Privy Council Appeal No. 23 of 1942
Bengal Appeal No. 12 of 1940

The Corporation of Calcutta – – – – – *Appellants*

v.

The Province of Bengal – – – – – – *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST DECEMBER, 1943

Present at the Hearing:
LORD ROMER
LORD PORTER
LORD CLAUSON
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD PORTER]

This appeal is against the judgment and decree of the High Court of Judicature at Fort William in Bengal, dated the 13th August, 1940, dismissing an appeal from the judgment and decree of the Chief Judge of the Court of Small Causes at Calcutta.

The question at issue is whether for the purpose of the assessment to the consolidated rate of a house in Calcutta owned by the respondent and occupied by the Commissioner of the Presidency Division in Bengal the annual value falls to be calculated under subsection (*a*) or under subsection (*b*) of section 127 of the Calcutta Municipal Act (Bengal Act III of 1923).

This section reads as follows:—

> "For the purposes of assessing land and buildings to the consolidated rate—
>
> (*a*) the annual value of land, and the annual value of any building erected for letting purposes or ordinarily let, shall be deemed to be the gross annual rent at which the land or building might at the time of assessment reasonably be expected to let from year to year, less in the case of a building, an allowance of 10 per cent. for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent; and
>
> (*b*) the annual value of any building not erected for letting purposes and not ordinarily let shall be deemed to be 5 per cent. on the sum obtained by adding the estimated present cost of erecting the building, less a reasonable amount to be deducted on account of depreciation (if any) to the estimated present value of the land valued with the building as part of the same premises."

The house in question is No. 4, Theatre Road, Calcutta, which since its purchase by the respondent in 1906 has with a few trivial exceptions been occupied by the Commissioner as his official residence. The purpose for which it was erected is unknown and the answer to the question which their Lordships have to determine therefore depends on whether it can be said to be ordinarily let or not. No question as to the amount chargeable arises. Whichever way their Lordships decide, the figures are not disputed.

On one matter the disputants are not in conflict, it is agreed that ordinarily let, means *usually* let and it is not contended that the house must be shown to be let on ordinary terms.

The house was purchased on behalf of the respondents at the end of 1906 or early 1907. Before buying it they wrote to the Government of India proposing to acquire a house which could be occupied by the Commissioner. From their letter it appears that the lack of suitable

accommodation at reasonable cost together with the possibility of being compelled to vacate at a moment's notice any premises taken and of failing to relet them had resulted in the Commissioner either residing at his club or in an unsuitable position. The Government of Bengal were therefore anxious that a house should be available. In their view a good house in Calcutta itself in an accessible and convenient situation which should be known to the public at large was of the first importance. At that time they contemplated making residence compulsory. For about a year and a half after it was acquired the house was occupied by the tenant then in possession. Thereafter it has been with the exception of two immaterial periods occupied by the Commissioner for the time being. It is of the old residential type standing in a large garden, its value to rent is about Rs.900, and it bears a nameplate with the inscription "Commissioner, Presidency Division."

Up till 1937 the assessment of the house had been treated as falling under section 127 (*b*) of the Act, but on the 13th of May in that year the respondent filed a suit in the Court of Small Causes, Calcutta, the appropriate Court for this purpose, claiming that the house was erected for letting, was let until 1908, and continued to be let thereafter, that a fair rent would be Rs.700 per month and that the correct annual value would be Rs.7560.

After hearing the evidence the Chief Judge held (1) that the house had been let to each successive Commissioner since its acquisition, he being responsible for a sum as rent and the occupier's share of the taxes, both of which he was liable to pay so long as he held the post of Commissioner, (2) that during that period he had the right to occupy the property in consideration of his paying or submitting to a deduction from his salary of 10 per cent., (3) that the relationship of landlord and tenant existed between the Government and the Commissioner and that the correct basis of assessment was under section 127 (*a*), the correct figure for the annual value being Rs.9720.

On appeal to the High Court, the case was remitted to the Chief Judge to determine:—

(*a*) Whether the Commissioner was required to occupy the house for the performance of his services;

(*b*) Did he occupy it in order to their performance; or

(*c*) Was it conducive to that purpose more than any other house which he might have himself rented.

In pursuance of these directions the learned Chief Judge took further evidence and after doing so held that the fact that it was made obligatory for the Commissioner to reside in the house, together with the facts that every Commissioner had continually done so since its acquirement, that it was known as the Commissioner's house, that it was situated in a convenient locality and was in fact used by the Commissioner for the performance of some of his official duties, all led to the irresistible conclusion that the Commissioner

(*a*) was required to occupy the house for the performance of his duties;

(*b*) did occupy it in order to their performance; and

(*c*) that it was conducive to that purpose more than any other house which he might himself have rented.

The Chief Judge added that as a result of the additional evidence it appeared that the Commissioner occupied the house as a servant and not as a tenant.

When the record was returned to the High Court the learned Judges of that body differed from the Chief Judge. In their view the Commissioner held the house on the terms of the general rules applicable to all Government servants, and those rules did not compel him to occupy the house, but did make him responsible for rent, leaving him free to sub-let by permission of the Government. They further held that having regard to these findings and the fact that the Commissioner had given evidence that he could perform his duties equally well though residing in another house, a finding in the affirmative under heads (2) and (3) was not justified. Accordingly they held that the Commissioner's occupation was that of a tenant and the house was assessable under section 127 (*a*).

The exact regulations which deal with the terms upon which houses occupied by Government officials are provided are not easy to ascertain. In answer to a letter from the Deputy Executive Officer of the Calcutta Corporation, Mr. G. S. Dutt, the Secretary of the Government of Bengal Department of Public Health and Local Self Government, after stating in an earlier letter that the occupation of the house by the Commissioner was compulsory, corrected himself on the 15th December, 1939, and said that the occupation was subject to certain rules, of which he enclosed a copy. These rules are printed in the record furnished to their Lordships and are the only material so provided. Strictly speaking, they appear to contain internal regulations for the guidance of the financial department of the Government of Bengal, and they are not so framed as to, nor in any case could they of themselves, contain a contract between the Government and one of its servants. See *Shenton* v. *Smith* [1895] A.C. 229.

Nor indeed do they authorize the Government or anyone on its behalf to make such a contract. The power to make rules for regulating the conditions of service pay and allowances of the Civil Service in India is to be found in the Government of India Act, 1915, section 96B. Under that authority certain fundamental rules were made, that applicable to the present case being No. 45, which provides that " A Local Government may make rules laying down the principles governing the allotment to officers serving under its administrative control for use by them as residences of such buildings owned or leased by it . . . as the Local Government may make available for the purpose. Such rules . . . may prescribe the circumstances in which such an officer shall be considered to be in occupation of a residence."

Rule 45 (*a*), after dealing with the method of calculating the capital cost to the Government of buildings which it acquires and of ascertaining the standard rent of such as are leased, goes on to provide in sub-rule 4 (*b*) that " unless in any case it be otherwise expressly provided in these rules," the officer " shall pay (i) rent for the residence, such rent being the standard rent or 10 per cent. of his monthly emoluments whichever be less, and (ii) municipal and other taxes payable by Government in respect of the residence not being in the nature of house or property tax."

The rule further sets out various modifications of the provisions as to rent in particular cases and in sub-rule VI deals with the payment of additional rent in return for special services undertaken by the Government and requires the tenant to pay certain additional charges.

Under the provisions of Fundamental rule 45, the Government of Bengal did make certain subsidiary regulations dealing with the provision of residences to their servants, but as these regulations do not substantially differ from the financial rules set out in the record their Lordships treat the latter, as the parties were content to treat them, as being applicable to the present case.

Those rules provide:—

> 279. Residence for public servants may be . . . purchased by Government . . . .
>
> (iv) when it is shown to the satisfaction of the local government that suitable house accommodation for officers whose appointments are permanent in respect of locality is not available in the vicinity or is available only under circumstances which will be likely to place such officers in an undesirable position in relation to house proprietors."
>
> *Rent Rules for Government Buildings used as Residences.*
>
> 281. The incumbent, whether permanent or temporary, of an appointment for whose benefit a house has been constructed or purchased or leased by Government will be held responsible for the prescribed rent during his tenure of the appointment."

Certain instances are given in which the Local Government may make exception to this rule, e.g., when the house is not occupied because the holder of another post is doing the duty or when the holder has been transferred from a post in the same station and it is not considered necessary that he should change his residence or when an Indian officer is appointed and the residence has been constructed to suit a European or vice versa or where a temporary holder for not more than two months is prevented from occupying the house by circumstances which the Local Government consider sufficient to warrant an exception.

Rule 282 permits the sub-letting of such residences provided:—

" (i) the sub-let should be to a tenant approved by the Superintending Engineer;

(ii) the officer will still remain personally responsible for the rent and for any damage caused to the building by fair wear and tear;

(iii) Government will not recognise the sub-tenancy.

(iv) The rent to be charged by the officer to his tenant should not, except with the sanction of the local Government in special circumstances, exceed the rent paid by the officer to Government.

(v) Sub-tenancy should continue only for so long as the officer who makes the arrangement holds the appointment for which the official residence is provided."

The only further evidence to which their Lordships need refer is that of the Commissioner at the material time who stated that he was in exclusive occupation, that he could live in any other residential quarter in order to perform his duties and could perform them equally well there, that official residences of Commissioners are generally known as Commissioners' houses and that a knowledge of their position and their accessibility is important and that he has to pay 10 per cent. of his salary whether he occupies the house or not.

In the Courts in India the question at issue was apparently treated as if it had arisen between subject and subject and no question was raised as to the possibility of establishing a contract between a Government and its servants or as to the authority under which such a contract was or could be made.

Very scanty evidence has been furnished in the case and none as to the making of any contract. If there be any it must be spelt out of the facts established and mainly from the evidence of the Commissioner and the rules printed in the record.

Apart from the complication arising from the fact that the house is occupied by a Government servant, their Lordships find themselves in substantial agreement with the High Court in India. The general principles upon which a tenancy as opposed to an occupation as servant is created are not in dispute. The mere fact that it is convenient to both parties that the servant should occupy a particular house and that he is put in possession of it for that reason does not prevent the servant from being a tenant: his possession is that of a tenant unless he is required to occupy the premises for the better performance of his duties though his residence is not necessary for that purpose or if his residence there be necessary for the performance of his duties though not specifically required. See per Brett J. in *Fox* v. *Dalby*, L.R.10, C.P. 285, at p. 295.

The position is unaffected by the circumstance that the servant is entitled to occupy the house only so long as he retains his position as servant or the particular office in virtue of which the house is provided. The same principles apply though he may be a tenant at will. See *Smith* v. *Seghill* L.R. 10, Q.B. 442, and *Marsh* v. *Estcourt*, 24, Q.B.D. 147.

In the present case their Lordships are of opinion that the Commissioner is neither compelled to live in the house nor is it necessary for him to do so in order to perform his duty. As to the latter point their Lordships have the Commissioner's evidence and nothing to contradict it. As to the former it may be that when the house was purchased it was contemplated that those holding the office of Commissioner would be compelled to live there, but if so, the intention was not carried out.

He who holds the office is indeed required to pay rent, but provided he does so there is nothing to compel him to reside in the house. He may even sub-let it with the permission of the Government though this does not involve a recognition of the sub-tenancy and the sub-tenancy is to continue only for so long as the sub-lessor holds the appointment.

Having regard to the facts that it is contemplated that the Commissioner should occupy the whole house, that he is under an obligation to pay what is called rent whether he occupies it or not, and that he pays the occupier's share of taxes, their Lordships would unhesitatingly come to the conclusion that the Commissioner occupied the house as a tenant in a case where anyone other than Government was the owner. The difficulty in the case lies in that fact and in the fact that the Commissioner is a Government servant.

It was admitted on behalf of the respondent that except in special circumstances no contract would exist or could be implied between a Government and its servant in respect of that service and that there was nothing in the present case which would prevent the ordinary rule from applying. But it was said though no contract could be implied in respect of the service, yet a contract could be expressly made or could be implied between those parties in respect of matters other than the service. Having regard to this argument it has in the first place to be determined whether the occupation of the house formed part of or was incidental to the contract of service or whether it formed a separate transaction between the Crown and the Commissioner. As to this question their Lordships entertain no doubt that the occupation is not incidental to nor is it dependent upon the contract of service. It is true that in the ordinary course the house would not be put at the disposal of the Commissioner unless he held that office. It is given him for that reason, but its provision forms no part of the terms of service, and it is open to him to refuse to live there if he does not desire to do so.

Certain limitations upon the Commissioner's rights (if he have any) must be conceded, viz.:—

(i) Even if in the particular case there were a contract the servant would still be subject to summary dismissal at the pleasure of the Crown. *De Dohse* v. *R.* (1886), 66 L.J. (Q.B.), 422 (H.L.).

(ii) The Commissioner might be transferred at any time to another post and is entitled (if at all) to occupy the residence only whilst he holds the office.

(iii) The Crown could at any moment terminate his occupation of the house even though he remained in his post of Commissioner.

In these circumstances, were it not for the considerations hereinafter mentioned, it would have to be determined whether he had any estate in the house or whether he was a mere licensee in occupation as a servant of the Government.

If he had any right it could be no more than a tenancy at will since the Crown could terminate his occupation at any time and the tenancy (if any) must be implied since no express contract exists.

That such an implication is possible appears from *Doe & Hull* v. *Wood*, 14 M. & W. 682, where Parke B. said " *Richardson* v. *Langridge* correctly lays down the law on this subject, viz., that a simple permission to occupy creates a tenancy at will."

It was suggested that in the present case the implication suggested would be impossible inasmuch as a tenancy at will must be terminable at the will of either party. The Crown, it was contended, could terminate the occupation at any time, but the Commissioner could not. Their Lordships cannot accede to this argument. In their view the Commissioner could cease to occupy the house at any moment and thereupon would terminate any tenancy though he would still remain liable for the payment of the monthly sum designated as rent.

If then the existence of a tenancy at will can be implied should such an implication be made in the case of a house situated in Calcutta owned by the Government of the Province of Bengal and occupied as the Commissioner's house is occupied in the present instance? In their Lordships' view it is not necessary finally to determine this question. The rules it is true do not make a contract between the Crown and the Commissioner but they do indicate the position if a house is in fact placed at his disposal. The Crown is under no obligation to provide a house nor the servant to live in it, but if a house is provided the Commissioner is in exclusive possession and is responsible for the rent whether he lives in it or not; he may sub-let and he pays the occupier's share of the rates.

Whatever the effect of such a circumstance in other cases (as to which they express no opinion) their Lordships are of opinion that where a house is put at the disposal of a Government servant, occupied by him under the terms of the regulations applicable to the present case and retained and enjoyed as this house has been, the building is ordinarily let within the meaning of the Act and is therefore rightly rated under Section 127 (*a*) of the Calcutta Municipal Act (Bengal Act III of 1923).

They will humbly advise His Majesty to dismiss the appeal. The appellants must pay the costs of the proceedings before the Board.

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In the Privy Council

THE CORPORATION OF CALCUTTA

v.

THE PROVINCE OF BENGAL

DELIVERED BY LORD PORTER

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