

# CALCUTTA HIGH COURT

Maharaja Birendra Kishore

Vs

Secretary of State

(Asutosh Mookerjee, C.J. E Fletcher and Walmsley, JJ.)

30.08.1920

## JUDGMENT

**Asutosh Mookerjee, Acting C.J.**

1. This is a Reference under Section 51 of the Indian Income Tax Act, 1918. The section is in the following terms:

1. If, in the course of any assessment under this Act or any proceeding in connection therewith other than a proceeding under Chapter VII, a question has arisen with reference to the interpretation of any of the provisions of this Act or of any rule there under, the Chief Revenue Authority may, either on its own motion or on reference from any Revenue Officer subordinate to it, draw up a statement of the case, and refer it, with its own opinion thereon, to the High Court, and shall so refer any such question on the application of the assessee unless it is satisfied that the application is frivolous or that a reference is unnecessary.

2. If the High Court is not satisfied that the statements contained in the case are sufficient to enable it to determine the questions raised thereby, the Court may refer the case back to the Revenue Authority by which it was stated, to make such additions thereto, or alterations therein as the Court may direct in that behalf.

3. The High Court upon the hearing of any such case shall decide the questions raised thereby, and shall deliver its judgment thereon containing the grounds on which such decision is founded, and shall send to the Revenue Authority by which the case was stated, a copy of such judgment under the seal of the Court and the signature of the Registrar; and the Revenue Authority shall dispose of the case accordingly, or if the case arose on reference from any Revenue Officer subordinate to it, shall forward a copy of such judgment to such Officer who shall dispose of the case conformably to such judgment.

4. Where a reference is made to the High Court on the application of an assessee, costs shall be in the discretion of the Court.

2. The assessment which has led up to the present proceeding was made by the Collector of Tipperah, in whose jurisdiction the assessee resides, within the meaning of the definition of the term "Collector" contained in Sub-section (5) of Section 2 of the Indian income Tax Act. The Maharaja of Tipperah, who was the assessee, took exception to the assessment as contrary to law, but the Collector refused to entertain the petition of objections on the ground that it could be heard by way of appeal from his order only by the Commissioner of the Chittagong Division. The matter was then taken before the Commissioner, who heard the objections, allowed them in part, and modified the order of the Collector on the 19th December 1919. The assessee was not satisfied with his partial success and applied to the Board of Revenue, as the Chief Revenue Authority of the Presidency, to revise the order of the Commissioner. On the 3rd May 1920 the Chief Revenue Authority made this reference under Section 51, with a view to obtain a ruling of the High Court on the several questions specified. When the matter was notified to be set down for disposal here, the Advocate-General appeared and mentioned to the Court, that, as it was understood that the assessee had arranged to be represented at the hearing by Vakil, he thought it fair to state in advance that objection would be taken that Vakils were not entitled to be heard on this Reference. When the case was actually taken up for disposal, Mr. Section R. Das intimated to the Court that he had been instructed to appear on behalf of the assessee and, consequently, the objection which the Advocate-General had intended to take could not, in the circumstances, arise. It transpired, however, that Mr. Das was instructed by Mr. O.C. Ganguly, who was a Solicitor of this Court but had not been enrolled as a Vakil. As an Attorney can appear in this Court only on the Original Side and in appeals from the Original Side, the question arose whether this was a matter in which Counsel could be instructed by an Attorney or only by a Vakil. Consequently, the point which the Advocate-General had previously brought to the notice of the Court did require consideration, though in a somewhat different form. We accordingly heard the Advocate General and Mr. Das and held that, as this reference by the Board of Revenue arose out of a proceeding for assessment of income tax within the jurisdiction of the Collector of Tipperah and the Commissioner of the Chittagong Division, Vakils were entitled to be heard and Counsel could be properly instructed only by a Vakil. When this was intimated to Mr. Das he stated, that Mr. Gobinda Chandra Dey Ray and Mr. Birendra Chandra Das, two of the Vakils of this Court, were ready to enter appearance on behalf of the assessee. After Mr. Das had thus been properly instructed, the matter was heard on the merits. We shall now state the grounds for our ruling on the question of procedure and then give our decision on the points raised in the Reference.

3. For the solution of the question of procedure, it is necessary to investigate the nature of the proceeding under Section 51 of the Indian Income Tax Act. It is plain that the nature of the proceeding cannot be affected by coincidental circumstances, such as the place from or the channel through which the Reference has been made; it is immaterial whether, at the time of the Reference, the Chief Revenue Authority was at Calcutta, Darjeeling or Dacca, or, whether the Chief Revenue Authority caused the order of Reference to be transmitted to the Government Solicitor who placed the matter in the hands of the Registrar on the Original Side or to the Legal Remembrancer who entrusted the matter to the charge of the Government Pleader on the Appellate Side. The nature of the proceeding is a matter of substance and not of form.

4. The scheme of the Indian Income Tax Act, 1918, for the determination of controverted questions of liability to assessment is fairly simple. The assessment is made, in the first instance, under Sub-section (1) of Section 18, by the Collector, who, under Clause (5) of Section 2, in relation to an assessee carrying on business, the Collector of the place where the principal place of business of such assessee is situated, and in relation to any other assessee, the Collector of the place where such assessee resides. When the assessment has been so made, the assessee may, under Sub-section (1) of Section 21, apply by petition to the Commissioner for relief against the order of the Collector. Under Section 22, the Commissioner may pass such order as he thinks fit, by way of confirmation, reduction, enhancement or cancellation of the assessment. Section 23 next authorises the Chief Revenue Authority to call for the record of any assessment proceeding which has been taken by any Officer subordinate to it and to make such enquiry and to pass such orders thereon as it thinks fit. Section 51 empowers the Chief Revenue Authority to make a reference to the High Court either on its own motion (that is, when it has seized of the proceeding under Section 23) or on reference from any Revenue Officer subordinate to it (that is, while the proceeding is still before the Collector or the Commissioner). Section 51 further provides that the Chief Revenue Authority shall make such reference on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary. Section 52 finally lays down that no suit shall be brought in any Civil Court to set aside or modify any assessment made under the Act. It is clear from the provisions analysed that the jurisdiction of the Civil Court is taken away, as the assessee would have been entitled, but for Section 52, to institute a suit in the Civil Court to contest the validity of the assessment made by the Collector. In lieu of such remedy, the assessee is permitted to take up the matter successively to the Commissioner and the Board of Revenue. The Chief Revenue Authority is thus constituted the Tribunal which finally re-replaces the Civil Court, subject to the reservation that there may be a reference to the High Court on questions of interpretation of the provisions of the Act or of the rules made thereunder. When such a reference has been made, the opinion pronounced by the High Court cannot be ignored, because it is made obligatory on the Revenue Authority concerned to decide the case

conformably to the judgment of the High Court. What then is the nature of the jurisdiction which the High Court exercises on such reference? Under the Letters Patent, the civil jurisdiction of the High Court is classified as original (ordinary and extraordinary), and appellate (from the Original Side or from the Courts in the Provinces.) The Letters Patent makes no mention of revision (as distinguished from superintendence) of the proceedings of subordinate Courts or of references from them. This does not justify the inference that the Court has no power to revise proceedings or to hear references. It was pointed out by Sir Richard Couch, C.J., in *Girdharee Singh v. Hurday Narain Saho*<sup>1</sup> that the power of revision is in essence an aspect of appellate jurisdiction. The substance of the matter is, as explained in *Secretary of State for India v. British India Steam Navigation Co*<sup>2</sup> that the error of the inferior Court is rectified by a superior Tribunal; this characteristically common to both the proceedings technically called appeal and revision. On the other hand, a reference is made by a subordinate to a superior Tribunal with a view to obtain its opinion upon a controverted question of law and thereby avoid possible error. An Appellate Court thus exists for the correction of an error of a subordinate Court by way of appeal or revision, as also for the evidence of error by a subordinate Court by pronouncing an opinion upon the question of law referred in advance. The essence of the matter thus is that when a Court hears a reference, it really performs the functions of a Court of Appeal quite as much as it undoubtedly does when it hears an application for revision. The index of the relation of superior and inferior Tribunal is furnished by the fact that the judgment pronounced on the reference by the High Court is binding upon the referring authority. There is thus no escape from the conclusion that the High Court exercises, not an original but an appellate jurisdiction when it entertains a reference under Section 51 of the Indian Income Tax Act, 1918. In this connection, we must not overlook Section 106(2) of the Government of India Act, 1915, which provides that the High Court has not and may not exercise any original jurisdiction in any matter concerning the revenue or concerning any Act ordered or done in the collection thereof, according to the usage and practice of the country, or the law for the time being in force; this substantially reproduces the provision in Section 8 of 21 Geo. III, C. 70, which debarred the Supreme Court from exercising jurisdiction in any matter concerning the revenue. Now, the Chief Revenue Authority, under the Indian Income Tax Act, 1918, exercises jurisdiction over the entire Presidency, as well in the Town of Calcutta, as beyond the limits of the Presidency town. A distinction may thus legitimately be drawn between a reference made in connection with an assessment on a person who resides in the town of Calcutta (that is, within the limits of the ordinary original civil jurisdiction of this Court) and a reference made in connection with an assessment on a person who resides beyond the limits of the ordinary original civil jurisdiction of his Court. In the former class of cases, the procedure should be assimilated with that applicable to appeals from the Original Side; in the latter class of cases, the procedure should be that applicable to appeals from the Courts in the Provinces under Clause 16 of the Letters Patent. This distinction, as is

well-known, has a historical origin and cannot be ignored. It was faintly contended, however, by Mr. Das, as a last resort, that the jurisdiction which the High Court exercises under Section 51 of the Indian Income Tax Act is neither original nor appellate, but a new kind of jurisdiction not contemplated by the Letters Patent. It is sufficient to say that this argument, though not lacking the merit of novelty, could not be of any practical assistance to Mr. Dass for, while an Attorney can appear only on the Original Side, a Vakil is excluded only from the Original Side. Consequently, if the jurisdiction were neither original nor appellate, an Attorney would not be, but a Vakil would be, competent to appear. In the present case, the assessment under Section 18 was made by the Collector of Tipperah and the order under Section 22 (which ultimately came under examination by the Board of Revenue) was made by the Commissioner of the Chittagong Division. Consequently, the procedure which governs appeals from the Courts in the Provinces, within the meaning of Clause 16 of the Letters Patent, is applicable to the reference made by the Chief Revenue Authority under Section 51, and on such reference Vakils, but not Attorneys, are entitled to appear. This view is not opposed to the procedure followed in the case of *Killing Valley Tea Co. Limited v. Secretary of Stats for India in Council*<sup>3</sup>; there no such question was raised, possibly for the reason that as the Company, though owning property situated at Naogaon in Assam, had its registered office at 1, Clive Street, Calcutta, and might, consequently, be deemed, under Section 2(5), to have its principal place of business within the town of Calcutta ; the assessment was, in fact, made by the Collector of Income Tax, Calcutta. Our conclusion is also not affected by the decision in *Barristers and Vakil, In re*<sup>4</sup> that Vakils had no right of audience in the High Court in cases sent up for trial under Act XIV of 1908. No reasons were recorded in that case; but it was plain that the jurisdiction to be exercised by the Court was original criminal jurisdiction. Nor is any assistance to be derived from the decision in *Bndhu Lall v. Chotu Gope*<sup>5</sup>, where the Court was equally divided in opinion upon the question, whether Vakils were entitled to be heard in a proceeding under Section 195 of the Criminal Procedure Code instituted in a Presidency Small Cause Court and brought up before the High Court in the exercise of its revisional jurisdiction or of its power of superintendence. Nor is any light thrown on the point before us by the practice in connection with references under Section 57 of the Indian Stamp Act, 1899; such references, so far as we have been able to discover, have hitherto been made mostly in connection with matters arising within the limits of the ordinary original civil jurisdiction of this Court, and, in such cases claim to a right of audience would not ordinarily be put forward by Vakils; but in one instance at least, Reference under Stamp Act, 1899 (6), where the question arose in relation to a Steamship Company from the Mofassil, Counsel appeared with a Vakil at the hearing.

5. On the other hand, Vakils have always appeared in references from subordinate Courts for disciplinary action against Pleaders and Muktears under the Legal Practitioners Act, 1879, as also

in proceedings instituted in this Court for disciplinary action against Vakils.

6. We have next to consider the questions referred by the Board of Revenue to this Court for decision:

(1) Is selami or premium agricultural income within the meaning of Section 2(1) of the Indian Income Tax Act, 1918, when charged.

(a) for the settlement of waste lands or abandoned holdings?

(b) for recognition of a transfer of a holding from one tenant to another?

(2) Are illegal abwabs, such as uttarayan agricultural income within the meaning of that section?

7. Section 4 provides that agricultural income shall not be chargeable to income tax. Section 2(1)(a) lays down that agricultural income" means any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land revenue or subject to a local rate assessed and collected by officers of Government as such, The assessee contends that the incomes mentioned in the two questions are exempt from assessment as they constitute agricultural income within the meaning of the definition just given. We are of opinion that this contention is well founded in respect of selami paid for the settlement of waste lands or abandoned holdings, but cannot be supported in respect of selami paid for recognition of a transfer of a holding from one tenant to another. When a new tenancy is created in respect of unoccupied waste lands or lands which had been abandoned by previous tenants, the premium represents essentially the capitalised value of a portion of the rent. We are not unmindful that in the case of *Dinanath Mookerjes v. Debnath Mullick*<sup>6</sup> it was ruled that money payable by a lessee in consideration of a lease granted, whether called nuzzur or selami, cannot be looked upon as rent, but is simply a debt due upon a contract and is recoverable by a suit in a final Cause Court on the money-bond executed in that behalf by the tenant in favour of his landlord. It is not necessary to hold that such Salami is rent within the meaning of the definition given in the Bengal Tenancy Act or the Transfer of Property Act. The expression used in the Indian Income Tax Act is "rent or revenue," and this is obviously wider than rent, as defined in the Bengal Tenancy Act or the Transfer of Property Act. The term "revenue" is defined in the Oxford Dictionary as follows: "The return, yield, or profit of any lands, property, or other important source of income; that which comes in to one as a return from property or possessions, specially of an extensive kind; income from any source, specially of an extensive kind; income from any source, but specially when large and not directly earned." There can be little doubt that when a lease is granted, the amount fixed for periodical payment is not independent of the amount paid in a lump sum as premium. The capitalized value of the sum periodically payable, taken along

with the premium, constitute in the aggregate the consideration for the grant; so that the larger the one element, the smaller the other. From this point of view, we must hold that the premium paid for the settlement of waste lands or abandoned holdings may reasonably be regarded as "rent or revenue" derived from land, within the meaning of that expression as used in the definition of "agricultural income" in Section 2(1)(a).

8. But these considerations do not apply to the selami or premium paid for recognition of a transfer of a holding from one tenant to another. When the transfer is recognized, the original tenancy continues and there is no new demise. The sum paid as selami or premium in such circumstances is obviously not rent in any sense of the term; nor can it be deemed the return, yield, or profit of any land. The money is paid by the transferee to the landlord to purchase peace, so that he may not contest the validity of the transfer. We cannot hold that money so levied by the landlord can be comprised within the scope of the definition of agricultural income.

9. Finally, the contention that illegal abuabs, such as uttarayan, constitute agricultural income, is manifestly untenable. The item uttarayan is a voluntary payment, made by tenants, at one piece per rupee of their rent, for expenses of the Bastu Puja on the Uttarayan Sanskranti day (the list day of the Bengali month Pous) and for distribution of sweets and oranges to all servants of the estate, Government officers and local residents. The item consequently is an illegal exaction and cannot, on the widest interpretation which may be placed on the phrase "rent or revenue," be possibly included therein; nor can it be said to be derived, that is, drawn, or obtained from the land. We do not feel pressed by the contention that, if the income from Uttarayan be treated as assessable, there would be an indirect recognition of it by Government; For, all that has to be considered is, whether it is exempted from assessment, because, if not exempted, it must be taxed as included in the all comprehensive expression in Section 3(1), namely, "income from whatever source it is derived." Reference may in this connection be made to the decision in *Partridge v. Mallandaine*<sup>7</sup> In that case, it was ruled that persons receiving profits from betting systematically carried on by them throughout the year as book makers on case courses, were chargeable with income tax on such profits, even though bets were considered null and void and not recoverable in law. Denman, J., said that even an illegal vocation would be taxable on its income, as "if a man were to make a systematic business of receiving stolen goods, and to do nothing else and were thereby to make a profit of, say £2000 a year, the Income Tax Commissioners would be quite right in assessing him if it were in fact his vocation." We hold, accordingly, that income derived from illegal abwabi, such as uttarayan, is not exempt from assessment.

10. The result is that Q. (1)(a) is answered in the affirmative, Q. (1)(b) and Q. 2 in the negative.

11. There will be no order for costs under Section 51(1), as the Reference has been decided in

part in favour of the assessee.

12. Let a copy of this judgment be forwarded to the Board of Revenue under Section 51(3).

**Fletcher, J.**

**13. I agree.**

**Walmsley, J.**

**14. I agree.**

Cases Referred.

1 21 W.R. 263 : 13 B.L.R. 103

2. 9 Ind. Cas. 183 : 18 C.L.J. 90 : 15 C.W.N. 848

364 Ind. Cas. 107 : 32 C.L.J. 421

44 Ind. Cas. 297 : 13 C.W.N. 605 : 10 Cr. L.J. 553

541 Ind. Cas. 313 : 25 C.L.J. 401 : 21 C.W.N. 654 : 18 Cr. L.J. 793

613 W.R. 307 : 5 B.L.R. App.1

7(1886) 56 L.J.Q.B. 251 : 18 Q.B.D. 276 : 56 L.T. 208 : 35 W.R. 276