Privy Council Appeal No. 73 *of* 1945
Bengal Appeal No. 10 *of* 1942

The Bengal Nagpur Railway Company Limited - - *Appellant*

v.

The Corporation of Calcutta - - - - - - *Respondent*

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 7TH NOVEMBER, 1946

Present at the Hearing:
LORD SIMONDS
LORD DU PARCQ
MR. M. R. JAYAKAR
SIR MADHAVAN NAIR
SIR JOHN BEAUMONT

[*Delivered by* LORD DU PARCQ]

The subject of this appeal is a complaint by the appellant company (the Bengal Nagpur Railway Company) in respect of the assessment to the consolidated rate of a piece of land, situate in the city of Calcutta, of which it is the owner. The complaint is that the land has been valued on a wrong principle and at an excessive rate. The plot in question is about 13 bighas in extent, and is known as No. 10B, Garden Reach Road. It was bought by the company in 1926, not for present use, but to be kept in reserve against the company's future requirements. It is described as follows in the petition for leave to appeal to His Majesty in Council:—

" The said land is vacant and is occasionally used by members of Railway Officers' Club for practice of the game of golf. It is not a regular golf course, having only four holes upon it."

Before setting out the facts, it is necessary to refer to the relevant provisions of the Calcutta Municipal Act, 1923, in order that the point in dispute may be appreciated.

The method of ascertaining the annual value of land is prescribed by section 127 of the Act. Its material words are:—

" The annual value of land . . . shall be deemed to be the gross annual rent at which the land . . . might at the time of assessment reasonably be expected to let from year to year."

The Act imposes a liability to pay rates not only on the occupier, but on the owner of land. Section 149 provides that " one-half of the consolidated rate shall be payable by the owners of the lands . . . and the other half by the occupiers thereof." Thus, if land is unoccupied, the owner pays one-half of the full rate on the annual value. He may, in certain conditions, obtain relief which will reduce his burden to one quarter of the full rate. This result is produced by the provision made in

section 151 for the case of land " which has been assessed to the consolidated rate " and " has remained unoccupied and unproductive of rent for a period of sixty or more consecutive days." If due notice is given to the executive officer, " he shall (*a*) remit one-half of the owner's share of the consolidated rate due on account of such period, or, (*b*) if the whole of such share has been paid, refund, on application made therefor, one-half of such share." There is a proviso that when any land (with certain immaterial exceptions) " which in the opinion of the Corporation is suitable for a building site, is not adequately utilized for such a purpose for a period of more than three years ", the right to remission shall cease on the expiration of that period unless exemption from the proviso is granted by the Corporation on certain defined grounds.

In the present case the Corporation has been willing to regard the appellant company as the owner of unoccupied land, and to permit it to take advantage of the provisions of section 151. It is desirable, however, to refer to section 3 (the " definition " section), for the light which it throws on the meaning of the word " occupier ", which is stated to include " an owner living in, or otherwise using, his own land . . . and also a rent-free tenant."

Under section 131 of the Act a revaluation is made every six years. At the time of the general revisional valuation of 1931-1932, the appellant company successfully applied for the separate valuation of the plot in question, which had previously been included in a larger parcel of land on which there were some small buildings. The avowed object of this application was to obtain a remission under section 151, and this was eventually granted with effect from the 1st July, 1933. At the 1937-1938 valuation the annual value of 10B, Garden Reach Road was determined to be Rs.22,485, on the footing that the hypothetical tenant would take the land as unoccupied or vacant land, and that the rental value of similar land in the neighbourhood was a fair standard of comparison. The appellant company objected to the valuation which, however, was confirmed by the deputy executive officer. The company then appealed to the Court of Small Causes at Sealdah. The Plaint alleged that " the only use since acquisition to which " the company had put the lands was " that its Officers' Club " had " put down a few holes on them for their occasional golf practice " and that in arriving at its valuation the Corporation had " not considered at all the beneficial user " of the land, the annual value of which, on the basis of such user, could not, it was said, exceed Rs.1,000. The reduction claimed was that appropriate to a payment " at quarter rates." At this stage, therefore, both parties were agreed that the appellant company was to be charged as a non-occupying owner, and was entitled to the remission under section 151 which had been granted as from July, 1933.

At the hearing before the Court of Small Causes the principal witness for the appellant company was one of its agents, a Mr. Sawday. He said that the land was used " for practising golf " and that there were four holes on it. It was run by the Bengal Nagpur Golf Club. He called it, not a golf course, but " an apology for a golf course." About ten men, he said, were using it. Another employee of the company described it as " an incomplete golf course ", and a third said that the land was " used as a practice ground for golfers ", that there were " four greens ", that the Golf Club, which had been " started about eight or nine years ago ", paid " for the upkeep of the club which is Rs.14 per month for one *Mali* ", and that the company " used to charge at Rs.2 per month from each member." The last-mentioned witness put the number of golfers using the ground at " about twenty." There was no evidence of the date when, or the length of time for which, these golfers had been charged Rs.2 per month. There was no suggestion that they had contractual rights at any material time. It would seem that they were mere licensees, under a licence which might at any time have been withdrawn.

The company, having failed in the Court of Small Causes, appealed to the High Court, where its counsel advanced a two-fold contention, based on the principle of English rating law that the rent which the hypothetical tenant would pay must be estimated by reference to the actual physical condition of the hereditament and to the existing mode of user. A sentence from the judgment of the Court shows how it was sought to apply this principle:—

"Mr. Bose argues that if this principle is applied to the present case, the premises in question ought to be valued on the basis of the rent which would be paid by a hypothetical tenant who must be presumed to keep the land vacant, or at the most use it as an imperfect golf course as it is being used at present, and in either view the yearly rent would be considerably below what has been estimated by the Corporation."

The first of the two submissions comprised in this argument was abandoned by counsel in the course of the hearing before their Lordships' Board. It was then conceded that if the land could properly be regarded as vacant land, the rental value of lands in its neighbourhood was a fair criterion of its rateable value. Their Lordships have no doubt that the contention which was thus abandoned was untenable. Indeed, it provides a striking example of the danger attending an injudicious use of precedent. The owner of land in England is not chargeable with rates, as owner, at all. If he leaves land vacant and unoccupied, he pays no rates. Under the Calcutta Act mere ownership carries with it a liability to pay one-half of the rate assessed on the annual value of the land. It is impossible to construe section 127 as meaning that, when land is unoccupied, its annual value must be taken to be the rent at which it might be expected to be let to a tenant who was precluded from occupying it. There is nothing in the words of the section to suggest that a hypothetical tenancy of so improbable a character was contemplated, and the elaborate provisions of section 151 can hardly have been framed in order to reduce by half, for the benefit of the non-occupying owner, what would already be a merely nominal sum. In their Lordships' opinion the hypothetical tenant of vacant land must be assumed to be free to make any reasonable and lawful use of the land, due regard being had to the fact that his tenancy is a yearly tenancy only.

It remains to deal with the argument which was relied on at their Lordships' Board. This was, in effect, the same as the second of Mr. Bose's two submissions. The High Court rejected it on the ground that the land in question could properly be treated as (or, in the words of the judgment, "must be deemed to be") vacant land. The latter expression was criticised as suggesting that the High Court based its opinion on a supposed estoppel, but their Lordships do not so read it. When it is remembered that the appellant company had itself alleged the land to be "vacant" in its Plaint, and that it appears to have been common ground at the hearing before the High Court that the land was not "occupied", the language used in the judgment seems natural enough. Moreover it is manifest that until the appellants came before their Lordships' Board the contention on which they chiefly relied assumed that the land was "vacant", for in their petition for leave to appeal (to which reference has already been made) they not only so described it, but submitted that the appeal involved the "very important and substantial question of law" whether "the English principle of valuing *rebus sic stantibus*" was subject to an exception "in the case of premises being kept vacant by the owner and not put to any use."

In their Lordships' opinion the High Court was fully justified by the facts in treating the land as "vacant" land for the purposes of valuation and assessment. So far as its physical characteristics were concerned, it could fairly be described as a piece of waste land in which four small holes had been made. No witness called it a golf course. Much was made in argument of the employment of a *Mali* and of the "four greens."

There was no evidence as to the nature and extent of the *Mali's* activities, and the word " green ", read in the light of all the evidence, may be no more than a topographical expression, denoting only the superficial area close to, and surrounding, a hole. It does not seem probable that the " greens " on this waste land in the city of Calcutta would be readily recognisable as such by an eye accustomed to courses laid out in a more congenial soil and under more encouraging climatic conditions. The existence of the Golf Club was prayed in aid, but that club was already well established in 1934, and in that year Mr. Sawday wrote a letter, in which he complained that the Corporation was objecting to the grant of a remission of rates in respect of this land " on the plea that sometimes an officer of the B.N. Railway hits a golf ball about on it ", and said " There are no facilities for play, no greens or anything of that sort." Conditions may have changed between 1934 and 1937, but at least it may be said that the Bengal Nagpur Railway Golf Club appears to have been capable of existing without a golf course.

No doubt the land in question could not properly be called " vacant " in the sense that no use whatever was made of it. With the owner's permission, ten or, it may be, twenty gentlemen have been accustomed to walk on it, and to try their skill at hitting a golf ball in the course of their perambulation. But in another sense it is vacant land, as the appellant company has itself recognised from the first. It was acquired in order that it might be kept " vacant " for the prospective purposes of the appellant company, and it is equally, and in the same sense, " vacant " for the suppositious purposes of the hypothetical tenant. The case would of course be different if the physical characteristics of the land had been substantially altered so as to adapt it to a particular purpose. Full effect must always be given to the words " at the time of assessment " in section 127, but it must not be thought that an owner, by making or permitting some trifling use of what is essentially vacant land, will escape all but a nominal charge as a ratepayer.

The argument of the appellant company's counsel before their Lordships' Board recognised that, by insisting that there had been " beneficial user " of the land, the company might lose the advantage which it had hitherto enjoyed under section 151. The High Court was not asked to decide whether there had been such user by the appellant company's servants as to render the company liable for the occupier's share of the rate or to deprive it of any claim to remission. There may be cases in which land must be regarded as " vacant " for the purpose of valuation, but is none the less " used " by its owner to an extent which, though limited, will bring him within the definition of " occupier " in section 3. The Corporation has not suggested that this is such a case, and it may be that the mere granting of permission to an owner's servants to walk on the land, or even to exercise themselves upon it in other ways, does not necessarily amount to a " use " of the land within the section. Their Lordships do not find it necessary to express any opinion on this question in the present appeal.

For the reasons given, their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant company must pay the costs of the respondent.

(52747) Wt. 8013— 170 11/46 D.L. G. 338

In the Privy Council

THE BENGAL NAGPUR RAILWAY COMPANY LIMITED

v.

THE CORPORATION OF CALCUTTA

[DELIVERED BY LORD DU PARCQ]

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