

1892

17 B. 54.

MARCH 21.

[54] APPELLATE CIVIL.

APPEL-
LATE
CIVIL.*Before Mr. Justice Jardine and Mr. Justice Telang.*

17 B. 54.

RAM TUKOJI (*Original Plaintiff*), *Appellant v. GOPAL DHONDI*
(*Original Defendant*), *Respondent*.^{*} [21st March, 1892.]*Landlord and tenant—Tenant's liability to pay cess imposed by an Act subsequent to the lease—Bombay Act III of 1869, s. 8—Local-fund cess.*

Under s. 8 of Bombay Act III of 1869, a lessor, who is in the position of a superior holder, may recover the local fund cess from his lessee.

Ranga v. Suba Hegde (1) followed.

[R., 17 B. 422 (424); 26 B. 504 (516, 517).]

SECOND appeal from the decision of R. S. Tipnis, Acting District Judge of Ratnagiri, in appeal No. 154 of 1889 of the District File.

The plaintiff sued to recover Rs. 80, being the amount of rent and local fund cess due for the years 1883-84 to 1886-87 in respect of certain lands in defendant's occupation.

The defendant held, at a fixed rent of Rs. 10 per annum, under a permanent lease granted by the plaintiff's father in 1862.

The defence to the suit was that the plaintiff had no right to enhance the rent, or recover the local-fund cess, in respect of the lands in defendant's possession.

Both the lower Courts held that the claim to enhanced rent was *res judicata*, having been decided against the plaintiff in a former litigation between the parties.As to the local fund-cess, the Subordinate Judge awarded the claim, but the appellate Court rejected it, on the ground that the cess was *prima facie* payable by the the lessor, and that there was no agreement by the lessee to pay it.

Against this decision the plaintiff preferred a second appeal to the High Court.

Ghanasham Nilkanth, for appellant:—Under s. 8 of Bombay Act III of 1869, a superior holder can recover the local-fund cess from an inferior holder. A landlord is in the position of a superior holder. He is, therefore, entitled to recover the cess from his tenants—*Ranga v. Suba Hegde* (1).[55] *Daji Abaji Khare*, for respondent:—The defendant held under a lease granted by plaintiff's father in 1862 long before the cess was imposed. The lessor cannot recover anything in excess of the rent fixed in the lease. It would be varying the terms of the written contract between the parties if the lessee were held liable to pay the cess in addition to the fixed rent—*Babshetti v. Venkataramana* (2). Section 83 of Bombay Act V of 1879 prevents a lessor from enhancing the rent in the face of an express agreement.

JUDGMENT.

JARDINE, J.—We do not differ from the opinion of the lower Court of appeal on the question of *res judicata*.

Objection has been taken to the ruling of that Court, that the defendants, who obtained a permanent lease of the land in 1862, are not

^{*} Second Appeal, No. 877 of 1890.

(1) 4 B. 473.

(2) 3 B. 154.

liable to pay the local-fund cess, since imposed by Bombay Act III of 1869. The District Judge's reasons are that no agreement to pay the cess had been proved, and that it is *prima facie* payable by the land-owner. The pleader for the appellant argues that the Act imposes the tax on the lessee, as ruled in a reported case from North Kanara, *Ranga v. Suba Hegde* (1), where it is said: "The cess is distinct from rent, and not having been in existence at the time the lease was made, it is of course not provided for in that lease. In the absence of any contract to the contrary, we think that it is equitable, and in accordance with the intention of the Legislature as shown in s. 8 of Bombay Act III of 1869, that the cess should be ultimately paid by the tenant." The pleader has not been able to refer us to any authority in support of the argument derived from equity.

No reference has been made to the Land Revenue Code, Bombay Act V of 1879; but the argument advanced for the appellant amounts to this—that we should interpret s. 8 of Act III of 1869 as if it meant what is very plainly said in s. 50 of the Act of 1879. *Cf.* Regulation XVII of 1827, s. 6, cl. 2, now repealed. This argument concedes that the Bombay Legislature has imposed the tax on the superior holder, in the present case the lessors; and the only question is whether s. 8 of the Act of 1869 implies that the superior holder may recover the amount from the lessee. That the lessor was a superior holder within the [56] definition of the Bombay Survey Act I of 1865, s. 2, cl. (k), the law in force in 1869, may be conceded. As to "occupants" being regarded as superior holders for the purpose of the assistance provided by Regulation XVII of 1827, Chaps. 6 and 7, see s. 44 of the Survey Act.

The difficulty of construing s. 8 of Bombay Act III of 1869, as imposing a duty on the inferior holder or lessee to pay the cess, arises from the want of explicit statement such as may be expected in a law imposing a new tax, especially when this section is compared with s. 50 of Bombay Act V of 1879. On the other hand, s. 8 of the Act of 1869 makes the provisions of the law relative to assistance applicable to *all* superior holders. The question is one of general importance, and we have taken time to consider it. On the whole, we think s. 8 is open to the construction put upon it, in *Ranga v. Suba Hegde* (1), by Westropp, C. J., and Melvill, J., and though that interpretation is not perhaps the necessary meaning of the words, we think we ought to lean to it, in order to avoid the unsettling of titles which might arise if we departed from what those eminent Judges have laid down. We now reverse the decree of the District Court and restore that of the Subordinate Judge. Costs of both appeals on the present respondent, the first defendant.

Decree reversed.

(1) 4 B. 473.