APPELLATE CIVIL.

Before Sir Ernest H. Goodman Roberts, Kt., Chief Justice, and Mr. Justice Dunkley.

1937
Nov. 25.

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

Municipal assessment—Cinema building—Annual rental value—Actual rent paid by tenant—Rent of hypothetical tenant—Comparative method—Correct basis of assessment—Appeal to High Court—City of Rangoon Municipal Act, ss. 80 (2), 91 (3).

The principle of assessment of a hereditament is the ascertainment of the annual rent which a hypothetical tenant might reasonably be expected to pay. The actual rent paid by an existing tenant is not the final or conclusive test. It is only *prima facie* evidence, and the special circumstances in which it is paid and in which any collateral engagements are entered into between the parties must be taken into consideration in determining what is the rent a hypothetical tenant might reasonably be expected to pay for the hereditament.

Poplar Assessment Committee v. *Roberts*, (1922) A.C. 93, referred to.

The comparative method, *i.e.* the evidence as to the assessment of other hereditaments is of little or no value when there is direct evidence as to the letting value of the hereditament whose assessment is in question.

Albert Pickard v. *Assessor of Glasgow*, (1937) S.C. 360 ; *Ladies Hosiery, Ltd.* v. *West Middlesex Assessment Committee*, (1932) 2 K.B. 679, referred to.

An appeal lies to the High Court if the correct basis of assessment applicable to the case is in dispute. But where the Judge of the Small Cause Court finds that the comparative method in respect of the building assessed is valueless, and, in arriving at a figure as the rent a hypothetical tenant would pay, he has reviewed all the material at his disposal and has considered all the terms of the lease between the parties, the High Court will not interfere with his findings.

Rafi for the Corporation. The basis of assessment of the Cinema theatre is the annual letting value which in terms of s. 80 (2) of the City of Rangoon Municipal Act is the gross annual rent for which the building may reasonably be expected to let from year to year. The

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* Special Civil First Appeal No. 66 of 1937 from the order of the Chief Judge of the Small Cause Court of Rangoon in Municipal Appeal No. 1 of 1937.

principle is referred to in *V.E.R.M. Chettiar* v. *The Corporation of Rangoon* (1). The Judge has omitted to apply the correct principle in this case ; he has only looked at the terms of the lease between the parties. The municipal assessor, on the other hand, has adopted the hypothetical tenant test and to arrive at the figure that a hypothetical tenant would pay, he has adopted the comparative method, and has also examined the terms of the tenancy between the parties. The rental value of cinema buildings in the neighbourhood was a very useful guide. *Albert Pickard* v. *Assessor for Glasgow* (2). Besides payment of the monthly rent, the lessee also undertook to pay a sum of Rs. 9,850 which was the consideration for granting a lease to the lessee. This sum is disguised rent and ought to have been taken into consideration by the Judge. The rental value of the building has also been increased by the lessor installing a new " talkie " machine. If the assessee says he was paying the sum of Rs. 9,850 for arrears of rent due by his predecessor he cannot turn round and say he was paying the sum for a new " talkie " equipment. Moreover the fittings of a cinema building must be taken into consideration in assessing the value. *R.M.P.V.M. Firm* v. *The Corporation of Rangoon* (3). Where an important item has been omitted by the Judge in arriving at the rental value, an appeal lies to the High Court.

Clark for the assessee. A preliminary objection in this appeal is that it does not lie. The right of appeal under s. 91 of the City of Rangoon Municipal Act is of a restricted character. An appeal lies only if a hereditament is not assessable at all and has been assessed or else a wrong principle of assessment has been applied.

(1) I.L.R. 13 Ran. 709. (2) 1937 S.C. 366.
(3) I.L.R. 4 Ran. 178.

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No appeal lies on facts and not every question of law that may arise in an assessment case is subject to appeal. The Judge has considered all the facts of the case and has come to his conclusion. No appeal lies on the mere question of the amount of this valuation. *Halkar* v. *The Corporation of Rangoon* (1) ; *Secretary of State for India* v. *Municipal Corporation of the City of Rangoon* (2). The Judge has not erred in this case in adopting the principle of assessment, namely, that of the hypothetical tenant. Whilst the actual rent paid by a tenant is not the criterion, still it affords very strong evidence in many cases of the rateable value. See Ryde on Rating, 6th Ed. p. 193.

The comparative method was found to be unsatisfactory in this case and the Judge was right in rejecting it. The alleged premium payable by the lessee was no part of the rent payable and the Judge rightly discarded it ; besides if it was part of the rent in arrears, it had already been assessed.

ROBERTS, C.J.—This is an appeal by the Municipal Corporation of Rangoon against the decision of the learned Chief Judge of the Small Cause Court, Rangoon, reducing the assessment of the respondents in respect of the Excelsior Picture Theatre, Montgomery Street, Rangoon, from Rs. 2,450 to Rs. 2,214 per mensem.

The basis of the assessment is upon the annual value, which is defined by section 80 (*2*) of the City of Rangoon Municipal Act as being " the gross annual rent for which buildings and land liable to taxation may reasonably be expected to let, from year to year." The only case in which appeal lies from the decision of the Chief Judge to the High Court is set out in section 91 (*3*) of the same Act, and arises when any question arises as to the liability of any building or

(1) I.L.R. 5 Ran. 38. (2) I.L.R. 10 Ran. 539, 550.

land to assessment or as to the basis or principle of assessment. In the present case it is agreed that the building was assessable, and it was contended for the respondents that no appeal lay because no question had arisen as to the basis or principle of assessment within the meaning of the sub-section.

It was agreed by both parties, and forms part of the judgment appealed against, that the basis or principle of assessment was by finding out the rent which a hypothetical tenant might reasonably be expected to pay : the learned Judge also added that the gross annual rent may also be ascertained by finding out and comparing the annual value of other properties of a like nature in the district ; and the appellants agreed with this view and contended that what has been called the method of comparison was, generally speaking, a safe guide towards the ascertainment of the gross annual rent, but that it was later ignored by the learned Judge. It is urged on their behalf that he has erred both in this matter and in not taking into account a payment of Rs. 9,850 by the lessees expressed in the lease itself to be made in consideration of granting it. This payment was to be made in addition to the rent reserved in the lease amounting to Rs. 2,450 per month, and the appellants say it is in the nature of rent or, as Mr. Rafi put it, " disguised rent."

The total amount so payable was Rs. 12,250, but it is established that Rs. 2,400 of the arrears of rent due from the tenant's predecessors was to be cancelled by the lessors appropriating the deposit of that amount which they held, and the balance Rs. 9,850 ought according to the appellants to be regarded as a premium, and spreading this over three years, and taking into account repairs, an amount calculated as interest on a deposit made by the lessees, and deducting the tenant's taxes, the calculated gross rental value if based upon

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these figures would be Rs. 2,472. After a small reduction, apparently for tenant's chattels, the Commissioner fixed the value as Rs. 2,450. The learned Judge reduced this assessment to Rs. 2,214 per mensem, disallowing the addition of the liability taken over of the former lessees' arrears of rent. He held that in fact it had not been shown that the payment stipulated for had any effect on the renting of the premises or the rent agreed on; in other words that it was not proved to be in the nature of disguised rent at all. One of the factors to be taken into account is that the lessors promised in clause 12 of the lease to purchase and instal and let and deliver to the lessee a new talkie equipment at a cost not to exceed Rs. 10,000 as soon as the arrears due should have been paid in full. It is said that when this promise was fulfilled the assessable value of the hereditament would increase, but we have no evidence as to the fulfilment of the promise or otherwise. The learned Judge had to decide the gross rental value, and taking the rent which a hypothetical tenant might reasonably be expected to pay he found that it was Rs. 2,214 per mensem.

We cannot say he was wrong. The actual rent paid by an existing tenant is certainly not the final or conclusive test of what an imaginary tenant would pay. As Lord Buckmaster pointed out in *Poplar Assessment Committee* v. *Roberts* (1)

"the actual rent paid is no criterion unless indeed it happens to be the rent that the imaginary tenant might reasonably be expected to pay in the circumstances mentioned in the section."

In other words, it is only *prima facie* evidence of value, and the special circumstances in which it is paid and in which any collateral engagements are entered into

(1) (1922) A.C. 93.

between the parties must be taken into consideration in determining what is the rent a hypothetical tenant might reasonably be expected to pay for the hereditament. These circumstances were examined with care in the lower Court.

The learned Judge pointed out that the valuation made by the Commissioner is sought to be justified by comparison with other cinema theatres in Rangoon, but concluded that such a comparison was unhelpful and that all there was before him for guidance was the lease itself. In my opinion he was right because it is practically valueless to adopt the comparative method except in the absence of more direct evidence. As pointed out by Scrutton L.J. in *Ladies Hosiery and Underwear, Limited* v. *West Middlesex Assessment Committee* (1)

"where the evidence as to the proper valuation of the particular hereditament is doubtful, evidence as to the assessment of other hereditaments may be of some weight, though as it will involve another investigation whether the assessment of the other hereditament is correct and whether the two hereditaments are comparable, it is of much less value than the direct evidence as to the hereditament whose assessment is in question."

In that case only one witness was called on behalf of the rating authority and he said that the rent which a hypothetical tenant would pay if he undertook to pay all tenant's rates, taxes and tithe rent charge, if any, the landlord bearing the cost of repairs and insurance and the expenses, if any, necessary to maintain the hereditament in a state to command that rent, was a sum at least equivalent to the gross value at which the hereditament had been assessed. In the face of his evidence, evidence based on the method of comparison with other

(1) (1932) 2 K.B. 679, 690.

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hereditaments was held to be of no weight. In the case of *Albert E. Pickard* v. *Assessor for Glasgow* (1) the evidence based on comparison appears to have been the best evidence available, the hereditament having been the subject of extensive improvements and alteration in order to convert it into a picture house subsequent to the date of the lease and the rent reserved therein to have afforded no guidance. There Lord Robertson described the method of valuation by comparison as the most satisfactory in the circumstances that existed. The case is no authority for saying that this method should be adopted where an actual rent for completed premises has been reserved. Lord Pitman did not himself decide that the comparative principle is the only proper principle to be applied in valuing a picture house. He said that such a proposition was agreed on both sides in that case, and Lord Fleming agreed that the comparative method was the proper method of valuing those particular premises. The headnote is, with great respect to the learned author, too widely expressed.

In the present case after reviewing the material at his disposal and taking the actual payments stipulated for in the lease as *prima facie* evidence of the rent a hypothetical tenant would pay, the learned Judge considered all the circumstances and in particular he considered the effect of certain moneys payable by the lessee under clause 10 therein. The figure arrived at after this review may or may not be the same as the actual rent paid by the present tenants, but it is based on a consideration of the full terms of the contract which they have made with the lessors, and is expressed to be the gross annual rental as defined by the Act.

Accordingly this appeal must be dismissed, with costs 20 gold mohurs.

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(1) 1937 S.C. 360.

DUNKLEY, J.—For the respondent company it has been strenuously urged that no appeal lies to the High Court under the circumstances of this case. The right of appeal to this Court is provided by the provisions of section 91 (*3*) of the City of Rangoon Municipal Act, which lays down that an appeal from the decision of the Chief Judge of the Rangoon Small Cause Court shall lie to the High Court

"when any question arises as to the liability of any building or land to assessment, or as to the basis or principle of assessment."

It is contended that the basis or principle of assessment is not in question in this case. The principle of assessment is the ascertainment of the annual rent which a (hypothetical) tenant might reasonably be expected, taking one year with another, to pay for the hereditament, and as regards this principle there is no dispute between the parties. But it is in regard to the method whereby this annual rent is to be ascertained that the difference between them has arisen. For the Corporation of Rangoon it is contended that the correct figure is to be ascertained by a consideration of the true rent which is being paid by the actual lessee of the premises under the existing lease coupled with a comparison with the assessments now in force of similar premises used for a similar purpose in the neighbourhood, that is, the "comparative method"; and for the respondent company it is submitted that the learned Chief Judge of the Small Cause Court was right in rejecting the "comparative" method, and relying solely on the terms of the existing lease of the premises. The method of ascertaining the annual rent which the hypothetical tenant might reasonably be expected to pay is the basis of the assessment, and there is therefore a clear dispute as to the correct basis of assessment, and consequently an appeal to this Court does lie.

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I, however, agree with my Lord the Chief Justice that this appeal fails. The case of *Ladies Hosiery and Underwear Limited, West Middlesex Assessment Committee* (1) is authority for the proposition that evidence as to the assessments of other hereditaments is of little value when there is direct evidence as to the letting value of the hereditament in question. The learned Judge of the Small Cause Court was therefore right in rejecting the "comparative method" in this particular case. The question for decision is therefore narrowed down to the true construction of the existing lease of this cinema. For the Corporation it is contended that the sum of approximately Rs. 10,000, which the lessee has contracted to pay under the terms of clause 10 of the lease, is in the nature of "disguised rent", but this contention is incorrect in view of the provisions of clause 12, whereby the lessor has contracted on payment of this sum in full to expend an equivalent amount in installing a new "talkie" equipment in the cinema. Clearly the consideration for payment of this amount is not the lease of the premises, but is the instalment of a new "talkie" equipment. I therefore agree that this appeal must be dismissed.

(1) (1932) 2 K.B. 679.