MOTICHAND HIRACHAND & ORS.

v.

BOMBAY MUNICIPAL CORPORATION

September 15, 1967

[J. C. SHAH, S. M. SIKRI AND J. M. SHELAT, JJ.]

Bombay Municipal Corporation Act (Bom. 3 of 1888), S. 154(i)—Income from display of advertisement—If can be included in rateable value.

The respondent-Municipal Corporation increased the rateable value of a building, assessed at the actual rent recovered by the appellant—owner, by adding the income derived by the owner under an agreement entitling a Company to display an advertisement on the roof of the building. The owner successfully filed a complaint against the increase which was upheld by the Small Cause Court. Against this order, the corporation filed an appeal to the High Court, and it confirmed the enhancement. In appeal, this Court:

HELD: The High Court was right in confirming the enhancement of the annual rent.

If a building or a part of it yields an extra income over and above the actual rent derived from it, such income on the terms of s. 154 (i) of the Bombay Municipal Corporation Act, can legitimately be taken into consideration by the assessing authority while determining the annual rent on the ground that a hypothetical tenant would take such extra income into account while considering what rent he can afford to offer for such building. [553B]

The hypothetical tenant includes all persons who might possibly take the property including the persons actually in occupation, even though he happens to be the owner of the property. The rent is that which he will pay in the "higgling of the market", taking into account all existing circumstances and any relevant future trends. Therefore, the mere fact that the income from the agreement is not rent but licence fee does not justify on any principle of rating or any construction of s. 154 of the Act, disregard of it, while estimating the rent which the property would be expected to fetch. [549B; C; 550G-H]

Though the owner of the building could not charge rent over and above that which was permissible under the provisions of the Rent Act, there was nothing in that Act which prohibited him from charging an amount from an advertiser in consideration of displaying his advertisement. [551D]

Mahad Municipality v. *Bombay S.R.T. Corporation,* LXIII Bombay Law Reporter, 174; *Cartwright* v. *Sculoates Union,* [1900] A.C. 150; *Robinson Bros.* v. *Houghton and Chester-le-Street Assessment Committee,* [1937] 2 K.B. 445, *Taylor* v. *Overseers of Pandleton,* (1887) 19 Q.B.D. 239, *Wilson* v. *Tavender* (1901) 1 Ch. 578, *Corporation of Calcutta* v. *Anil Prakash Basu,* A.I.R. 1958 Cal. 423, referred to.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 378 of 1965.

Appeal from the judgment and decree dated April 9, 1963 of the Bombay High Court in First Appeal No. 616 of 1961.

Raj Bahadur and *B. R. Agarwala,* for the appellants.

S. T. Desai, O. P. Malhotra and *O. C. Mathur,* for the respondent.

A The Judgment of the Court was delivered by

Shelat, J. Whether in determining the rateable value of a building the assessing authority under s. 154(1) of the Bombay Municipal Corporation Act, III of 1888 can take into consideration income derived by the owner under an agreement entitling an advertisement hoarding to be put up on the roof of such B building is the question arising in this appeal.

For consideration of this question a few relevant facts may first be recited. The appellants are the owners of "Fulchand Nivas", a building situate at the corner of what was known at the relevant time as Marine Drive and Sandhurst Road opposite Chowpatty Sea Face, Bombay. The building consists of ground and five upper C floors and a terrace. The ground floor and five upper floors of the building were and are let out. For the last few years the Municipal Corporation has been assessing the rateable value of the building as equivalent to the actual rents recovered by the owners. After the rateable value for the year 1956-57 was assessed it was found that the terrace of the building was used for advertising D Tata Mercedes-Benz Automobile Trucks and Buses by means of a neon-sign. This was done under an agreement dated February 5, 1957 entered into by the appellants under which the Tata Locomotive and Engineering Co. Ltd., had agreed to pay to the appellants Rs. 800 per month in consideration of their being allowed to display the said advertisement and a further sum of Rs. 700 in consideration of the owners agreeing not to allow E any one else to use any portion of the said building for displaying any advertisement save those of the tenants on the ground floor not above the level of the height of the ground floor. The agreement provided also that it would be the owners who, during the continuance of the agreement, would pay all existing and future rates, taxes etc., which would be assessed, imposed, charged F or become payable in respect of the said building or the said advertisement except the Municipal Licence fee in respect of the said advertisement which would be borne by the Company. On March 3, 1958 the respondent corporation issued a notice under section 167 of the Act informing the owners that the assessment book had been amended and that the amount of the rateable G value of the building was increased from Rs. 44,320 to Rs. 64,685. The appellants thereupon filed a complaint under section 163(2) of the Act against the said increase and the assessing authority by an order dated February 21, 1959 reduced the rateable value from Rs. 64,685 to Rs. 59,600. In maintaining the increase from Rs. 44,320 to Rs. 59,600 the assessing authority took into account the additional income arising from the said agreement and H received by the appellants. The appellants thereupon filed an appeal before the Chief Judge, Small Cause Court, Bombay, objecting to the said increase. The Chief Judge disallowed the said increase and directed that the rateable value should be Rs. 44,320. The Chief Judge held that under the said agreement

there was no demise or transfer of an interest in the said property in favour of the Committee, that the said agreement amounted merely to a licence revocable at any time though subject to the express terms of the agreement and was no more than a grant of a right in gross to display neon-sign outside the property and that the only user of the property was that of a small portion of the terrace used as a base for the said advertisement. He held that it was not any inherent or intrinsic quality of any portion of the property which commanded such a high consideration as the sum of Rs. 1,500 per month. Aggrieved by this order, the respondent Corporation filed an appeal before the High Court at Bombay. The High Court held that the Chief Judge was in error in holding that the Municipal Corporation was not entitled to take into account income earned by the owners under the said agreement, set aside his order and restored the original value assessed by the assessing authority at Rs. 59,600. The High Court analysed section 154 of the Act and after consideration of the rules as to rating recognised by several decisions both English and that of the High Court itself in *Mahad Municipality* v. *Bombay S.R.T. Corporation*[1] held that the said increase was justified. The appellants then applied for and obtained a certificate under Art. 133(1)(a) of the Constitution and filed this appeal.

Counsel for the owners challenged the correctness of the High Court's judgment and order and contended that in determining the annual rent of the building the assessing authority can take into account the rent at which the building is expected to be let, that therefore the income derived from an agreement which amounts to a mere licence and not a demise cannot be added to such rent, such income being totally irrelevant to the concept of annual rent envisaged in rating. To appreciate the contention it is necessary first to examine s. 154(1) of the Act. The section provides that in order to fix the rateable value of any building or land assessable to a property tax, there shall be deducted from the amount of the annual rent for which such land or building might reasonably be expected to let from year to year a sum equal to ten percentum of the said annual rent and the said deduction shall be in lieu of all allowances for repairs or on any other account whatever. The assessing authority for the purpose of fixing the rateable value has therefore to determine the annual rent, that is, the annual rent for which such building might reasonably be expected to let from year to year and to deduct the 10 per cent statutory allowance therefrom and arrive at the net rateable value which would be equivalent to the net annual rent. The rateable value is thus taken to be the same as the net annual rent of the property. It is a well recognised principle in rating that both gross value and net annual value are estimated by reference to the rent at which the property might reasonably be expected to let from year to year. Various methods of valuation are applied

(1) LXIII Bombay Law Reporter, 174.

A in order to arrive at such hypothetical rent, for instance by reference to the actual rent paid for the property or for others comparable to it or where there are no rents by reference to the assessments of comparable properties or to the profits earned from the property or to the cost of construction. The expression "gross value" means the rent at which a hereditament might reasonably B be expected to let from year to year. The rent which a tenant could afford to give is calculated *rebus sic stantibus*, that is to say, with reference to the property in its existing physical condition and to the mode in which it is actually used. The hypothetical tenant includes all persons who might possibly take the property including the person actually in occupation, even though he happens to be the owner of the property. The rent is that C which he will pay in the "higgling of the market", taking into account all existing circumstances and any relevant future trends. If the property affords the opportunity for the carrying on of a gainful trade, that fact also must be taken into account. The property is assumed to be vacant and to let and the material date for the valuation is that of the proposal which gives rise to D the proceedings. The actual rent paid for the property is not conclusive evidence of value, though such actual rent may serve as an indication as to what a hypothetical tenant can afford to pay. However, if the actual rent is paid on terms which differ from those of the hypothetical tenancy it must be adjusted, if possible, to the terms of the hypothetical tenancy before it affords evidence of value. (See Halsbury's Laws of England, (3rd ed.) E vol. 32, p. 60 and onwards). It is also well recognised that while valuing the property in question every intrinsic quality and every intrinsic circumstance which tends to push the rental value up or down must be taken into consideration. In other words, in estimating the hypothetical rent "all that could reasonably affect the mind of the intending tenant ought to be considered." (*Cartwright* v. *Sculcoates Union*[1]). Scott, L. J. *Robinson Bros.* v. F *Houghton and Chester-le-Street Assessment Committee*[2] observed:—

> "It is the duty of the valuer to take into consideration every intrinsic quality and every other circumstances which tends to push the rental value up or down, just G because it is relevant to the valuation and ought therefore to be cast into the scales of the balance... The objective being the real value of the actual hereditament, the inquiry is primarily economic and not legal; it is only legal in so far as logical relevance is the measure of legal admissibility." (See also Ryde on Rating. 11th ed., 385, 387).

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The measure for purposes of rating is therefore the rent which a hypothetical tenant, looking at the building as it is, would be prepared to pay. Though the tenant is hypothetical and the rent

(1) [1900] A.C. 150.

(2) [1937] 2 K.B. 445 at 469.

too is hypothetical, the property in respect of which he would estimate that which he would offer as rent is not hypothetical but concrete. While estimating the rent which he would be prepared to pay he would naturally take into consideration all the advantages, together with the disadvantages attached to the property, that is, the maximum beneficial use to which he would be able to put the property. In doing so he is bound to take into consideration the fact of the property being situated at an unique place as the instant property undoutedly is, *viz.*, at the juncture of two of the most prominent roads with the additional advantage of Chowpatty Sea Face being opposite to it where in the evenings and on week-ends, it cannot be questioned, large crowds usually gather. Coupled with this would be the advantage that a neon-sign advertisement can be vividly seen if fixed on the top of the building by people, pedestrians and those in vehicles, from fairly long distances in all directions, especially as the advertisement happens to be a rotating one. There can therefore be no doubt that if a property possesses such an amenity, such amenity is bound to add to its beneficial value and the tenant who desires to take it on lease is bound to take into consideration while making up his mind as to the rent which he can profitably offer as to how much income he would be able to derive from exploiting such an amenity. The measure of the hypothetical rent which such a tenant would offer would thus be the extent of the beneficial use to which he would be able to put the property on its being demised to him.

That being so it seems to us that the question whether an agreement under which such a tenant would be able to exploit the advantageous situation in which the property is situate amounts to a lease or licence is totally irrelevant for the purpose of assessing the rateable value. Equally irrelevant is the question whether the income arising from such an agreement is rent or licence fee. To consider such income as irrelevant in the process of rating on the ground that it does not amount to rent but to licence fee is to misconstrue the true measure of the rent expected from the prospective tenant. The tenant would not only take into consideration the actual rent derived from the property but also such other income which he would be able to extract from the situation of the property by exploiting as best as he can the beneficial use to which the property is capable of being put. Therefore, the mere fact that the income from the agreement is not rent but licence fee and therefore cannot be added to the actual rent fetched by the property does not justify on any principle of rating or any construction of section 154 of the Act, disregard of it while estimating the rent which the property would be expected to fetch.

It is true that the rating was so far made including the year in question on the basis of the actual rent derived from

A the property. That appears to have been done because of the restrictions under the Bombay Rent Act by reason of which the property cannot be leased at rent higher than the standard rent allowed under the provisions of that Act. Since no hypothetical tenant would pay rent higher than such standard rent the actual rent would ordinarily be the rent expected from a hypothetical tenant. The question would be whether the Corporation B would be justified in enhancing the rateable value by adding the said sum of Rs. 1500 per month arising from the said amount? It is true, as observed earlier, that the hypothetical rent cannot be in view of the rent restrictions higher than the actual rent. But the income arising under the said agreement is not rent realised from letting out any part of the property to the C Company but is in consideration of the exclusive privilege granted to it of displaying its neon-sign advertisement. It is manifest that the user thereunder of part of the terrace adds to the beneficial value of the building. For such user the owner can legitimately expect something extra over and above the standard rent of the building. Though the owner of the building D cannot charge rent over and above that which is permissible under the provisions of the Rent Act, there is nothing in that Act which prohibits him from charging an amount from an advertiser in consideration of the privilege of displaying his advertisement. A hypothetical tenant, therefore, would take into consideration such extra income arising from the special advantage attached to the building and would be prepared to pay E over and above the actual rent something in respect of such an additional advantage.

Counsel for the appellants relied upon certain decisions which we may now examine. *Taylor* v. *Overseers of Pendleton*(1) is a case where the question was whether the advertising agent was a tenant or a licensee. If he was a licensee it would F be the owner who would be the occupier; if a tenant it would be the advertising agent who would be the occupier. Since under the English law it is the occupier and not the owner who is liable for rates it was held that the agent being the tenant was the occupier and it was he and not the owner who was liable to pay rates. In *Wilson* v. *Tavener*(2) the defendant agreed by an G agreement to let the plaintiff erect a hoarding upon the forecourt of a cottage and to allow him the use of a gable end for a bill posting station at yearly rent. It was held the agreement did not amount to tenancy from year to year but was a licence and a quarter's notice terminating at the end of the year of the currency of the agreement was a reasonable notice. These H decisions cannot be appropriately brought to aid by the appellants as under the English law it is the occupier who is liable for the tax and it is for that reason that the court had to determine in each case whether the agreement in question created

(1) [1887] 19 Q.B.D. 289. (2) [1901] 1 Ch. 578.

a demise or a licence. But whether the advertiser was a lessee A or a mere licensee, the income arising from advertisement hoardings has always been rated irrespective of the question as to who was liable to pay the tax. Reliance was placed both before the High Court and also before us on the decision in *Corporation of Calcutta* v. *Anil Prakash Basu*(1). The building there was let out to the tenant at Rs. 64/14/- per month. On the roof of it, how- B ever, the Calcutta Street Advertising Company had displayed a neon sign board of Capstain cigarette for which the owner was paid Rs. 125 per month. The question was whether the Calcutta Corporation was right in treating this income as rent within the meaning of s. 127(a) of the Calcutta Municipal Act, 1923 and take it into account while determining the annual letting value of the building. Section 127(a) is as follows: C

> "For the purpose of assessing land and building to the consolidated rate 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 D time of assessment reasonably be expected to let from year to year less in the case of a building an allowance of 10% for the cost of repairs and for all other expenses necessary to maintain the building in a state to command such gross rent."

The High Court held that the roof of the building on which the E sign board was put up could not be said to have been demised, that the amount paid to the owner by the advertising agency was therefore not rent and that the use of the roof for putting up the sign board amounted to a licence and therefore could not be treated as rent for the purpose of assessing the annual value of the building. The High Court relied on certain English decisions F and also on its own earlier decisions for deciding whether the agreement between the owner and the advertising agency amounted to a lease or licence. Having held that the agreement amounted to a licence and not lease and the income was licence fee and not rent it rejected the contention of the Municipal Corporation that it was entitled to treat the amount of Rs. 125 a G month as rent over and above the actual rent of the building. It may be observed that it was never argued before the High Court that the agreement, whether the said amount was rent or licence fee, added to the beneficial value of the building, that though the roof on the terms of that agreement could not be said to have been demised, what had to be considered under s. 127(a) for assessing the annual rent of the building was the H rent which a hypothetical tenant was expected to pay and not the actual rent, and whether such hypothetical tenant would or

(1) A.I.R. 1958 Cal. 423.

A would not take into consideration the extra income derived from the use of the roof for the advertising hoarding over and above the actual rent while deciding what rent he can profitably offer for the building. Such a question not having been raised or decided this decision also cannot assist the appellants.

In our view if the building or a part of it yields an extra B income over and above the actual rent derived from it such income on the terms of s. 154(1) of the Act can legitimately be taken into consideration by the assessing authority while determining the annual rent on the ground that a hypothetical tenant would take such extra income into account while considering what rent he can afford to offer for such building. That being C the correct position under s. 154(1) of the Act the High Court, was right in confirming the enhancement of the annual rent from Rs. 44,320 to Rs. 59,600.

The appeal fails and is dismissed with costs.

Y. P.

Appeal dismissed.