APPELLATE CIVIL.

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, and Mr. Justice Carr.

1926
May 14

SOORATEE BARA BAZAAR CO., LTD.
v.
MUNICIPAL CORPORATION OF RANGOON.*

City of Rangoon Municipal Act (Burma Act VI of 1922), s. 80—Basis and mode of rating bazaar shops.

The method of assessment of bazaar property is to determine the rent which a hypothetical tenant would pay for such property. In making his offer for renting on lease, such tenant would calculate the gross rent he would receive and then make allowances for (*a*) empty stalls, bad debts, (*b*) cleaning protecting and collection charges, (*c*) taxes, (*d*) profit and loss arising from the undertaking.

In assessing the property in question it was proper to deduct from the gross rents, license-fees, directors' commission, lighting charges, proportionate cost of establishment, interest on the capital required by a hypothetical tenant, and his reasonable profit, and the occupiers' taxes (lighting, conservancy and water taxes amounting to 16½ per cent. of the rental) but not the general tax (7 per cent.) payable by the landlord.

Sooratee Bara Bazaar Co., Ltd. v. *The Municipal Corporation of Rangoon*, 3 B.L.J. 221—*referred to.*

Ormiston—for Appellants.

N. M. Cowasjee—for Respondents.

RUTLEDGE, C.J., AND CARR, J.—This is an appeal from a judgment of the then officiating Chief Judge of the Small Cause Court of Rangoon affirming the assessment made by the Commissioner of the Corporation in respect of the Sooratee Bara Bazaar Blocks A, B, C, D and E.

The judgment appealed from affirms the order of the Commissioner for the reasons given by him; so we have to fall back upon that order to appreciate the several claims made by the appellants that the order is wrong.

* Civil Miscellaneous Appeal No. 153 of 1925.

1926

SOORATEE BARA BAZAAR CO., LTD. v. MUNICIPAL CORPORATION OF RANGOON.

RUTLEDGE, C.J., AND CARR, J.

On page 2 of his order the Commissioner sets out the principle on which he bases the assessment :—"The method of assessment adopted is to determine the amount of rent which would be paid by a 'hypothetical tenant' for the Suratee Bara Bazaar Company's property. If we consider a 'hypothetical tenant' taking the bazaar on lease he would first of all, in making his offer for renting the property, calculate the total gross rent which he would receive. He would then make allowances for :—

(*a*) Stalls, which would become empty in the ordinary course of things and be vacant before being relet, and also for bad debts and irrecoverable rents, such as constantly occur from time to time.

(*b*) He would then have to consider the necessary expenses which he would incur in the way of cleaning, protecting, etc., the bazaar, the cost of collecting rents and so on.

(*c*) He would then have to consider other necessary outgoings in the way of taxation.

(*d*) He would then have to consider how much actual profit he would expect to put into his own pockets to reward him for the trouble of managing the business and incurring the risk of loss, which is inseparable from all business transactions.

"The preceding paragraph is quoted *verbatim* from the judgment of the High Court in Civil Miscellaneous Appeal No. 44 of 1923. I assume therefore that this method of valuation for assessment purposes has the approval of the High Court. In practice the method comes to a calculation of the gross rents recoverable from this property and of the amount which must be deducted from the gross rents in order to arrive at the valuation of the

property for assessment purposes. My task has been much simplified by the fact that the Bazaar Company has placed all its books and records at the disposal of the Assessor and the figures of gross rents, etc., have been agreed upon. The only thing therefore left for me is to consider the principles involved and what deductions from the gross earnings should be allowed. I will first state those deductions which I am prepared to allow. These are :—

	Rs.
(1) License-fee paid to the Corporation	... 13,900 per annum
(2) Directors' commission	... 15,946 per annum
(3) Lighting	... 5,332 per annum."

In the argument of the case this part of the Commissioner's order was not attacked.

The first point on which the assessment is attacked is with regard to the allowance for the cost of establishment. The appellants claimed under this head a sum of Rs. 48,800. The Commissioner has found that the appellants are the largest individual owners of house property in Rangoon ; that they paid about 1½ lakhs of rupees per annum municipal taxes in respect of this house property as apart from the bazaar ; that, of the appellants' staff, the Secretary, the Head Clerk, the Cashier, the Assistant Clerk, the Typist and two Accounts Clerks deal with the appellants' house property as well as the bazaar property, and that the Assessor's deduction of 25 per cent. from the gross cost of establishment on account of the house property was reasonable. He consequently allowed under the head of " Cost of Establishment " Rs. 45,350 instead of Rs. 48,800. Since admittedly the members of the staff mentioned by the Commissioner manage and deal with a very large estate of house property, some deduction from the cost of establishment is clearly indicated. The amount deducted has not been shown to be unreason-

1926

SOORATEE BARA BAZAAR CO., LTD. v. MUNICIPAL CORPORATION OF RANGOON.

RUTLEDGE, C.J., AND CARR, J.

able; and, in any case, since a deduction ought to be made, the exact amount of that deduction is not a question of legal principle which this Court could go into in a second appeal.

The appellants claimed an allowance of Rs. 43,000, being interest at 10 per cent. on the paid up capital of the Company, *viz.*, Rs. 4,30,000. The Commissioner held that this claim was inadmissible as, in making it, the Company confused its position as owner of the bazaar and the position of a 'hypothetical tenant'. We consider that he was correct in holding that an allowance was inadmissible on this basis. He goes on, however, to hold that the hypothetical tenant requires no capital. It is difficult to conceive of a person offering to take a tenancy of a vast business like the Suratee Bara Bazaar without any capital whatever. We quite agree that cases of railways, docks and gas companies, where a tenant has to incur large expenditure on necessary stock-in-trade, tools, machinery and plant, form no guide whatever in a case like the present. It is urged that the hypothetical tenant takes over the large building with raised concrete platforms, which are let out to daily tenants at a daily rent, that these sub-tenants provide themselves with whatever furniture or apparatus may be necessary for the purposes of their trade; that the hypothetical tenant consequently does not require to expend anything in the way of fixtures, plant, or furniture, and that, as the rents come in daily, he will be able from the first day of his tenancy to meet any liabilities which he may incur. Even though the tenant may not have to incur any expenditure on furniture or stock-in-trade, we think that it is unreasonable to suppose that he could take on the tenancy of the Suratee Bara Bazaar without any capital. If a tenant had

no capital, the landlord would obviously insist on his rent being payable in advance. A small sum, in our opinion, ought to have been allowed sufficient to cover one month's rent payable in advance, and any other expenditure, such as a deposit in respect of electric light, which the tenant might have to incur ; and we think that there will have to be a remand to ascertain the amount under this head.

Intimately connected with the last point is the further objection which the appellants take, to the assessment, in that the Commissioner has taken the Directors' commission, *viz.*, Rs. 15,946 as a sufficient allowance for the profit which would be sufficient to induce a hypothetical tenant to incur the responsibility of the tenancy of the bazaar. Admittedly a hypothetical tenant, not being a philanthropist, would require a substantial inducement to make him incur a heavy responsibility. It has been pointed out that the Directors' remuneration might be taken as an equivalent of the tenant's remuneration for his personal management, and that in the Commissioner's calculation nothing has been allowed to the hypothetical tenant for his management beyond the amount allowed for cost of establishment. We think that there will have to be a remand for a finding of what, in the condition prevailing in Rangoon, would be a reasonable amount as tenant's profit to induce a hypothetical tenant to become tenant of the bazaar premises after taking into consideration reasonable remuneration for himself as manager.

The appellants claimed that an allowance of 10 per cent. should have been made on account of stalls which became empty and remained vacant for some time before being relet, for bad debts, irrecoverable rents and such other contingencies. It is admitted

1926

SOORATEE BARA BAZAAR CO., LTD. v. MUNICIPAL CORPORATION OF RANGOON.

RUTLEDGE, C.J., AND CARR, J.

that the Finance Committee, on the recommendation of the Commissioner, ordered that a deduction of 10 per cent. in regard to these contingencies shall be made on all property let in separate parts. The Commissioner has, in our opinion, quite rightly held that this order does not apply to the bazaar which is being valued on the principle of what rent would a hypothetical tenant be prepared to give for the bazaar as a going concern. The Commissioner had held that vacancies are very seldom to be found in the bazaar, and that the machinery for collecting rents works so well that the amount which has to be written off as "irrecoverable" is reduced to a minimum. It is objected on behalf of the appellants that exceptional good management should not be imputed to the hypothetical tenant, but only ordinarily reasonable management. There is no question of legal principle involved in this point. The Commissioner has made an allowance under this head; and nothing has been adduced before us to lead us to think that the amount allowed is unreasonably small.

Finally it is claimed that the deduction on account of municipal taxation should be 23½ per cent. instead of 16½ per cent. and that the method of calculation is wrong and results in a deduction of only a little more than 14 per cent. instead of 16½ per cent. Both of those questions were decided in Civil Miscellaneous Appeal No. 44 of 1923 of this Court (1) which was between the present parties. It is contended that those decisions were wrong.

We are of opinion that those decisions are correct, but think it desirable to attempt to make the reasons for them somewhat clearer.

The Commissioner's calculations up to this stage have determined the gross amount which a hypothet-

(1) (1924) 3 B.L.J. 221.

ical tenant would be prepared to pay for the premises. In addition to the rent the tenant will be liable also for certain municipal taxes. If we add taxes to the gross amount already calculated we shall *ex-hypothesi* arrive at a total greater than the tenant will pay. The rent must, therefore, be less than that gross amount by a sum equal to the amount of the municipal taxes payable by the tenant. In this case the gross amount is Rs. 58,402. The taxes payable by the tenant amount to 16½ per cent. of the rent. The problem before us therefore is—

What is the sum which with 16½ per cent. of itself added will equal Rs. 58,402 ? In another words we have to solve the equation—

Rent *plus* 16½ per cent. of rent	=	Rs. 58,402
That is rent *plus* 33/200 of rent	=	,, 58,402
Or 233/200 of rent ...	=	,, 58,402
Therefore rent ...	=	,, 58,402 × 200 ÷ 233
	=	,, 50,130.

This result agrees with that obtained by the Commissioner using the formula given in the former case.

Verifying this by working backward we find that 16½ per cent. of Rs. 50,130 is Rs. 8,271 and adding these two together we get Rs. 58,401. Fractions are, of course, neglected. On this it is clear that the method of calculation adopted is correct.

Coming now to the claim that the allowance should be 23½ per cent. we find that this is made up of the 16½ per cent. already dealt with and 7 per cent. which represents the general tax payable by the landlord. As this is not payable by the tenant there is no reason whatever why it should be taken into account in calculating the true rent from the gross amount that the hypothetical tenant would be able to pay.

In the result we remand the case with a direction that the Commissioner do proceed to determine

1926

SURATEE BARA BAZAAR CO., LTD. v. MUNICIPAL CORPORATION OF RANGOON.

RUTLEDGE, C.J., AND CARR, J.

the allowances which should be made on account of—

(i) interest on the capital required by a hypothetical tenant : and

(ii) reasonable profit of the hypothetical tenant.

The appeal thus succeeds only on two very minor points and fails on the more substantial questions. We direct therefore that the appellant do pay to the respondent ten gold mohurs as the costs of this appeal.

ORIGINAL CIVIL.

Before Mr. Justice Chari.

1927

April 29

SURATEE BARA BAZAAR CO., LTD.
v.
MUNICIPAL CORPORATION OF RANGOON.*

Authorized acts—Damage to private rights—Creation of nuisance—Negligence—Liability of damage or nuisance not inevitable—Exercise of permissive right—Performance of obligatory duty—Intention of legislature as regards harmful consequences—Exercise of option to perform statutory duty—City of Rangoon Municipal Act (Burma Act VI of 1922), Ch. 3, ss. 25 and 26 ; ss. 3, 113, 192, 205—Corporation's power to erect watercloseis—Duty not to cause nuisance—Grounds for injunction—Protection of mere amenities—Provision of compensation in an act not always a bar to suit—Corporation's liabilities and immunities.

Held, that if the legislature authorises a specific act (including repeated performances of it at different times or at different places) to be done, and if the performance of that act and of every other subsidiary act necessary for and incidental to the performance of the main act, creates nuisance or causes damage, the local body authorised to perform the act cannot be restrained by injunction nor made liable for damage except on the ground of negligence. It follows that if the act can be performed without creating a nuisance and without causing injury or damage then the local body performing the act would be liable if the act is performed in such a manner as to create nuisance or cause damage. It is a matter of construction of a legislative Act whether it merely confers a permissive right (which is optionally excercisable) on a local body or enjoins the performance of an obligatory duty. In the former case no nuisance or infringement of

---

* Civil Regular Suit No. 565 of 1926.