

APPELLATE CIVIL.

Before Mr. Justice White and Mr. Justice Tottenham.

1878
Aug. 28.

SURNOMOYEE DABEE (PLAINTIFF) v. KOOMAR PURRESH
NARAIN ROY (DEFENDANT).*

Road Cess Act (Beng. Act X of 1871)—Income-tax—Suit for arrears of rent.

In 1862, at the time the Income-tax was in force, *A* made a patni-settlement of certain lands with *B*, *B* agreeing to pay any enhancement of the revenue that might be made by Government at any time, or “any impost in future to be laid by Government, the income-tax to be paid by *A* according to his income, *B* having nothing to do with the same.”

In 1876, *A* brought a suit against *B* for arrears of rent. *B*, under the contract, claimed to have set-off as a tax on income, a sum which he had paid under the Road Cess Act, which had been passed in 1871, after the Income-tax Act had been repealed.

Held, that the tax imposed by the Road Cess Act passed by the Bengal Council could not be considered to be a tax on income; the income-tax having been a tax imposed by the Government of India on a person's annual income, levied upon whatever actually came to his hands as income, and not upon the value of his property; and that, therefore, *B* could not set off the amount as being income-tax.

Held also, that although the Road Cess Act contains no saving clause in favor of contracts, it does not prohibit in future the making of contracts which shall interfere with the incidence of the road-cess as directed by the Act, nor vacate contracts that may have been made before the passing of the Act; and in the absence of any provisions to that effect, an agreement entered into before the passing of the Act could not be affected by the subsequent passing of the Act.

THE plaintiff and defendant were zemindars of a large property, of which the plaintiff held a $3\frac{1}{2}$ -anna share, and the defendant the remaining $12\frac{1}{2}$ -annas. In the year 1862 the plaintiff made a patni-settlement of his $3\frac{1}{2}$ -anna share with the defendant at a rent of Rs. 25,696 per annum, of which Rs. 13,996

* Appeal from Appellate Decree, No. 175 of 1878, against the decree of J. Tweedie, Esq., Officiating Additional Judge of Zilla Rajshahye, dated the 30th November 1877, modifying the decree of Baboo Nundo Coomar Bose, Second Subordinate Judge of that District, dated the 22nd of July 1876.

(the annual jamma payable to Government on account of the 3½-anna share) was, according to the kabuliat, to be annually lodged by the defendant with the Collector, and the balance, Rs. 11,700, described as the amount of the annual profits, to be paid by the defendant to the plaintiff; and the kabuliat further contained a clause in these words: "If the revenue be enhanced in any way, or any impost be laid by Government in future, I (the defendant) shall pay the same separately in addition to the aforesaid settled amount of rent. I or my heirs shall not in any way be able to raise any objection to your getting the aforesaid amount of Rs. 11,700, and if I or they make any, the same shall be null and void, but you (the plaintiff) shall pay the income-tax according to your income, and I have nothing to do with the same."

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In 1876, the plaintiff brought a suit against the defendant for arrears of rent for the year 1282-83 (1875-76), and for interest on the instalments in arrear. The defendant admitted the sum due for arrears of rent, but stated that the plaintiff, from the year 1280—82 (1873—75), had neglected to pay the road-cess tax, amounting to Rs. 1,168, and that he had, therefore, been compelled to pay it for him, and therefore claimed to have that amount set off against the plaintiff's claim.

The Subordinate Judge was of opinion that the amount paid by the defendant as "road-cess tax" could not be set off or deducted from the plaintiff's claim, for the reason that the defendant in the kabuliat had agreed that "if at any time the revenue should be enhanced by Government in any way, or any 'impost' be laid by Government in future, he would pay the same separately in addition to the settled amount of rent;" and that, therefore, if 'the road-cess tax' could not be considered as enhanced revenue, it certainly came within the meaning of the word 'impost,' and the defendant was, therefore, liable under the kabuliat to pay it; he, therefore, gave judgment for the amount claimed by the plaintiff.

The defendant appealed to the Additional Judge, who held that the defendant could not be compelled to pay, under the kabuliat, his co-zemindar's share of the road-cess tax, because the patni-settlement was made at a time previous to the passing

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of the Road Cess Act of 1871, and therefore the contract could have no reference to any taxes imposed by that Act. Moreover, that the road-cess tax could not be said to be a "formal increment to the permanent revenue, nor could it be said to be an impost,—i.e., an irregular increment to the permanently assessed revenue," and those being the only two classes of increment which the patnidar had bound himself to pay in addition to the sum reserved by the patni-lease, the defendant could not, in his opinion, be bound to pay the road-cess tax, which was a tax payable by the plaintiff; but he was clearly of opinion that the tax was an income-tax, and as such a charge which the plaintiff had expressly undertaken to bear; he therefore modified the decree of the lower Court, allowing the defendant to set off the sum paid by him as road-cess against the amount due for rent.

The plaintiff appealed to the High Court.

Baboo *Sreenath Doss* and Baboo *Gooroo Doss* for the appellant.

Baboo *Rash Behari Ghose* for the respondent.

The judgment of the High Court was delivered by

WHITE, J. (TOTTENHAM, J., concurring). — The point raised by this appeal is, whether the defendant (the respondent before us) is entitled from the annual profit,—viz., Rs. 11,700,—payable by him to the plaintiff (the appellant before us) under a patni-kabuliat, to deduct that portion of the road-cess levied upon the land, the subject of the patni-tenure, which falls according to Beng. Act X of 1871 upon the plaintiff, but has been paid by the defendant. If this question had been one pure and simple of the construction of the patni-kabuliat, we should have taken time to consider the validity of an objection raised by Baboo Rash Behary Ghose on behalf of the respondent, that a special appeal does not lie in such a case under the new Code; but the decision of this appeal involves not only that question, but also a consideration of the Bengal Road Cess Act, and of the effect of its provisions upon contracts made prior to its passing, and we are clearly of opinion that the special appeal lies.

(After shortly stating the facts, and the terms of the kabuliat, as above his Lordship continued):—

When this kabuliat was executed, the Income-tax Act was in force, but has since been repealed. The road-cess was not imposed until the year 1871. The Act ordaining the cess directs, that where land is the subject of various tenures and sub-tenures, the road-cess shall be recoverable from the several owners or occupiers in certain proportions mentioned in the Act. The payment on account of road-cess, which is sought to be deducted by the defendant, is that portion of the cess which under the Act would fall upon the plaintiff, and, if the rights of the parties as regards the point in dispute are not governed by the contract to which they were parties in 1862, it is clear that the defendant would be entitled to make the deduction which he claims.

The first Court decided that the road-cess was an impost or 'augobar' within the meaning of the kabuliat, and decreed that the defendant must pay the whole of the annual profit of Rs. 11,700 without any deduction on account of the road-cess. Mr. Tweedie, the Additional Judge, has taken a different view of the matter. He holds that the road-cess is not an impost (augobar) within the meaning of the kabuliat, but that it is really an income-tax, and as such, a charge which the plaintiff has expressly undertaken to bear.

The correctness or otherwise of his decision turns, in the first place, upon what is the tax which the plaintiff by the kabuliat undertook to pay; and, secondly, upon what is the nature and character of the tax imposed by the Bengal Legislature and called the road-cess.

As regards the first question, the word used in the kabuliat to define the particular tax which the plaintiff has agreed to pay, is the English word income-tax, although the word itself is written in the Bengali character. Income-tax is a word which has a very sharply defined meaning. The tax is distinguished by well-known characteristics, and when the kabuliat was executed, a tax of that name, and having these well-known characteristics, was in force. We have no doubt that the income-tax intended by the kabuliat was the income-tax then in force, and any

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future tax that might hereafter be imposed which falls upon income, and is of the same character and nature as the income-tax then in force.

As regards the second question, if the cess imposed by Beng. Act X of 1871 is really an income-tax, then unquestionably the plaintiff who has agreed to pay "income-tax" would be bound to pay this cess, although it has been imposed since the date of the kabuliat.

We are of opinion, however, that having regard to the provisions of the Road Cess Act, the impost is not an income-tax.

The income-tax, which was levied at the date of the kabuliat, was a tax imposed by the Legislature of the Government of India upon all the people of India whose incomes exceeded a certain amount. It formed part of the financial system of India, and was levied mainly, if not entirely, for the purposes of all India. The subject-matter of the tax was a man's annual income from whatever source derived, and was levied upon what actually came to his hands as income, and not upon the value of his property. Now the road-cess is imposed not by the metropolitan Legislature of India, but by the local Legislature of Bengal. It is not a tax upon income. It is a tax, as s. 4 of Beng. Act X of 1871 says, upon immoveable property within a certain part only of India, and it is assessed upon the annual value of that property; and, as the interpretation-clause shows, irrespective of whether the property is a rent-paying one or not. Again, the proceeds of the tax are applicable to purely local purposes,—*viz.*, the construction and maintenance of roads and other means of communication. It is to my mind as much a misnomer to call the road-cess an income-tax as it would be to give that name to the lighting or water-rate, which is levied upon the owners and occupiers of houses in Calcutta, or to the highway rate which is collected in England.

Being of opinion that the road-cess does not come within the meaning of income-tax as named in the kabuliat, the next question is, whether it is an outgoing which the defendant ought to pay. The defendant has agreed to pay any impost (*augobar*) which may be laid on by Government in future. The word "*augobar*" has been the subject of some criticism by Mr. Twee-

die, based apparently on its primary and literal meaning, and he has come to the conclusion that road-cess is not "augobar." It appears to us unnecessary to decide whether "augobar" does or does not include such a tax as road-cess, for we think upon a consideration of the language of the kabuliat, to which I have above referred, that the true meaning of the parties is, that the Rs. 11,700 annual profit should be treated as a net annual sum payable by the defendant, and that the same should be paid without deduction, except for income-tax. The translation of the Subordinate Judge runs thus:—"I or my heirs shall not in any way be able to raise any objection to your getting the aforesaid profit of Rs. 11,700," which is thus paraphrased by Mr. Tweedie:—"I shall not on this account (*viz.*, khazana bridhi or augobar) or on any other account, make any deduction from the Rs. 11,700 'manafa' payable by me to you."

It appears to us not unreasonable or improbable that, when the plaintiff has by his patui-settlement virtually turned himself into an annuitant upon the land, and assigned to the defendant the land with all the prospect of its future increase of value, that the parties should come to an arrangement by which the annual payment to the plaintiff should be exempt from all present and future charges upon the land except income-tax.

The only remaining question is, whether the directions in the Road Cess Act override the contract which the parties made for themselves long before that Act was passed. Although the Act contains no saving clause in favor of contracts, it does not prohibit in future the making of contracts which shall interfere with the incidence of the road-cess as directed by the Act, nor vacate contracts that may have been made before the passing of the Act. In the absence of any provision to that effect, we think that the terms of the kabuliat must still govern the rights of the parties, and that the agreement which they have come to is not affected by the subsequent passing of the Road Cess Act.

The result is, that this appeal will be allowed. The decree of the lower Appellate Court will be set aside, and that of the first Court will be restored with costs. The appellant will have his costs of this appeal and also in the lower Appellate Court.

Appeal allowed.

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