BOMBAY HIGH COURT

Sir Byramjee Jeejeebhoy

Vs.

The Province of Bombay

O.C.J. Suit No. 1056 of 1939

(John Beaumont, Kt., C.J., Broomfield and Kania, JJ.)

27.09.1939

JUDGMENT

John Beaumont, Kt., C.J.

1. The plaintiff in this suit is the owner of certain Immovable properties in the City of Bombay, and he seeks a declaration that Part VI of the Bombay Finance Act of 1932, incorporated therein by the Bombay Finance (Amendment) Act, 1939, is ultra vires of the Bombay Provincial Legislature, and a declaration that the urban Immovable property tax purporting to be levied by Section 22, forming part of the said Part VI of the Bombay Finance Act, 1932, is illegal and invalid. He also asks for further declarations that the notices served on the plaintiff by the Bombay Municipality under Section 202 of the City of Bombay Municipal Act under powers purporting to be conferred by the impugned Act are invalid so far as they relate to the urban Immovable property tax, and other consequential relief.

2. The first point taken by Government is that this Court has no jurisdiction to hear the suit by reason of Section 226 of the Government of India Act, 1935, P which provides that no High Court shall have any original jurisdiction in any matter concerning the revenue. Why a High Court should be debarred from exercising jurisdiction which a Subordinate Judge could exercise, I do not know ; but we have to take the Act as we find it. Before the Section can apply, however, we must determine that the tax which is challenged is legal ; if it is not, its imposition does not concern revenue, but is a nullity. To refuse jurisdiction to try this question would involve dismissing the case against the plaintiff without hearing him. This point was not seriously contested by the Advocate General.

3. The material provisions of Part VI of the Bombay Finance Act, 1932, which were added by the Bombay Finance Act, 1939, are as follows :-

> Section 20 directs that Part VI of the Act extends to the City of Bombay, and the other places therein mentioned.
> Section 21 defines " annual letting value " in the City of Bombay as meaning the rateable value of buildings or lands as determined in accordance with the provisions of the City of

Bombay Municipal Act, 1888.

Section 22 is the charging Section and provides that there shall be levied and paid to the Provincial Government a tax on buildings and lands thereinafter called the " Urban Immovable Property Tax " at ten per cent, of the annual letting value of such buildings or lands. Then there is a proviso that the tax shall be levied and paid to the Provincial Government at the rate of five per cent, of the annual letting value in the city of Bombay on the buildings and lands the annual letting value of which does not exceed L 2,000. Subsequently by a notification under Section 29 of the Act lands and buildings the annual letting value of which does not exceed L 500 were exempted from the tax.

Section 23 exempts from the tax certain buildings and lands not material to specify.

Section 24 provides that the said tax shall be levied and collected in the areas within the limits of a municipality by the municipality concerned, and that the levy) and collection of the tax shall be made in any area within the limits of the municipality in the same manner in which the property tax is levied and collected in the said area.

Section 26 directs that the tax shall be leviable primarily on the actual occupier of the buildings or lands upon which the said tax is assessed, if he is the owner of the buildings or lands, or holds them on a building or other lease granted by or on behalf of Government or on a building or other lease from any person or local authority, and in other cases the tax shall primarily be leviable if the property be let, on the lessor, if the property be sub-let, upon the superior lessor ; and if the property be un-let, upon the person in whom the right to let vests. The effect of this Section appears to be to charge the tax upon the owner.

Section 27 provides that where any building or land assessed to the tax has been vacant and unproductive of rent for any period of not less than sixty consecutive days, or has been wholly or in great part demolished or destroyed by fire or otherwise deprived of value, the municipality concerned shall remit or refund such portion of the tax as may be prescribed by rules.

Section 29 enables the Provincial Government to make rules for carrying out the purposes of the Act.

4. By an amending Act XVII of 1939, called the Bombay Finance (Second Amendment) Act, 1939, the urban Immovable property tax was made a first charge upon the building or land affected thereby and upon the moveabk-property, if any, found within or upon such building or land belonging to the person liable to pay such tax.

5. By the City of Bombay Municipal Act, 1888, it is provided in Section 139 that property taxes may be imposed for the purposes of the Act. Section 140 provides that the property taxes shall consist of a water-tax, a halalkhor-tax and a general tax which latter tax is to be of not less than eight and not more than seventeen per cent, of the rateable value of buildings and lands in the city. Section 154 provides- 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 per centum of the said annual rente, and the said1 deduction shall be in lieu of all allowance for repairs or on

any other account whatever.

6. Section 212 provides that the property tax shall be a first charge upon the building or land subject thereto.

7. The question which arises in this suit is whether the imposition of the urban Immovable property tax, which I will hereinafter refer to as " the impugned tax " was within the legislative powers of the Bombay Provincial Government under the Government of India Act, 1935.

8. By Section 99 (1) of the Act the Federal Legislature was given power to make laws for the whole or any part of British India or any Federated State, and a Provincial Legislature was given power to make laws for the Province or for any part thereof.

9. Section 100 is in these terms-

> (1) Notwithstanding anything in the two next succeeding Sub-section s, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the "Federal Legislative List").
> (2) Notwithstanding anything in the next succeeding Sub-section, the Federal Legislature, and, subject to the preceding Sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the "Concurrent Legislative List").
> (3) Subject to the two preceding Sub-section s, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the "Provincial Legislative List").
> (4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

10. It has to be noticed in passing that by Section 316 of the Act the powers conferred on the Federal Legislature are at present exercisable by the Indian Legislature.

11. List I of the Seventh Schedule which comprises the matters within the legislative authority of the Indian Legislature, includes item 54 " Taxes on income other than agricultural income," and item 55 " Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies taxes on the capital of companies."

12. List II which comprises matters within the legislative authority of a Provincial Government includes item 41 " Taxes on agricultural income," and item 42 " Taxes on lands and buildings, hearths and windows."

13. The impugned tax may fall either (1) within item 42 of the Provincial List and not within the Federal List, or (2) within item 54 or item 55 of the Federal List and not within the Provincial List, or (3) it may fall within both the Lists.

14. In my opinion there can be no doubt that the impugned tax is a tax on lands and buildings, and falls within item 42 of the Provincial List, unless it is excluded by reason of its falling within the Federal List.

15. I also feel no doubt whatever that if the impugned tax falls within either item 54 or 55 of the Federal List, and also within item 42 of the Provincial List, the powers of the Indian Legislature must prevail to the exclusion of the powers of the Provincial Government. Item 54 of the Federal List embraces " Taxes on income," and in my opinion all the items in the Provincial List must be so construed as to exclude taxes on income. Some reliance was placed by the Advocate General on behalf of the Provincial Government on the recent decision of the Federal Court in the Excise case-In re C.P. Motor Spirit Act., AIR 1939 FC 1. The Court there had to decide whether a tax on the sale of motor spirits was a tax on the sale of goods within item 48 of the Provincial List, or a duty of excise within item 45 of the Federal List. The Court held that although the tax would have come within the general words " duties of excise " if not restricted by the context, nevertheless it could not have been intended that the tax on sales included in the Provincial List should have no effect, and in order to reconcile the two Lists the Court gave a more restricted meaning to " duties of excise " than that which the words would have borne unaided by context. The Court adopted the principle, which has been laid down in many cases in the Privy Council in relation to the construction of the British North America Act, 1867, that the Court must, if possible, reconcile conflicting items in the Central and Provincial Lists before falling back upon the non-obstante clause in Section 100 of the Government of India Act, and in applying that principle the Court restricted the general words of the Federal List so as not to nullify a particular power contained in the Provincial List. But in the present case the more general words are to be found in the Provincial List. There are many taxes on lands and buildings which do not involve a tax on income, e.g., taxes on area, or floor space, or frontage, or occupation, and in my opinion to cut down the meaning of such clear words as '" Taxes on income" by reference to the Provincial List should be to disregard altogether the plain intention of the Legislature as shown in Section 100.

16. The real question in this case is whether the impugned tax is a tax on income within item 54 of the Federal List, or a tax on the capital value of the assets of the plaintiff within item 55.

17. The Privy Council and the Federal Court have laid down that in considering a question of this character the Court must have regard to the pith and sub-stance of the tax which is attacked and not merely to the form in which it may have been imposed. It is argued on behalf of the plaintiff that the impugned tax is in substance a tax on income, and reliance is placed on the fact that to some extent the tax is graded by a reference to the annual value of the property charged and that an allowance may be made by rules in respect of vacant properties, matters which suggest that it is really payable out of income. It is contended further that the basis of the tax is the same as the basis on which Income Tax from property is imposed by Section s 6 and 9 of the Indian Income Tax Act. By Section 9 Income Tax is payable by an assessee in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant thereto of which he is the owner, other than such portions of such property as he may occupy for the purposes of his business, subject to allowances in respect of repairs, insurance premia, interest on mortgages, payments on account of land revenue, collection charges and vacancies. Emphasis is laid on the fact that the tax is based on annual value and not on actual income, although the Advocate

General contends that having regard to the allowances authorised the intention of the Legislature is really to get at the actual income. Reliance is also placed by the plaintiff on authorities relating to Income Tax charged on lands and buildings under Schedule A of the English Income Tax Act. In the case of *London County Council v. Attorney-General*[1] the question arose whether tax paid on the rents and profits of land under Schedule A was properly speaking Income Tax. The trial Court held that it was not, since it was based on the estimated value of the property, and not on income. In dealing with this question Lord Macnaghten in a passage from his speech, which is often quoted, says this (p. 35) :-

> Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of Income Tax assessed under Sched. D and those assessed under Sched. A or any of the other schedules of charge. One man has fixed property, another lives by his wits ; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived.

18. Lord Davey in his speech says this (p. 44) :-

> It is said that the tax imposed on property within Sched. A is not strictly an income tax, because it is levied on the annual value of property and not on the profits received by the owner. That, no doubt, is so, and if one were writing a treatise on taxation it would be proper to refer to this distinction.

19. and later on he says (p. 45) :-

> The truth is that the income tax is intended to be a tax upon a person's income or annual profits, and although (for conceivable and no doubt good reasons) it is imposed in respect of the annual value of land, that arrangement is but the means or machinery devised by the Legislature for getting at the profits.

20. It is clear from that case, and from others in which it has been followed, that in a Statute imposing Income Tax, that is a tax on total income, the tax relating to land is none the less Income Tax because it is assessed on the annual value of the land and not on the actual income. But it does not follow from that proposition that every Statute which charges a tax in relation to annual value of land is charging a tax on income. Prima facie, a tax on the annual value of land is not a tax on income, and recognition of that fact seems implicit in the decision of the House of Lords.

21. The argument on behalf of the Provincial Government is that the impugned tax is not a tax upon income. It is charged on land and buildings and is based on the estimated rent which the property would fetch less ten per cent. Such a value may bear very little relation to the actual income of the property. An allowance of ten per cent, for repairs may be an inadequate allowance in the case of an old building ; the property may be

[1][1901] A.C. 26
subject to mortgages the interest on which absorbs the whole of the income; or it may be subject to an onerous lease which produces less rent than the property could be let for at the time. It is argued that in imposing the impugned tax the Legislature were not purporting or desiring to tax income. They were imposing a tax of ten per cent, on the rateable value upon the owner of particular lands and buildings.

22. In construing the Government of India Act, 1935, the Court is entitled to look to the legislative practice prevailing in England and in India at the time when it was passed. On this principle the Court can clearly look at the provisions of the English and Indian Income Tax Acts, and the Court may also have regard to the fact, to which the Advocate General has called our attention, that taxes on lands and buildings imposed primarily upon the owner and made a charge upon the lands and buildings concerned have been for many years a well recognized form of taxation in India in municipal affairs. In this connection we were referred to the Bombay Municipal Act, 1888, the Bombay Municipal Boroughs Act of 1925, the Madras Act IV of 1919, the Calcutta Municipal Act of 1923, the United Provinces Act of 1916, the Central Provinces Act of 1922, the Punjab Act III of 1911, the Bihar and Orissa Act VII of 1922, and the Karachi Municipal Act of 1933, in all of which a tax of this nature was authorized by the Provincial Government, though admittedly with the consent of the Governor-General. It is argued that the Legislature must have intended to enable Provincial Governments to continue to impose taxes of this nature when they included lands and buildings in item 42, and that, although existing taxes may be saved by Section 143 of the Government of India Act, Municipalities in India will have to devise for the future some fresh system of raising revenue for municipal purposes if Provincial Governments cannot confer upon them the right to levy a tax on lands and buildings of the nature of the impugned tax.

23. The question to be determined comes back to the short one, whether the impugned tax is a tax on income. I am of opinion that it is not. The charging Section 22 imposes the tax on lands and buildings, and not on income, and the basis of the tax is annual value. This is an arbitrary basis which might be applied as well for ascertaining capital value, as for ascertaining income. The fact that some concession is allowed to the small owner, a concession which may be based as much on political, as on economic considerations, and that an allowance may be made where the property is shown to produce no income, a fact which may be taken to show that the estimated value was found to be erroneous, cannot alter the nature of the tax.

24. If the tax is not a tax on income the further question remains whether it is tax on the capital value of the assets of the plaintiff within item 55. The Advocate General submits that item 55 is directed only to a tax on the whole of the assets other than agricultural land of individuals and companies, and that it is directed to what is known as a capital levy. An analysis of the language employed in items 54 and 55 respectively affords scope for this argument, but whether the contention be sound or not, in my opinion, it is impossible to say that this tax, although it is a tax on lands and buildings, is a tax on the capital value of the lands and buildings. It is imposed without any relation to the capital value except so far as such value can be ascertained by reference to rateable value.

25. For the foregoing reasons I am of opinion that Part VI of the Bombay Finance Act, 1932, is not ultra vires the Provincial Government, and that the urban Immovable property tax is a valid

tax. If that be so, it seems to me that the question whether the tax can be raised by the municipal authorities in manner provided is a matter concerning the revenue, and that the jurisdiction of this Court to determine the question is barred by Section 226 of the Government of India Act, 1935. I therefore express no opinion upon that question.

Broomfield, J.

1. I have had the advantage of reading the judgment of the learned Chief Justice, with which with respect I agree, and I shall content myself with a few observations on the most important issue in the case, namely whether the urban Immovable property tax is a tax on income.

2. Relying on a dictum of Lord Macmillan in *Croft v. Dunphy*[2] ("When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power") both sides have tried to support their arguments by reference to taxing Acts in England and India. So far as legislative practice suggests an inference either way it seems to me to) be in favour of the validity of the tax. In England income tax in respect of lands and buildings is assessed on the basis of a rack-rent or " what the property is worth in the way of rent," which is substantially the same as annual letting value, the basis of the impugned tax. Indian Income Tax Acts have followed the English practice. But *London County Council v. Attorney-General*[3] shows that this tax on lands and buildings was not at first regarded by the Courts as properly speaking a tax on income at all; and the effect of the decision of the House of Lords in that case seems to be, not that it is a tax on income, but that it is an income tax within the meaning of the Income Tax Acts. Income tax, as Lord Macnaghten said, is one tax, not a collection of taxes, and there is no difference in kind between the duties of Income Tax assessed under the various Schedules. It may well be doubted, however, whether the Schedule A tax on lands and buildings would have been regarded as a tax on income if imposed by a separate enactment not being an Income Tax Act. In *Rex v. Special Commissioners of Income Tax : Essex Hall, Ex parte*[4] Kennedy L.J. said (p. 444) :-

> An assessment upon ' annual value' may, for certain purposes, be treated, in applying the Income Tax Acts, as an equivalent for an assessment upon ' gains and profits'; but they are not simply synonymous or interchangeable expressions.

3. As regards the various municipal taxes in India (taxes on lands and buildings based on annual value) they might have been important, if it could have been said either that they are taxes on income or that they are not. But we cannot say that they are or are not taxes on income without begging the very question which we have to decide. Other points to be noted in connection with these taxes are, that the Acts by which they were imposed were all passed at a time when the Provincial Legislatures were empowered to impose taxes on income; that they all received the assent of the Governor-General; and that, under the present constitution, their operation is saved by Section 143 (2) of the Government of

[2][1933] A.C. 156 [4][1911] 2 K.B. 434
[3][1901] A.C. 26

India Act.

4. The main ground on which it is sought to be shown that the impugned tax is a tax on income is

that it is assessed on the same basis as Income Tax, that is on annual value or the amount at which the property may reasonably be expected to let. But the mode of assessment does not determine the character of a tax. Annual value may be the basis of assessment of Income Tax. It may also be the basis of assessment of a tax on capital, e.g., in the case of succession to land under the Succession Duties Act in England; *In re Elwes*[5] or again it may be the basis of assessment of rates such as the ordinary municipal rates in England, which are neither taxes on income nor taxes on property, but a personal charge on the occupier. Clearly it is impossible to say that the employment of annual value as the measure of the impugned tax is any indication that it is a tax on income.

5. We have to discover what is the " essential character " of the tax, what it is " in pith and substance," apart from the mere machinery by which it is assessed, and we are to look mainly at the charging Section s of the Act for this purpose. But neither in the charging Section s nor in any other part can I find any clear evidence that it is intended to be, or is in effect, a tax upon income. By reason of the fact that the provisions of the Bombay Municipal Act are made applicable, there is a deduction of ten per cent. from the annual letting value " in lieu of all allowance for repairs or on any other account whatever " ; and some remission is allowed in the case of vacancies. The Act itself provides that the rate of tax is five per cent. instead of ten per cent. in the case of properties the annual letting value of which does not exceed L 2,000. By a notification under Section 29 the tax is remitted entirely where the annual letting value is less than L 500. But these allowances and concessions, which may be explained by a desire to temper the wind to the shorn lamb, are really matters affecting the rate rather than the subject matter of the tax. On the other hand the omission from the Act of any allowance for such outgoings as interest on mortgages (provided for by Section 9 of the Income Tax Act) is difficult to explain except on the footing that the basis of the tax is something not dependent on the income of the assessee.

6. It seems to me to be a matter of cardinal importance in this case that annual value, even when used for the purposes of Income Tax Acts, is not a measure of the actual rent or income but an arbitrary figure. That this is so is pointed out by Lord Davey in *London County Council v. AttorneyGeneral*[6] and Buckley L.J. in the Essex Hall case described annual value as " but an hypothetical sum arrived at in a certain manner." If annual value is not equivalent to actual rent or income, why should it not be used as the basis of assessment of a tax on lands and buildings ? It is in fact used, as I have said, for the purpose of assessing some taxes which are not taxes on income. We have to start with the position that the Provincial Government under item 42 of the Provincial List has power to impose taxes on lands and buildings. (The very full and learned argument we have had upon the case has failed to reveal any reasons, historical or other, for supposing that the addition of the words " hearths and windows " in item 42 has any bearing on the scope of the power conferred). Power to impose taxes on lands and buildings means, of course, power to impose taxes on persons, owners or occupiers as the case may be, in respect of these properties. No limit is prescribed as to the amount of the tax which may be imposed, and as to the character of the tax or method of assessment the only

[5](1858) 28 L.J. Exch. 46 [6][1901] A.C. 26

restrictions, or the only ones which concern us at any rate, are that the Provincial Legislature cannot tax income or capital value, by reason of items 54 and 55 in the Central List.

7. Suppose a tax were imposed of X rupees on every house in Bombay, payable by the owner. That would be a crude and unequal impost, but perfectly legal. It would be more equitable, but

still I imagine perfectly legal, if the tax were graded according to the size of the building, the number of storeys or rooms, or according to the extent of frontage on important streets, or according to the cost of construction. Why should it not be permissible to go a little further in the direction of making the amount of the tax correspond to the importance and value of the properties, by employing the standard basis of assessment of municipal property taxes ? If annual value had been equivalent to income that would not be possible, for income may not be taxed by the Provincial Legislature. But when you speak of income being taxed, within the meaning of item 54, what has to be considered in my opinion is actual income, and not the hypothetical income arbitrarily adopted for income tax purposes.

8. It was rather faintly suggested that if the impugned tax is not a tax on income it must be a tax on capital and within the mischief of item 55. What is meant by the capital value of assets in that item is by no means clear, and the argument threw little light on the matter. It may be that what is intended is a tax on the total value of assets in the nature of a capital levy. In any case the measure of the capital value of assets would appear to be the market price. That would obviously be affected by several factors, e.g., mortgages and charges, of which the impugned tax takes no account. I do not see therefore that item 55 is of any more assistance to the plaintiff than item 54. With the question whether the urban Immovable property tax constitutes an unfair burden on the tax-payer we are, of course, not at all concerned. Looking at the essential character of the tax from the legal point of view, I think it may be described as a tax on lands and buildings, imposed on the owners qua owners, and assessed by a somewhat arbitrary but not inequitable standard, which is not dependent either on the income of the assessees or on the capital value of the properties. If so, it is a, valid tax.

Kania, J.

1. The first defence raised in the written statement is that the suit is barred by Section 226 of the Government of India Act (hereafter described as the Constitution Act) of 1935. The Section runs as follows :

> (1) Until otherwise provided by Act of the appropriate Legislature, no High Court shall have 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.

2. On a plain reading of the Section it is clear that it can have no application when the question is whether there is any valid revenue. If the Finance Act IV of 1939 of the Province of Bombay is ultra vires, the Section cannot be a bar to this suit. This position is not seriously disputed by the learned Advocate General.
3. If the levying of the tax is not ultra vires, the rest of the provisions relating to the collection can be viewed in two ways : (1) Those provisions themselves are ultra vires the Provincial Legislature. In my opinion, Section 226 of the Constitution Act does not bar a suit to question that. It stands on the same footing as the first contention. (2) Though the legislation is not ultra vires necessary steps, which are conditions precedent, have not been taken to collect the tax. In my opinion Section 226 comes in the way of this contention. This discussion is in respect of the plaintiff's case against defendants Nos. 2 and 3 only, and I shall deal with it later on.

4. The principal question is whether the Finance Act is ultra vires the Provincial Legislature. The relevant Section s of the material Acts are set out in the judgment of the learned Chief Justice. It will be useful first to summaries the recognized rules of construction of statutes when the powers of the two legislatures are different. It should also be noticed that in Canada the grouping is by classes of subjects generally described. As to how the question should be approached, in *Citizens Insurance Company of Canada v. Parsons* : *Queen Insurance Company v. Parsons*[7] it is stated as follows (p. 109) :-.

> The first question to be decided is, whether the Act impeached...falls within any of the classes of subjects enumerated in sect. 92, and assigned exclusively to the legislatures of the provinces ; for if it does not, it can be of no validity, and no other question would then arise. It is only when an Act of the provincial legislature prima facie falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in sect. 91, and whether the power of the provincial legislature is or is not thereby overborne.

5. In my opinion this only means that in the present case on looking at item No. 42 of List II of the Seventh Schedule of the Construction Act, whether, irrespective of any other items in the lists in the schedules, the tax imposed by the Finance Act is included in the words used in item No. 42. In this connection it is to be observed that the particular Act should receive a broad and liberal construction and that the Act is passed in exercise of the plenary powers of a sovereign legislature, within its limits.

6. The second rule stated in Attorney-General for *Ontario v. Attorney-General for Canada*[8] is that where there are two mutually exclusive jurisdictions the supposed conflicting Section s should be read together and the construction, if possible, should be modified of one or the other of the items to avoid a conflict. It is further stated in *Croft v. Dunphy*[9] that "When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative) practice of the State which has conferred the power." These observations show that in construing the words used in the Constitution Act the powers of the Imperial Parliament which passed the Act and its practice have to be borne in mind in ascertaining the meaning of the words used in the Constitution Act. Obviously in construing the same Act the legislative practice and the meaning of expressions used in Acts prevailing in India should also be taken into account.

[7](1881) 7 App. Cas. 96 [9][1933] A.C. 156, 165

[8][1912] A.C. 571

7. *In re C.P. Motor Spirit Act*[10], (generally described as the Excise Case) decided by the Federal Court in India it was observed that the provisions of an Act like the Government of India Act, 1935, should not be cut down by a narrow and technical construction, but considering the magnitude of the subjects with which it purports to deal in a very few words, it should be given a large and liberal interpretation so that the Central Government, to a great extent but within certain fixed limits, may be mistress in her own house, as the Provinces, to a great extent but again within certain fixed limits, are mistresses within theirs. In an enquiry whether an enactment is

ultra vires the Court must ascertain the true nature and character of the challenged enactment, its pith and substance; and not the form alone which it may have assumed under the hand of the draftsman. When there is an absolute jurisdiction vested in a legislature, the laws promulgated by it must take effect according to the proper construction of the language in which they are expressed. But where the law-making authority is of a limited or qualified character obviously it may be necessary to examine, with some strictness, the substance of the legislation, for the purpose of determining what it is that the legislature is really doing. It is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent authority to deal with matters falling within these classes of subjects (mentioned in the Central and Provincial Lists) exists in each legislature and to define, in the particular case before them, the limits of their respective powers. It could not have been the intention that a conflict should exist : and in order to prevent such a result the two Section s must be read together, and the language of one interpreted and where necessary modified by that of the other. In that way, in most cases, it may be found possible to arrive at a reasonable and practical construction of the language of the Section s so as to reconcile the respective powers they contain and give effect to all of them. In the interpretation of a completely self-governing constitution founded upon a written organic instrument (such as the Government of India Act of 1935) if the text is explicit, the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and the scheme of the Act.

8. In Attorney-General for *Canada v. Attorney-General for Ontario*[11] it is stated as follows (p. 367) :-

> Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation, it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid.

9. In *Gallagher v. Lynn*[12] it was stated as follows (p. 870) :-

> It is well established that you are to look at the 'true nature and character of the legislation'... 'the pith and substance of the legislation. If, on the view of the statute

[10] AIR 1939 FC 1 [12][1937] A.C. 863

[11][1937] A.C. 355

> as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct

> prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed 'in respect of the forbidden subject.

10. Again in Attorney-General for *Alberta v. Attorney-General for Canada*[13] the following rule of construction was emphasized (p. 130) :

> A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question... It is not competent either for the Dominion or a Province under the guise1, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other.

11. In *Provincial Treasurer of Alberta v. Kerr*[14] the importance of the words in the taxing Section was stressed in the following terms (p. 720) :-

> The identification of the subject-matter of the tax is naturally to be found in the charging Section of the statute, and it will only be in the case of some ambiguity in the terms of the charging Section that recourse to other Section s is proper or necessary.

12. On reading together item No. 54 in List I and item No. 41 in List II it is clear that under the Constitution Act, income, however derived, is divided in two parts : (1) Agricultural income; and (2) the rest. Agricultural income is defined in the Constitution Act by a reference to the Indian Income Tax Act, Section 2(1).

13. In order to determine the character of the impugned tax we were asked to note the points of similarity between the impugned tax and income tax. First, both are direct taxes. Under both the owner is liable. Even when provision is made for the recovery of the property tax from the occupier the ultimate liability of the owner is emphasized and a right to reimburse is given. Secondly, even a vacant plot of land is taxed under both, on the footing of its annual letting value. In respect of a property occupied by the owner himself the tax is payable under both the Acts, on the footing of an arbitrary basis, viz. the annual letting value. Under both Acts exemption is given to owners whose income or profits are below stated figures. Under both Acts an arbitrary standard is adopted for the purpose of determining the amount of tax payable. The points of distinction suggested are that under the Indian Income Tax Act there is no charge on the property, business property is excluded, and allowances for repairs on a fixed percentage, interest on mortgages, land revenue, collection charges, insurance premia etc. are permitted. It was urged also that income from property outside the Province will be included under the

[13][1939] A.C. 117
[14][1933] A.C. 710

heading taxes on income under the Incometax Act while under the impugned Act only the letting value of the property within the Province is charged.

14. It must be conceded that every tax because it is a direct tax does not necessarily become "

Income Tax ". Also because there is a graduated tax it is not necessarily Income Tax. Graduation is found in the succession duties also. Most of the suggested points of distinction are also not useful to determine the point. Property used for business though excluded for Income Tax purposes under the heading " property " is charged to tax under the heading of "business." The allowance for repairs and the other allowances, whether made or not, or the extent thereof cannot determine the nature of the tax. It was pointed out that under the Income Tax Act of 1886 no allowances were permitted ; still the tax was Income Tax. Moreover the allowances permitted under the Indian Income Tax Act may be withdrawn. That would not alter the nature or character of the tax. The fact that under the Indian Income Tax Act properties wherever situate have to be taken into account is because it is an Act of the Imperial legislature while the jurisdiction of the Province is limited to the provincial boundaries. The amending (Bombay) Act XVII of 1939 which made the tax a charge on the property is an important point of distinction as it clearly shows that the property in the hands of the owner is subject to the burden of this tax.

15. It is necessary in this connection to consider what ' income' under the Income Tax Act means. In *Income Tax Commissioner v. Shaw, Wallace & Co*[15]*.,* their Lordships observed as follows (p. 212):

> Income, their Lordships think, in this Act [Income-tax] connotes a periodical monetary return " coming in with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall.

16. Again in *London County Council v. Attorney-General*[16] Lord Macnaghten stated as follows (p. 35) :-

> Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one (tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Sched. D and those assessed under Sched. A or any of the other schedules of charge. One man has fixed property, another lives by his wits ; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which' taxable income is derived. That is all. Sched. A contains the duties chargeable for and in respect of the property in all lands, tenements, and hereditaments capable of actual occupation. There the standard is annual value. It is difficult to see what other standard could have been adopted1 as a general rule. But there again, if the subject of charge be

[15](1932) L.R. 59 I.A. 206

[16][1901] A.C. 26

> lands let at rack-rent, the annual value is ' understood to be the rent by the year at which the same are let.' In every case the tax is a tax on income, whatever may be the standard by which the income is measured.

17. Lord Davey in his speech stated as follows (pp. 44, 45) :-

> It is said that the tax imposed on property within Sched. A is not strictly an income tax, because it is levied on the annual value of property and not on the profits received by the owner. That, no doubt, is so, and if one were writing a treatise on taxation it would be proper to refer to this distinction. But the question is, What do the words ' income tax' mean in the language of the Legislature, and in this Act?...The truth is that the income tax is intended to be a tax upon a person's income or annual profits, and although (for conceivable and no doubt good reasons) it is imposed in respect of the annual value of land, that arrangement is but the means or machinery devised by the Legislature for getting at the profits.

18. In A Reference under the Government of Ireland Act, 1920, and Sect. 3 of the Finance Act (Northern Ireland), 1934, *In re*[17] Lord Thankerton observed as follows (p. 358) : -

> It therefore remains to consider the second contention of the Corporation- namely, that the tax so imposed by the central authority on the ratepayer is ' substantially the same in character' as income tax. Counsel for the Corporation sought to establish this substantial similarity in character by a detailed comparison of the provisions of the Income Tax Act, 1918, under Sch. A and, in particular, Sch. B, with the provisions of the Poor Relief (Ireland) Act, 1838, along with the fact that under Section 187, sub-Section 1, of the Income Tax Act, 1918, the value of all tenements and rateable hereditaments for the purposes of Schs. A and B is ascertained primarily according to the valuation for poor rate purposes. But, in the opinion of their Lordships, it is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery-often complicated-by which the tax is to be assessed is not of assistance, except in so far as it may throw light on the genera] character of the tax.

19. After quoting the passage from Lord Macnaghten's judgment defining " income" (quoted above) the judgment proceeds as follows (p. 359):-

> On the other hand, the poor rate is levied in respect of the occupation of hereditaments, irrespective of a person's income generally, and irrespective of whether the ratepayer is in fact deriving profits or gains from such occupation. A dwelling house is a burden, not a source of profit, for the occupier who pays rent for it. He is rated on the value of the burden, while he remains unrated in respect of his whole profits, be they from business or from investments. In their Lordships' opinion, this marks the essential difference in character between income tax and rates, and it is unnecessary to consider other and less important differences between them.

20. Having regard to these observations and what is understood by the word "income" under the Indian Income Tax Act it is necessary to scrutinize the provisions of the

[17][1936] A.C. 352

impugned Act. Literally taken, under Section 22 of the impugned Act, the tax is on buildings and

lands and the rate at which it is levied is ten per cent. of the annual letting value of such buildings and lands. But it is permissible to look at the whole Act to determine the true nature of the tax. Is the owner of buildings and lands liable to pay the tax because actually or decided by an1 arbitrary method he receives income and the tax is on the income graded according to the receipts, actual or decided by an arbitrary method ? In my opinion that is the correct test for deciding the rival contentions. The adoption of the annual letting value as the standard for fixing the rate may be one which is convenient and does not necessarily make the tax Income Tax. Although it may not be overlooked that the same standard is adopted for Income Tax purposes it does not necessarily follow that the nature of the tax is also the same. The exemptions and the lower rate of tax to be charged on the footing of annual letting value are all factors for assessing the annual letting value under Section 22 of the impugned Act. Under the proviso to Section 21 a percentage of the capital value, as may be determined by the Provincial Government, is to be deemed the annual letting value. That also prescribes a method to determine the standard, viz. the annual letting value. It does not affect the nature of the tax. The exemptions provided by Section 27 also show that in the event of the return from property being less the annual letting value will be reduced in proportion to be fixed by the rules. All these provisions indicate that the standard on which the property is taxed will be fluctuating. If the present position under the two Acts is compared it is obvious that the annual letting value under the impugned Act has little relation with the actual income. The crucial question is this : Is the tax on the lands and buildings or on income of the lands and buildings ?

21. Having heard elaborate arguments on both sides it appears that this is the narrow question by which the true character and nature of the tax should be determined. If lands and buildings are treated as investments and the return, as income, is taxed it is a tax on the income. On the other hand, if the tax is on the lands and buildings themselves and the assessment is on a standard named by the legislature which may fluctuate or vary on the produce or income from it, it would be a tax on the property. As has been pointed out in A Reference under the Government of Ireland Act, [1936] A.C. 352, the measure of the tax is not itself the test. In determining the nature of the tax consideration may be given to the standard on which the tax is levied, but that is not the determining factor. The contention of the plaintiff must be that the impugned Act is for the purpose of taxing the owner's income. According to him that is the essential nature and character of this tax. I do not find adequate words in the impugned Act to support that contention. Section 22 of the Act in terms states that it is a tax on buildings and lands. The other words used in that Section by themselves or read with the other Section s do not displace this character of the tax. An inanimate object cannot pay the tax. Therefore a tax on property must be paid by the owner or occupier. From the fact that the owner is liable to pay the tax it does not follow that the tax is Income Tax. In attempting to determine the nature and character of the tax a process of detailed comparison of the provisions of the Income Tax Act and the impugned Act is not necessarily helpful. That was pointed out in A Reference under Government of Ireland Act. Having considered the matter from all points of view I am unable to consider the impugned tax as a tax on income.

22. In considering this question it was urged that the grouping of the things under item No. 42 should be remembered. Although in the existing legislation in India the expression " Tax on lands and buildings" existed, there was no tax on hearths and windows. The fact that the legislature has thought fit to group all these things under one item must be given some meaning. Speaking generally it is difficult to conceive of a case of income or profits regularly derived from

hearths and windows. British Parliament was cognizant of the tax imposed on windows although this tax had been abolished many years ago. By the fact that hearths and windows are mentioned in the same group as lands and buildings it was clearly indicated that the tax that can be imposed under that item should be equally capable of being imposed on all the things mentioned in the same item.

23. In my opinion this whole line of reasoning is irrelevant. There is no reason to believe that the legislature by grouping several things under one item intended that the tax on each should be by the same measure. The contention that taxes on all income are divided between item No. 54 of List I and item No. 41 of List II is correct. From that, however, it does not follow that the tax in question must be considered a tax on income. The definition of agricultural income also does not help the plaintiff in the present controversy.

24. The attempt to classify taxes on property under heads like capital, income and occupation is not profitable, as the list is not exhaustive. On the other hand as pointed out by the learned Advocate General taxes on lands and buildings have been known to Indian Legislatures for over fifty years, and find place as such in the Municipal Acts passed by the different provinces. Under the Government of India Act of 1915 (as amended by the Act of 1919) and the Devolution Rules framed thereunder the Provincial legislatures had authority to levy the tax on lands and buildings for municipal purposes only. Under the Constitution Act of 1935 the power to levy the tax remains, while the limitation to the power is removed. It is difficult to believe that when enacting the Constitution Act the legislature intended to and did deprive the Provinces of this power. The terms of Section 22 of the impugned Act, including the measure by which the tax is to be calculated, are very similar to those found in the Provincial Acts which govern municipalities. It appears therefore more reasonable to hold that the power recognised to exist in Provincial legislatures for so many years has not been intended to be curtailed1. It was urged that the Municipal Acts of the Provincial Legislatures received the assent of the Governor-General-in-Council and thereby the encroachment of the Provinces was condoned. I do not think it is a sound argument. The power to legislate had been given by the Government of India Act, 1915, (as amended by the Act of 1919) and the Devolution Rules. That had nothing to do with the assent of the Governor-General-in-Council. The observations of Lord Macnaghten in *London County Council v. Attorney-General* quoted above show that even for Income Tax purposes it was recognised as a tax on property but as the scheme of the Income Tax Act is to put all income together and tax the total as such it was not considered right to take out one item separately from the total. Those observations rather support the defendant's contention here.

25. I do not think the impugned tax is of a nature to encroach upon item 55 in List I, Under that item the tax should be on the total capital assets, and not on individual portions of a person's capital.

26. As regards defendants Nos. 2 and 3 the plaintiff's case also fails. In the letter written on behalf of the plaintiff to explain his case in detail, three grounds are suggested. The first is that there is no agent named as such in the impugned Act. The word used in Section 24 of the impugned Act, is " municipality ". That is proper and correct as regards municipalities under the Bombay Municipal Boroughs Act XVIII of 1925 and the District Municipal Act III of 1901. In the City of Bombay Municipal Act the word " municipality " is not used. By Section 4 however the three municipal authorities, which taken together will mean the whole municipality, are

clearly mentioned. The City of Bombay Municipal Act defines the powers, rights and obligations of each authority. This may be criticized as defective drafting but does not make it bad law. Under Section 24, when applied to Bombay itself, " municipality" in my opinion must mean and is intended to mean the appropriate municipal authorities.

27. The second point urged is that it is ultra vires the Provincial legislature, to order the Municipal Commissioner to collect the tax. No authority is cited to support the contention. Item No. 13 of List II is relied upon but that does not help the plaintiff. If a power to impose the tax is conceded, power to collect the same is necessarily implied. The Provincial Legislature within the province being supreme there appears no reason why it should not appoint or name any person or corporation to collect the tax. There is nothing to support the contention that this cannot be done without amending the Municipal Act. The second part of this contention also fails.

28. An inquiry into the third part of the question appears to be barred by Section 226(1) of the Constitution Act. Even otherwise, I think, there is no substance, in the point. The word " levy " in Section 24 of the impugned Act must be construed as meaning " take necessary steps to collect." The tax having been levied (imposed) by Section 22 it cannot be obviously imposed again by Section 24. If the word " levy " in Section 24 is read with this meaning the contention clearly fails.

29. In my opinion therefore the impugned Act is not ultra vines the Provincial Government and the urban Immovable property tax is legal and valid.
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