courts.

The next question for our consideration is whether the notice given is sufficient. The defect found is that the relief, as mentioned in the notice, does not tally with the relief claimed in the suit. The main reliefs for which the notice was given were:

"1. That it be declared that the assessment of cess upon the profits of the *Hat* in Lakhiraj Punsia is ultra vires.

2. That the cess valuation be rectified upon assessment of the land on the basis of a reasonable rent to be fetched.

5. That the order of the Board of Revenue as well as the Subordinate Courts be set aside so far as the assessment is concerned."

(1) (1907) I. L. R. 35 Cal. 82, F. B.

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It is clearly indicated that the plaintiffs wanted to be relieved from the assessment.

The learned Munsif held the notice to be invalid on two grounds: first, that Kanti Chandra Roy who gave notice was not authorized to give that notice. That point has been decided by the learned Additional District Judge in favour of the plaintiffs. The second ground was the one I have stated, namely, that the plaint did not tally with the notice. Two of such differences have been mentioned. One is that relief no. 3 of the notice is not mentioned in the plaint. Relief no. 3 of the notice is—

"That it be declared that rule 51 of the Cess Act is not applicable and if it be held to be applicable it is ultra vires."

The learned Munsif says that this does not find place in the plaint. It is obvious that this was absolutely superfluous in the notice. What section 80 requires is that the notice should contain the cause of action, etc., etc., and the relief claimed. The notice fulfils the requirements of law, and if the fact that a particular rule was ultra vires was mentioned in the notice and omitted from the plaint, the notice does not become invalid on that ground.

The next objection of the learned Munsif is that the relief (*c*) of the plaint which seeks to recover Rs. 9-15-0 and asks for an injunction is not covered by the notice. It has been held and it is obvious from the plain meaning of section 80 of the Code of Civil Procedure that the notice need not be practically a copy of the plaint. The notice should be such as to give substantial information to the Government, the basis of the claim and the relief which the plaintiffs seek. It is obvious from the notice taken as a whole that the plaintiffs wanted to have it declared by the Court that the assessment of cess on their zamindari on the income of the *hat* was ultra vires and that the relief which they wanted to seek was that they should be relieved of that assessment. It was not incumbent

upon the plaintiffs to give in detail all the forms in which they would seek the relief. Two paragraphs of this notice, in my opinion, were sufficient to give the defendant all the information which section 80 requires a plaintiff to give, namely, reliefs nos. (1) and (5) as given in the notice. In the suit the plaintiffs want, apart from the declaration of the illegality of the assessment, an injunction against the defendant, not to realise that cess and this is incidental to the declaration. In my opinion the plaint is substantially the same as the notice. It was perhaps realised by the plaintiffs that the Civil Court could not set aside the order of the Revenue authorities, but could only stop the defendant from realising the cess. Instead of seeking the relief exactly in the form in which it was mentioned in the notice, the plaintiffs have sought it in the form in which it can be given by a Civil Court.

There is, however, one matter which can be said to be not covered by the notice, namely, the prayer for refund of Rs. 9-15-0. I find no authority that for this addition in the plaint which was not covered by the notice, the entire suit of the plaintiffs should be dismissed. It was open to the plaintiffs to amend their plaint at any stage and proceed with the suit without a prayer for refund. As a matter of fact, we are asked to strike out from the prayer portion so much of it as it relates to the refund of Rs. 9-15-0. I would direct that this be done.

The result is that the appeal is partly allowed, and the plaintiffs' suit is decreed. They will get all the reliefs which they have claimed, except the relief which I have ordered to be struck out. The defendant will bear the costs of the suit throughout.

LUBY, J.—I agree.

Appeal allowed in part.