BOMBAY HIGH COURT

Municipal Commissioner

Vs.

Gordhandas Hargovandas

First Appeal No. 223 of 1950, in Suit No. 124 of 1948

(Gajendragadkar and Vyas, JJ.)

06.04.1953

JUDGMENT

Gajendragadkar, J.

1.This appeal arises from a dispute between 23 rate-payers at Ahmadabad and the Municipal Corporation of the City of Ahmadabad. The plaintiffs' case is that R. 350A which the Corporation has framed in 1947 in respect of the rate on open lands is 'ulrta vires' and the assessment list prepared pursuant to the said rule is illegal and void. They have, therefore, claimed a declaration in that behalf and have asked for an injunction restraining the Corporation from recovering the rates from the respective plaintiffs according to the said assessment list.' The defence, in substance, was that the rule is 'intra vires' and the assessment list which, has been properly made in accordance with the provisions of the Municipal Act is not open to any objection. The learned Judge has held that the rule is 'ultra vires'; he has, therefore, granted the plaintiffs the declarations and injunction as claimed by them. It is this decree which is challenged before us by Mr. Purshottam on behalf of the Municipal Corporation, and the principal point which he has argued before us is that the learned Judge was wrong in holding that R. 350A was 'ultra vires'. Some other issues were framed in the trial Court and they have been decided by the learned trial Judge. Those issues, however, have not been argued before us. That is how the short but important question which calls for our decision in this appeal is whether R. 350A framed by the Municipal Corporation of the City of Ahmadabad is 'intra vires' or not.

2. All the plaintiffs own open plots within the jurisdiction of the Corporation and they have been called upon to pay the rate on their respective open lauds according to the assessment list prepared on the basis of R. 350A. This rule first lays down the manner in which the rateable area of the open lands shall be determined, and then it provides that the rate on the area of open 3and thus determined shall be levied at one per cent, of the valuation based on capital and all such lands, subject to 'exemptions thereinafter provided, shall be liable to be charged the same. From

the operation of this rule certain exemptions have been made. Lands for which the water rates are leviable under Rules 322 to 350 do not fall within the purview of R. 350A. Besides, there are eleven categories of exemptions mentioned in the rule itself. Rule 243 deals with valuation based on capital. It lays down that valuation based upon capital shall be the capital value of buildings and lands as may be determined from time to time by the valuers of the Municipality who shall take into consideration such reliable data as the owners or the occupiers thereof may furnish either of their own accord or on being called upon to do so.

3. The plaintiffs' case is that R. 350A was made for the first time in 1947, that rates had never been levied by the Corporation on open plots on such a basis until then, and that the rate levied under this rule amounts to a capital levy on a part of the assets of the rate-payer and as such it is 'ultra vires'. It is common ground that the Corporation derives its authority to impose taxes or rates under Section 73 of Bombay Act XVIII of 1925. Sub-Sections (1) of Section 73 empowers a Municipality to impose for the purposes of the Act a rate on buildings or lands or both situate within, the municipal borough. Sub-Sections (2) of Section 73, however, provides for a limitation; it says that nothing in this section shall authorize the imposition of any tax which the State Legislature has no power to impose in the State under the Government of India Act, 1935. In substance, the plaintiffs' case is that the basis adopted by the Corporation in levying the rate on open lands has made the rate a capital levy and that a capital levy can be imposed only by the Government of India under Entry 55, List I, of Schedule VII to the Government of India Act, 1935. Entry 42 in List II of Schedule VII undoubtedly empowers the local Legislature to levy tax on lands and buildings, hearths and windows; but if the local Legislature, under the guise of levying a tax on lands or buildings, seeks to recover capital levy from the said assets, their action would be 'ultra vires'. If that be so, a Municipality would likewise be acting beyond its jurisdiction if it purported to levy a tax on the value of the capital assets.

4. The Municipal Corporation, however, contends that the rate in question does not amount to a capital levy at all, but that it is a rate on open land and the value of the capital has been utilized merely as a means or machinery to enable the Municipal Corporation to levy a reasonable rate on the said open plot. In support of this contention, the Municipal Corporation relies upon the explanation to Section 75 of the Municipal Boroughs Act. Section 75 lays down the procedure preliminary to imposing a tax. It provides that before imposing a tax a municipality shall, by a resolution passed at a general meeting, specify, among other things, (iii) in the case of a rate on buildings or lands or both, the basis for each class of the valuation on which such rate is to be imposed; and the explanation to Section 75 adds that in the case of lands the basis of valuation may be either capital or annual letting value. According to the Municipal Corporation, all that R. 350A has purported to do is to adopt the capital value as the basis of valuation for levying the rate on open lands, and it is competent to the Corporation to adopt such a basis because the rate which is ultimately levied on this basis is, in substance and in law, a rate or tax on land, and not a capital levy on the assets. In this behalf, the Municipal Corporation had specifically pleaded that the capital value of every individual land was determined on taking into consideration all the

facts such as its situation, building potentiality, the zone in which the land may be situated, development in the vicinity and other advantages. The learned trial Judge has accepted the plaintiffs' case and has held that R. 350A, particularly in the light of the definition contained in R. 243, amounts to the levy of a tax on the value of the capital assets, and, as such, is 'ultra vires' of the Municipal Corporation.

5. The principles which must be borne in mind in dealing with an argument of conflict between two entries in the different Lists in the Government of India Act of 1935 are fairly well settled. In regard to the topics mentioned in each one of the Lists, the sovereignty of the Legislature empowered to deal with those topics is undoubtedly absolute. When we deal with any specific entry in these Lists, we should normally give to the words used in describing the entry their largest denotation; these words should be construed liberally and in their broad sense. If, as a result of such construction, conflict between entries in the two Lists appears inevitable, we should, if we reasonably can, attempt to put a narrower and more restricted construction on the words used in either or both of the entries in question so as to avoid the conflict. It is only if the Court is satisfied that on no reasonable construction can conflict be avoided that the question of trespass has to be faced and considered. If the Provincial Legislature trespasses upon the sphere reserved for the Central Legislature, the Act of the Provincial Legislature must obviously be held to be invalid by reason of the 'non-obstante' clause in Section 100 of the Government of India Act, 1935.

6. In the present case, the Provincial Legislature is given the power to levy a tax on lands. Entry 42 of List II, which confers this power on the Provincial Legislature, introduces no terms of limitation and does not provide for any particular manner in which the tax should be levied. In other words, the power of the Provincial Legislature to levy the tax on lands is unqualified and absolute. In the present case, the power of the Municipal Corporation to levy a tax on the open land is similar in extent to the power of the local Legislature. It is therefore, necessary to examine the nature and effect of R. 350A in the light of this power. The rule, no doubt, adopts the basis of capital value for levying the rate, and indeed the explanation to Section 75 of the Municipal Boroughs Act in terms allows the Municipal Corporation to adopt such a basis. If, by adopting this basis, the inevitable result would be that the rate which is ultimately levied amounts to a capital levy and is, therefore, 'ultra vires', it would be necessary to hold that, not only is R. 350A 'ultra vires', but the 'Explanation' to Section 75 itself is 'ultra vires'.

7. I do not, however, feel driven to this conclusion because I am disposed to hold that a distinction must be made between a rate or tax which is levied on land on the basis of its capital value and a tax which is levied on the capital value of the land treating it as an asset itself. The explanation to Section 75 has been introduced in the Municipal Boroughs Act, not as a subject of taxation, but only as a measure to determine the amount of tax to which the lands or buildings, or both, should be made subject. It seems to me that it is perfectly legitimate to the taxing authority to attempt to correlate its tax to the real value of the property. It would be open to a municipality

to levy a uniform tax on all the buildings; it would similarly be open to the municipality to levy a uniform tax on all the lands. The Municipality may, however, attempt to make such taxation reasonable by taking into account the areas of the lands and the size and nature of the buildings. But when the municipality makes provisions for taking into account these relevant facts, the municipality is attempting only to make its taxation reasonable, just and equitable. It is with that view alone that, in the case of lands, the Municipal Corporation of Ahmadabad has chosen to adopt the basis of the capital value of the open lands to determine the rate or tax that should be levied on them.

8. It is possible to consider this question in another way. Under Entry 55 in List I, if the Central Legislature were to levy a tax on the capital value of the assets, the levy would be made only after determining the capital value of the assets properly so called. If the asset in question happens to be a land, its real capital value in the context would be determined after taking into account the encumbrances to which the land may be subject and the other liabilities which may be enforceable against it. If the market value of the land is Rs. 10,000, but the property is subject to a mortgage of Rs. 20,000 and is, besides, liable to pay other dues, the value of the equity of redemption which vests in the owner of the asset may amount to nil or may even be minus. In such a case, the levy of a tax on this asset would be inconceivable. This difference in approach, says Mr. Seervai, distinguishes the tax on land properly so called from, the tax on the capital value of the assets. The position of the Municipal Corporation when it levies a rate on the same property, treating it as land, is not the same or similar. It would be open to the Municipal Corporation to take into account the values of the land as such, without reference to the encumbrances to which it is subject, and to levy the rate on the value of the land so determined. In other words, the municipal rate or tax would not be concerned to determine the real economic capital value of the asset in question, but to find out the market value of the land apart from its real capital value in the economic sense and levy its tax on it in this way, the capital value of the open land determined by the Municipal Corporation under Rule 350A would not always or necessarily be the same as the capital value of the same land if it was determined by the Central Legislature for the purpose, of levying a tax under Item 55 in List I.

9. It may be conceded that in some cases the capital value may work out to be the same in cases falling under Entry 55 of List I and those falling under Entry 42 of List II. But even in these cases the object with which the capital value is determined and the ultimate use which is proposed to be made of this capital value in levying a tax on lands under Entry 42 of List Ii should not be confused with the object with which capital value may be determined and the use which may be made of such capital value by legislation passed under Entry 55 of List I. The two rates or taxes would, despite the apparent similarity in some features, be distinct and separate; and in dealing with the question as to whether the tax levied by the Municipal Corporation commits a trespass on a tax which is leviable by the Central Legislature under Item 55, this distinction cannot be overlooked. In this connection, I may usefully refer to the observations of Lord Penzance in - *'Coltness Iron Co. v. Black[1]',* In dealing with the method of taxation intended

by the Legislature to be applicable to mines, the learned Judge observed as follows (p. 327) :

> "But when such a matter as that is brought under the provisions of this Act for taxation, the wide difference between it and the present case is at once apparent; for the merchant or trader is taxed in such a case not in respect of any 'property' which he possesses, and of which he enjoys the fruits, taut only upon the profits which he realizes annually in his trade; whereas the owner of a 'mine' is taxed in respect of that 'mine' as a fixed and realized 'property' which belongs to him, and from which he reaps an annual benefit; and the words 'annual value' or 'profit received' from that 'property', are introduced into the statute, not as the subject of taxation, but only as the measure of the taxation to which the 'property' shall be subjected".

In levying a rate on the open lands, it is perfectly competent to the Municipal Corporation to consider, not only what the lands actually yield to their owner, but what they are likely

[1](1881) 6 AC 315

to yield. The Corporation may consider not only the beneficial enjoyment of the property which may actually be made, but also the beneficial enjoyment of which the property is capable : vide *'London County Council v. Churchwardens and c of Parish of Erith and Assessment Committee of Dartford Union[2]',* at pp. 590, 591.

10. Similarly, Mr. Justice Fazl Ali, in delivering the judgment of the Federal Court in - *'Ralla Ham v. Province of East Punjab[3]',* has observed that (p. 87) :

> "..... .if a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax without intending to tax income".

In the said case, the learned Judges of the Federal Court were considering the question as to whether the tax livable under the Punjab Urban Immoveable Property Tax Act amounted to a tax on income and thus trespassed on Item 54 in List I of Schedule VII to the Government of India Act. In repelling the argument that the tax levied by the Provincial Legislature amounted to a trespass of the kind alleged, Mr. Justice Fazl Ali examined the real purpose and the object of the tax and he emphasized that though the method and mode adopted by the Provincial Legislature in determining the reasonable amount of tax may appear to be similar to the method and mode which may be adopted by the Central Legislature in levying tax on income as such, in essence the two taxes are different and there is no question of trespass by one on the field of the other. Mr. Seervai has relied on these decisions.

11. It would be useful in this connection to refer to the decision of the Full Bench of this Court in - *'Sir Byramjee Jeejeebhoy v. Province of Bombay[4]',* The Full Bench was concerned with the provisions of the Urban Immoveable Property Tax Act, II of 1932, and the question raised before

them was whether the tax levied under the said Act under Section 22, which was the charging section of the Act, was 'ultra vires' in that it amounted to a tax on income other than agricultural income and thus trespassed on Entry 54 in List I. This question was answered by the Full Bench in favour of the Provincial Legislature. It would be interesting to consider the arguments which, were urged by the opponents of the Act. The main argument was that the method adopted under the impugned Act in determining the annual letting value of the property was substantially similar to, if not identical with, the method laid down under the material provisions of the Income-tax Act for determining the income for the purpose of levying income-tax. The similarity between the two methods could not be disputed. But it was held that merely because of this similarity of the means or machinery the identity of the two taxes could not be established. In dealing with this question, Chief Justice Beaumont cited the observations of Lord Davey in - *'London County Council v. Attorney-General*[5]*',* Said Lord Davey (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."

[2](1893) AC 562 [4] AIR 1940 Bom 65
[3] AIR 1949 PC 81 [5]1901 AC 26

The learned Chief Justice has then proceeded to express his conclusion in these words :

> "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."

Mr. Justice Broomfield, in a concurring judgment, has put the same position with respect, very tersely, when he says that the mode of assessment does not determine the character of a tax. He added (p. 47) :

> "..... .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', (1858) 28 LJ Ex 46 (F) : or again it may be the basis of assessment of rates each 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."

In other words, the learned Judges who decided this case adopted the test of what is described as the 'pith and substance' of the Act. They set out to discover the essential character of the tax and

they came to the conclusion that the essential character of the tax was that it was a tax on property, and not a tax on income. It would be noticed that the Full Bench came to this conclusion though it did appear to the learned Judges that the method adopted in deciding the annual letting value of the property was very similar to the method that would be adopted in deciding the income of the property for the purpose of income-tax. In my opinion, it would be legitimate to rely on this decision in support of the view that the character of the means or machinery devised by the Legislature for levying a tax would not by itself determine the character of the tax as such. We must examine the essential features of the tax and consider the 'pith and substance' of the legislation before we decide whether it is a tax on land as such or it amounts to a tax on the capital value of the assets consisting of the land. Incidentally, I would like to add that, the observations made by Mr. Justice Broomfield have been expressly approved by Mr. Justice Fazl Ali who delivered the judgment of the Federal Court in - 'Ralla Barn's case,, to which I have already referred.

12. I may also refer to some other decisions where apparent conflict between different items in different Lists has been avoided by Judicial decisions by making reasonable adjustments in construing the relevant words. In - 'In re, C.P. and Berar, Sales of Motor Spirit and Lubricants Taxation Act, 1938', AIR 1939 FC 1, the legislation passed by the Central Provinces Legislature levying sales-tax under Entry 48 in List II, which deals with the taxes on the sale of goods, was challenged as constituting a trespass on Entry 45 in List I which provides for the duties of excise The argument urged against the validity of the Provincial Act was that the expression "duty of excise" was wide enough to cover the field occupied by the impugned Act. The learned Judges of the Federal Court refused to accede to this argument and they construed the words "duty of excise" as denoting a power to Impose duties of excise upon the manufacturer or producer of excisable articles, or at least at the stage of, or in connection with, manufacture or production, and extending no further. In other words, the provisions of the said Act which operated upon the sale of goods after their production were held to be valid.

13. In - *'Province of Madras v. Boddu Paidanna and Sons[6]',* a similar question arose before the Federal Court. In this case again, the conflict was between Entry 48 in List II and Entry 45 in List I. The impugned Act was passed by the Madras Legislature levying tax on sales. Their Lordships held that the power of the Provincial Legislature to levy a tax on the sale of goods extends to sale of every kind, whether the first sale is by the manufacturer or producer or not, and that the provisions of the Madras Act imposing such a tax were not 'ultra vires' of the Provincial Legislature. It is interesting to notice that under the Provincial Act a tax for sale could be and was levied on the first sale by the manufacturer or producer, so that 'qua' the manufacturer or producer there could have been apparently a double tax one by the Central Government under the duty of excise for the production or manufacture of the article, and the other by the Provincial Government for the sale of the said article. and yet their Lordships held that the two taxes which the manufacturer was called upon to pay were economically two separate and distinct imposts. The Provincial power flowing from Entry 48 in List II was very liberally construed as extending

to sales of every kind, whether first sales or not, and a Central power available under Entry 45 in List I was in a sense limited to the power to levy the tax on goods immediately after their production and manufacture and before they joined the stock of the goods in the market. It would thus be noticed, that, though in some cases the two taxes might appear to overlap, that was not held to constitute an infirmity in the validity of the Provincial Act. This view of the Federal Court has been expressly upheld by the Privy Council in - *'Governor-General in Council v. Province of Madras*[7]*',* In delivering the judgment of the Board, Lord Simonds conceded that

> "the term 'duty of excise' is a somewhat flexible one : it may, no doubt, cover a tax on first and, perhaps, on other sales : it may in a proper context have an even wider meaning";

and yet, in order to avoid a conflict between Entry 45 in the Federal List and Entry 48 in the Provincial List, Their Lordships approved of the view taken by the Federal Court in limiting the scope of Entry 45 to a duty of excise on the goods before they go into the market :

> "The two taxes," said Lord Simonds, "the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there ('Boddu Paidanna's case,,) pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts." (p. 101)

In my opinion, the tax which has been levied by the Municipal Corporation on the open land is a tax on land properly so called, and it cannot be treated as constituting a trespass on Entry 55 in List I on the assumption that it amounts to a tax on the capital value of the

[6] AIR 1942 FC 33

[7] AIR 1945 PC 98

assets. Therefore, I must hold that neither R. 350A framed by the Corporation nor the Explanation to Section 75 of the Bombay Municipal Boroughs Act is 'ultra vires'.

14. In this connection, it would be relevant to remember the legislative history and practice in India on this topic. The power given to the local bodies to adopt the basis of capital value in levying rates or taxes on lands existed in Municipal legislation prior to the coming into force of the Government of India Act, 1935. Section 75 of the Bombay Municipal Boroughs Act, 1925 with which we are concerned, is an instance in point. Besides, the Municipal Acts in Bengal, Madras and Uttar Pradesh also afford illustrations of the same principle. Section 123(1)(a) of the Bengal Municipal Act, XV of 1932 gives power to the municipality to levy a rate on holdings situated within the municipality assessed on their annual value. Section 123, Sub-Section (2), provides that if the gross annual rental cannot be easily estimated or ascertained, the annual value of such holding shall be deemed to be an amount which may be equal to, but may not exceed, seven-and-half per centum on the value of the building or buildings on such holding at the time of the assessment plus a reasonable ground rent for the land comprised in the holding.

Under Section 98-A of the Madras City Municipal Act, 4 of 1919, power is conferred upon the Municipality to levy a tax on property called the "property tax". Section 99 authorizes the

municipality to levy taxes at such percentages of the annual value of buildings and lands as may be fixed by the commissioner subject to the limitation that the aggregate of the percentage so fixed shall not, in the case of any land or building, be less than 15-1/2 per cent, or greater than 20 per cent, of its annual value. Section 100, which deals with the method of assessment of property tax, provides that the annual value of the premises falling under Section 100(2)(a) proviso shall be deemed to be 6 per cent, of the total of the estimated market value of the land at the time of the assessment and the estimated cost of erecting the building at such time after deducting, for depreciation a reasonable amount which shall in no case be less than 10 per cent, of such cost. Section 128(1) of the Uttar Pradesh Municipalities Act 2 of 1916 empowers the municipality to levy a tax on the annual value of buildings or lands or of both. Section 140 of the said Act defines "annual value" as meaning in certain cases falling under clause (a) of Sub-Section (1), a proportion not exceeding 5 per cent, to be fixed by rule made in that behalf of the sum obtained by adding the estimated present cost of erecting the building to the estimated value of the land appurtenant thereto. It is well established that in interpreting items, in the Lists in sch. VII to the Government of I India Act, it is open to the Courts to consider, legislative history in order to give proper meaning to the words used in the items. When the Government of India Act was passed, the English Parliament must have known that by legislative practice the Indian Municipalities were allowed to adopt the basis of capital valuation in levying taxes on certain kinds of property. If it was the intention of the Parliament in enacting the Government of India Act, 1935, to prohibit the Municipalities from adopting such a basis, they would have introduced appropriate words of limitation in Entry 42 of List II. It would, therefore, not be unreasonable to give to the words used in Entry 42 in List II their broad and liberal meaning; and if the said Entry is so construed, the power to adopt the basis of the capital value of certain properties in levying tax on them cannot be said to be excluded from this Entry. The adoption of this method or basis does not alter the character of the tax. It still continues to be a tax on land and cannot be mistaken to be a tax on the capital value of the assets.

15. I have dealt with this question on the assumption that Entry 55 in List I confers jurisdiction on the Central Legislature to levy a tax on the capital value, not only of all the assets, but of even a part of the assets. In, A. I. R. 1940 Bom 65' a Full Bench of this Court had to consider the construction of Entry 54 in List I as against Entry 42 in List II. Incidentally an argument was urged before the Full Bench even as to Entry 55 in List I, Chief Justice Beaumont said that it was unnecessary to consider the argument based on Entry 55; but, nevertheless, he observed that an analysis of the language employed in Entries 54 and 55 respectively affords scope for the argument that the assets mentioned in Entry 55 must mean the totality of the assets. According to Mr. Justice Broomfield, the meaning of the expression "capital value of the assets" in Entry 55 was by no means clear. He, however, added that it may be that what was intended, was a tax on the total value of the assets in the nature of a capital levy. Mr. justice Kania, on the other hand, expressed his clear opinion that under Entry 55 the tax should be on the total capital assets and not on individual portions of a person's capital.

16. It has been argued before us by Mr. Purshottam that Entry 55 in List I would not permit the Central Legislature to levy a tax on the capital value of a part of the assets, and, as such, even if the tax imposed by Rule 350A by the Municipal Corporation amounts to a tax on the capital value of an asset, it cannot be said to constitute any trespass on Entry 55 in List I. Mr. Purshottam has however, himself invited our attention to another decision of this Court in - *'J.N. Duggan v. Comr. of I. T*[7]*.',* in which a contrary view has been expressed with some emphasis by Chagla, C.J. In this case the Court was considering the question as to whether the Income-tax and Excess Profits Tax (Amendment) Act, 1947, was 'ultra vires' of the Legislature. By this Act, a new definition of "capital asset" was inserted and the definition of "income" was also expanded so as to include any capital gain chargeable according to the provisions of Section 12B of the impugned Act. The question as to whether the charging section of this Act was 'ultra vires' was answered both by Chagla, C.J. and by Tendolkar, J. against the assessee, but for entirely different reasons. The learned Chief Justice took the view that it was 'intra vires' because it fell within Entry 55 of List I of sch. VII whereas according to Mr. Justice Tendolkar it was 'intra vires' because it fell within Entry 54 of the said list. In dealing with the question as to whether a tax on one of the assets of the assessee could be validly levied under Entry 55, the attention of the Chief Justice was invited to the observations made by the learned Judges in - 'Sir Byramjee Jeejeebhoy's case, and it was argued that Entry 55 empowers the Central Legislature to levy a tax On the total assets of an individual or a company, and not a part of the assets. The learned Chief Justice has rejected this contention. Mr. Purshottam argues that, in the result, the view taken by the learned Chief Justice has expressly not been taken by Mr. Justice Tendolkar, and we are, therefore, not bound by this view in dealing with the point in the present appeal. Mr. Seervai has strongly and elaborately supported this argument. However, in view of the fact that I have come to the conclusion that the tax levied by the Municipal Corporation on the land in question in the present suit is valid even on the assumption that Entry, 55 In List I empowers the Central Legislature to levy a tax on a part of the assets, I do not think it necessary to consider the merits of the question raised before us by Mr. Purshottam as to the construction of Entry 55. It is, however, necessary to refer to one observation made by the learned Chief Justice in his judgment before I part with this case. The learned Chief Justice, in construing Entry 55, contrasted it with Entry 42 in List II and observes

[7] AIR 1952 Bom 261

that (p. 263) :

> "..... whereas the Provincial Legislature is competent to impose a tax on lands and buildings, the Central Legislature is empowered under entry 55 of list I to impose a tax not on lands and buildings as such, but on the capitalized value of lands and buildings"

and that

> "Therefore, the power of the Provincial Legislature is restricted to tax on lands and buildings without taking into consideration the capital value of lands and buildings."

With very great respect, I am unable to agree with this last observation. It is clear that the scope of Entry 42 in List II was not argued fully before the learned Chief Justice and, in fact, the Court was not directly called upon to consider the proper construction of the said Entry at all. Therefore, the attention of the learned Chief Justice was not drawn to the legislative history on the topic and it was not pointed out to him that in many Provincial Municipal Acts power has been expressly given to the Municipalities to impose a tax on lands after adopting the basis of the capital value of the said lands. As I have already pointed out, I have come to the conclusion, that even if the capital value of lands is taken into consideration by the Municipal Corporation in determining the amount of tax to be levied on the open land, the tax does not become a tax on the capital value of the assets. But with respect, I do not read these observations of the learned Chief Justice as expressing his considered decision that under Entry 42 in List II it would not be competent to the local Legislature to consider the capital value of lands at all. Therefore, I must hold that the learned trial Judge was wrong in coming to the conclusion that Rule 350A framed by the Municipal Corporation of Ahmadabad was 'ultra vires'.

17. It has been argued before us by Mr. Desai on behalf of the rate-payers that even if the explanation to Section 75 of the Bombay Municipal Boroughs Act be 'intra vires', Rule 350A framed by the Municipal Corporation of Ahmadabad is 'ultra vires' because it is inconsistent with the said explanation to Section 75 itself. Mr. Desai says that the scheme of the Municipal Boroughs Act shows that the rate to be levied on buildings or lands is intended to be levied on the profit or yield or income of the said property, and Mr. Desai also emphasizes the fact that the explanation to Section 75 merely authorizes the Municipal Corporation to adopt the capital value of the land as the basis in levying a tax. According to Mr. Desai, the tax can be levied either by determining the annual letting value of the property or by adopting the method of ascertaining the capital value of the property. But even when the latter basis is adopted, the Municipality must ascertain by the adoption of the said method the annual value of the property, and it is only on the annual value of the property thus determined that a tax can be levied. Rule 350A does not purport to determine the annual value of the property at all. It merely provides that the rate shall be levied at 1 per cent, of the valuation based on capital; and this, says Mr. Desai, is nothing short of a capital levy on a part of the assets of the rate-payer. I am unable to accept this argument. The basis of determining the capital value of the property is usually adopted in cases where the municipality finds it impossible to determine the annual letting value. If an open land is never let out and material about its annual letting value is otherwise not available, the municipality is authorised to levy a reasonable tax on the land on the basis of its capital value. When this basis is adopted, the capital value of the property is determined so as to enable the municipality to levy a tax at a reasonable rate on such property. In adopting this basis, the municipality is not bound or always expected to determine the annual value or yield or return of the said property. It is significant that in the present case it is not disputed that in determining the capital value of the land the Corporation did take into account all the relevant facts as mentioned in the written statement. Besides, even if it is assumed that by adopting the basis of capital value the

municipality must determine the annual value of the property and levy tax on such value, it would make no difference in the result. In such a case, the municipality may levy a much higher rate of tax on the annual value of the property determined on the basis of its capital value. By adopting this procedure two steps are taken, while the Ahmedabad Corporation has adopted the shorter method of determining the tax in one step. The substance of the matter is that the municipality can levy a tax on lands in the light of its capital value. I would like to add that the Municipal Acts in other States, to which I have already referred expressly require the municipalities to determine the annual value of the properties in the manner mentioned therein. In the present case, the Municipal Corporation have alleged that they considered all the relevant facts in regard to every open plot in determining its capital value. If the Corporation has decided that 1 per cent, of the capital value thus determined would represent a reasonable rate for levying the tax on such lands, it would, I think, be impossible to hold that the rule which lays down this provision is 'ultra vires' for the only reason that the Corporation did not first determine the capital value of the property in question and then levy the tax on such capital value. If it is all a matter of fixing a reasonable rate on the open land, and if the rate is otherwise reasonable, it would be difficult to hold that the rule levying the rate is 'ultra vires' for the reason alleged by Mr. Desai. It is true that, in the present case, the plaintiffs alleged that the rates were unreasonable and excessive. But the learned Judge has rejected this plea on the ground that such a plea cannot be entertained by a Civil Court. Besides, this plea has not been taken before us by Mr. Desai. Therefore, in our opinion, if the Municipal Corporation adopted the basis of the capital value and levied a tax at the rate of 1 per cent, it cannot be said that they have acted contrary to the provisions of Section 75, or what Mr. Desai terms as the scheme of the Municipal Boroughs Act.

18. The result is that the appeal must be allowed, the decree passed by the learned trial Judge must be set aside and the plaintiffs' suit dismissed with costs throughout in favour of the Corporation. Appeal has abated as regards respondent No. 13 and is therefore dismissed so far as he is concerned.

Vyas, J.

19. I agree with my learned brother. The facts of the case have been stated by him and I would be content to add my observations on a short but interesting point of law which this appeal has raised. Amongst the taxation rules framed by the Ahmadabad Municipality is Rule 350A regarding rate on open lands, under which rule the plaintiffs who are owners of open lands within the limits of the Ahmadabad Municipality have been, assessed to a certain rate on those lands. The material portion of R. 350-A reads :

> "Except in the case of lands for which water rates are livable under Rules 322 to 350, the rate on open lands shall be levied as under : (1).. (II) Rate on the area of open land as determined above shall be levied at 1 per cent, of the valuation based on Capital .... etc., etc."

It is the contention of the plaintiffs that the above mentioned r. 350-A, the assessment list prepared on the basis of the rate stated in r. 350-A and the actual levy of the rate are all illegal and 'ultra vires' of the powers of the municipality. Now, the point of law which this appeal raises is this : Is it within the competence of the Provincial Legislature to levy a tax on lands and buildings on the basis of the capital value thereof ? If the answer is in the affirmative, rule 350-A of the taxation rules of the Ahmadabad Municipality would be within the competence of the municipality to make and the levy of the impugned rate upon open lands of the plaintiffs would be 'intra vires' of the powers of the municipality.

20. Now, there has been a considerable controversy in this case between the plaintiffs and the defendant as to the nature of the impugned tax, i.e. whether it is a tax on the capital value of the lands, in other words a capital levy, or a tax on lands. The plaintiffs contend that the word "assets" in entry No. 55 of the legislative List I in sch. VII to the Government of India Act, 1935, is not a collective noun, but must include a part of the assets, that the impugned tax is a tax on the capital value of a part of the plaintiff's assets, that accordingly the tax must fall under Entry 55, List I of Schedule VII and that, therefore, it would be a subject outside the competence of the Provincial Legislature to legislate upon, and therefore, Rule 350-A of the rules framed by the Ahmadabad Municipality would be 'ultra vires' of the powers of the municipality. On the other hand, it has been strenuously submitted for the defendant that the impugned tax is a tax on lands falling under Entry 42, List II of schedule VII and that therefore it is within the legislative competence of the Provincial Legislature to legislate about it, and therefore Rule 350-A of the taxation rules of the Ahmadabad Municipality is 'intra vires' of the powers of the Municipality. According to the defendant, in levying this particular tax on lands, the capital value of the lands came into consideration only as a measure or basis for assessing the tax. Now, as the impugned tax purports to be a tax on lands, it falls prima facie under Entry 42 of List II, and if on a proper examination of the matter it is found that in fact and in law it does, so fall and does not fall under Entry 55 of List I, there can be no doubt that it would be within the competence of the Provincial Legislature to levy such a tax. It has been settled by authority that for deciding the nature of a tax, we must derive help and guidance from the charging sections. In the present case, the charging section is Section 73 of the Bombay Municipal Boroughs Act, No. XVIII of 1925, and Section 73 lays down :

> "Subject to any general or special orders which the State Government may make in this behalf and to the provisions of Sections 75 and 76, a municipality may impose for the purposes of this Act any of the following taxes, namely :
> (i) a rate on buildings or lands or both situate Within the municipal borough; etc, etc".

The material part of Section 75 provides :

> "A municipality before imposing a tax shall observe the following preliminary procedure :

(a) it shall, by resolution passed at a general meeting, select for the purpose one or other of the taxes specified in Section 73 and approve rules prepared for the purposes of clause (j) of Section 58, prescribing the tax selected, and in such resolution and in such rules specify

(i) .....

(ii) .....

(iii) in the case of a rate on buildings or lands or both, the basis, for each class, of the valuation on which such rate is to be imposed; etc., etc."

There is an Explanation at the foot of Section 75, and the Explanation says :

"In the case of lands the basis of valuation may be either capital or annual letting-value."

21. Thus, it is clear from the provisions of the charging Section 73 read with Section 75 that the impugned tax is essentially a rate on lands, and a recourse to the capital value of the lands was taken only as a means or basis for the assessment of the rate. The 'Explanation' to Section 75 was introduced into the Act, not as the subject of taxation but as the measure of the taxation to which lands or buildings may be subjected . In the House of Lords case, (1881) 6 AC 315 Lord Penzance, distinguishing between the case of a merchant or trader, who was taxed not in respect of any property which he possessed and of which he enjoyed the fruits but only upon the profits which he realized annually in his trade, and the case of an owner of a mine who was taxed in respect of that mine as a fixed and realized property which belonged to him and from which he reaped an annual benefit, observed that the words "annual value" or "profit received" from that "property" were introduced into the statute which His Lordship was considering not as the subject of taxation, but only as the measure of the taxation to which the property was to be subjected. In our case also, the words "the basis of valuation may be either capital or annual letting-value" are introduced into the 'Explanation' to Section 75 of the Act, not with a view that the capital value or annual letting-value was to be the subject of taxation, but with a view that the taxation on lands was to be levied on the measure of the capital value or annual letting-value. Merely because the words "capital value" are used in the 'Explanation' to Section 75 and also merely because the words "rate on the area of open land ... .shall be levied at 1 per cent, of the valuation based on capital" are used in Rule 350-A of the taxation rules of the Ahmadabad Municipality, it could not be validly contended that the impugned rate is a tax on the capital value. It is well settled that it is not irrational to correlate a tax on property to the value of the property. In - 'AIR 1949 FC 81' it was observed thus by Mr. Justice Fazl Ali (p. 87) :

"..... .If a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax without intending to tax income."

The same principle was emphasized by Mr. Justice Broomfield in 'AIR 1940 Bombay 65' when

he said (p. 70) :

> "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 ?"

It would thus be permissible to make the amount of the tax correspond to the value of the property and, in our view, nothing further was done when the words "capital value" were used in the 'Explanation to Section 75 of the Act and the words "1 per cent, of the valuation based on capital" were introduced in Rule 350-A. They would not make the impugned tax a tax on the capital value.

22. I have pointed out above that it has been settled by authority that the nature and character of a tax are to be determined from the charging sections. In - '*Sir Byramjee Jeejeebhoy v. Province of Bombay*', it was sought to be shown on behalf of the appellant that the impugned tax, which was an urban immoveable property tax levied under Section 22 of the Bombay Finance Act, 1932, as amended by the Bombay Finance Amendment Act, 1939, was a tax on income as it was assessed on the same basis as income-tax, i.e. on annual value or the amount at which the property might reasonably be expected to let. That contention was negatived and it was held that the mode of assessment of a tax did not determine its character, and accordingly it was impossible to say that the employment of annual value as the basis for a tax was any indication that the tax was on income. It was held that one ought mainly to look at the charging section in order to discover the essential character of the tax. In the body of his judgment, Mr. Justice Broomfield observed (p. 70) :

> "..... 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; (1858) 23 LJ Ex 46 (F); 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."

23. It is clear therefore that simply because the capital value of a property is a factor which plays an important role in the levy of a tax on the capital value of the assets of a person and also in the

levy of a tax on lands or buildings belonging to that person, it would not follow that the two taxes are not distinct taxes but must fall under the same denomination, i.e. under Entry 55 of List I. Mr. Justice Broomfield has emphasised the principle in the above-mentioned case that although the basis of assessment may be the same, the taxes, for the determination of which the said basis is employed, may be entirely distinct and may fall under different entries of the distinct legislative Lists. Mr. Justice Broomfield then proceeded further in his judgment to point out that what is to be discovered In such, cases is the "essential character" of the tax and 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 sections of the Act for this purpose. I have already stated that the charging section here is Section 73 read with. Section 75 of the Act and these sections would clearly show that the impugned tax is not a tax on capital value, but that it is a tax on lands for the levy of which the capital value was turned to as a means or mode for deriving guidance and assistance. Section 73 imposes no limitation on the taxing power of a municipality, i.e. no limit is prescribed as to the amount of the tax which may be imposed. Power to impose a rate on buildings or lands means power to impose taxes on persons, owners or occupiers as the case may be, in respect of these properties. As to the method of assessment, Section 75 says that in the case of lands, the basis of valuation may be either capital value or annual letting value. The only restriction upon the taxing power of the Provincial Legislature, which restriction must also govern the taxing power of the municipality, is that it cannot tax the capital value itself. In this case, I am satisfied that the capital value itself of the lands was not the subject-matter of the taxation, but it was taken into consideration only as a measure of the taxation. In - *'Provincial Treasurer of Alberta v. Kerr*[8]*',* also it was observed that the identification of the subject-matter of the tax was only to be found in the charging section, and if we turn to Section 73 of the Act here, we do not find any warrant therein for the contention that the impugned tax was a tax on the capital value. In - '*Ralla Ram v. Province of East Punjab*', also, to which I have already referred, Mr. Justice Fazl Ali, who delivered the judgment of the Bench, observed (p. 87) :

> ".....In the first place, we have to look into the charging section of the statute, because as was pointed out in - '*Provincial Treasurer of Alberta v. Kerr*',, 'the identification of the subject-matter of the tax is only to be found in that section.' The charging section in the present case is Section 3, which in clear terms levies not a tax on income but a tax on buildings and lands. It is true that we must look not to the mere form but to the substance of the levy, and the tax must be held to be invalid, if in the guise of a property tax it is really a tax on income. There is however nothing in the impugned Act to show that there was any intention on the part of the Legislature to get at or tax the income of the owner from the building."

24. In this context, a reference to Section 3 of the Punjab Act may be convenient since that was the charging section in that case. Sub-section (1) of Section 3 is in these terms :

> "There shall be charged, levied and paid an annual tax on buildings and lands situated in

the rating areas shown in the Schedule to this Act at such rate, not exceeding twenty 'per centum' of the annual value of such buildings and lands, as the Provincial Government may by notification in the Official Gazette direct in respect of each such rating area." It may be noted that the annual value is also a standard used in the Income-tax Act for getting at the true profits or income of a person. On this ground, it was sought to be contended that Section 3 of the Punjab Act was beyond the competence of the Provincial Legislature to enact, since the tax on income was within the competence of the Central Legislature alone to legislate upon. It was in the context of these circumstances that Mr. Justice Fazl Ali turned to the charging section (S. 3) of the Punjab Act in order to hold that the tax which was levied under that section was not a tax on income, but a tax on buildings and lands. Precisely the same position emerges from an examination of

[8]1933 AC 710

the charging Section 73 in our case. There is nothing in the language of that section to warrant a conclusion that, under the guise of levying a rate on buildings or lands, power was given by the Provincial Legislature to the municipalities to levy a tax on the capital value of the properties. The point, in substance, is that it is the charging section which determines the nature and character of the tax and the charging section in this case shows that the impugned tax is not a tax failing under Entry 55 of List I but that it is a tax on lands falling under Entry 42 of List II.

25. There is a real and distinct, though at times subtle, distinction between the two positions one in which the capital value is directly the subject-matter of taxation and the other in which the capital value is to be turned to as a measure or machinery or basis for assessing a tax on property. In the latter position, the measure or basis may be described in terms of a certain percentage of the capital value. But that is merely a way or manner of expressing in words that the capital value has been taken as a guide for calculating a tax. For instance, let us assume that on taking the capital value as a basis or machinery for determining the quantum of a tax on land, the municipal authorities came to the conclusion that the tax on a given land should be X rupees. Now if X rupees work out a percentage of 1 per cent, on the capital value of the land, one should not have any cogent grounds for quarrelling with the words "1 per cent, of the value based on capital" in rule 350-A. What is important and what is really determinative in such matters is not a strictly verbal interpretation, but the pith and substance of the impugned tax. In the case of - *'Subrahmanyan Chettiar v. Muttuswami Goundan*[9]*',* Sir Maurice Gwyer, C.J. observed as follows (p. 51) :

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee

whereby the impugned statute is examined to ascertain its 'pith and substance' or its 'true nature and character,' for the purpose of determining whether it is legislation with respect to matters in this list or in that."

Also, in - 'AIR 1939 FC 1', a question arose whether a tax on the sale of motor spirits was a tax on the sale of goods within Entry 48 of the Provincial List or a duty of excise within Entry 45 of the Federal List and the learned Chief Justice observed (pp. 7, 8) :

"..... Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the 'non obstante' clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a withness to the imperfections of human expression and the

[9] AIR 1941 FC 47

fallibility of legal draftsmanship."

26. It is thus clear that where the jurisdictions of the Central and Provincial Legislatures appear to come in conflict, a Court must Endeavour the conflict by considering the scheme of the Act and if necessary by even modifying the language; in other words, by ascertaining the pith and substance of the conflicting provisions. The observations of the learned Chief Justice in 'Subrahmanyan Chettiar (L)' and in 'In re the Central Provinces and Berar Act No. XIV of 1938, which are quoted above, would effectively meet the contention of the plaintiffs that there would be a conflict between the powers of the Federal Legislature and Provincial Legislature in case we hold that it is within the competence of the Provincial Legislature to levy a tax on lands on the basis of capital value. In - 'AIR 1945 PC 94', a question arose whether the Madras General Sales Tax Act, 1939, which imposed a tax on the sale of goods, was not an encroachment on the part of the Provincial Legislature in the field of the Central Legislature, and it was held that the term "duty of excise" was a flexible term and that its meaning may in particular circumstances be narrowed down to effect a reconciliation between the two jurisdictions. It was observed by Lord Simonds, who delivered the judgment of the Judicial Committee, that although the term "duty of excise" might no doubt cover a tax on first and perhaps on other sales and might in a proper context have an even wider meaning, its meaning, in the context of that particular case, was narrowed down and it was held to be a duty primarily levied on a manufacturer or producer in respect of the commodity manufactured or produced, it was held that it was a tax on goods, not on sales or the proceeds of sale of goods. In the case of - '(1901) AC 26, Lord Davey said (p. 44) :

> "..... ..It is said that the tax imposed on Property within Schedule 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."

and later on (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."

This would be an authority for holding that simply because a tax on a land is levied in relation to the capital value thereof, it would not follow that it is a tax on the capital value itself. When I look at the scheme of Sections 73, 75, 76 and 77 of the Act and read R. 350-A in the light of that scheme, I have no difficulty in holding that the impugned tax is in substance not a tax on the capital value. It might appear on first thought that the words "rate on the area of open land.....shall be levied at 1 per cent, of the valuation based on capital" in R. 350-A invade Entry 55 of List I and to that extent there may appear to be a conflict between Entry 55 of List I and Entry 42 of List II. But, in our view, the conflict is merely a seeming conflict and, in the words of the learned Chief Justice Gwyer, is due more to the imperfections of human expression and fallibility of legal draftsmanship than to any desire on the part of the municipality to intrude upon the jurisdiction of the Central Legislature, i.e. to intrude upon Entry 55 of List I. In any case, the seeming invasion by R. 350-A into the field of the Federal Legislature is not so great as to justify the view that in pith and substance the impugned tax is a tax on the capital value.

27. In this connection, we may refer once again to the case of - *'Ralla Ram v. The Province of East Punjab',* . A question arose in that case whether the Punjab Urban Immoveable Property Tax Act (Punjab Act XVII of 1940) was beyond the competence of the Provincial Legislature which enacted it. Sub-Section (1) of Section 3 of that Act, to which I have already referred, provided :

> "There shall be charged, levied and paid an annual tax on buildings and lands situated in the rating areas shown in the Schedule to this Act at such rate, not exceeding twenty 'per centum' of the annual value of such buildings and lands etc., etc."

It was argued on behalf of the appellant in that case that the moment it was seen that the basis of the tax was the annual value of property, which was the very basis used by the Indian Income-tax Act for assessing income from property, it should be held that it was in substance "a tax on income" which was a subject outside the authorized field of the Provincial Legislature. Mr. Justice Fazl Ali, who delivered the judgment of the bench, said that the crucial question was

whether merely because the Income-tax Act had adopted the annual value as the standard for determining the income, it must necessarily follow that if the same standard was employed as a measure for any other tax, that tax also became a tax on income, and his Lordship said (p. 85) :

> ".....If the answer to this question is to be given in the affirmative, then certain taxes which cannot possibly be described as income-tax must be held to be so."

The question was answered in the negative, and in doing so, Mr. Justice Fazl Ali mentioned a case in 'A Reference under the Government of Ireland Act, 1920 In re, 1936 AC 352', in which Lord Thankerton, who delivered the judgment, had observed (p. 358) :

> ".....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 general character of the tax."

While dealing with the essential difference between the poor rate and the rate in respect of a person's whole profits, be they profits from business or from investments, Lord Thankerton in the same case observed (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."

28. The principle which was laid down by Lord Thankerton in that case demolished the contention that wherever the annual value was the basis of a tax that tax became a tax on income, it would show that there are other factors to be taken into consideration and that it is the essential nature of the tax charged, and not the nature of the machinery, which is to be looked at. In other words, simply because the capital value is a factor which plays an important role in the levy of a tax on the capital value of the assets of a person and also in the levy of a tax on the lands of that person, it would not follow that the two taxes are not distinct taxes but must fall under the same denomination, i.e., under Entry 55 of List I. From what has been stated above, it would follow in our case that wherever the capital value is the basis of a tax, it could not be said as a matter of infallible deduction that the tax is a tax on the capital value.

29. In - *'Gallagher v. Lynn[10]',* also, the proper approach to a question such as the one before us was expressed thus by Lord Atkin (p. 870) :

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

In the case before us, the taxation rule regarding the levy of a rate on open lands is within the express powers of the municipality to make; and on the authority of Lord Atkin's observations quoted above, it should be held that the said rule is not invalidated simply because the capital value of lands is to be considered incidentally as a basis for the assessment of the tax on lands. To put the matter in a different form, we may ask ourselves a question : Did the municipality, under the guise of dealing with a rate on lands in R. 350-A, in fact encroach upon the forbidden field, the field of the Central Legislature ? In the facts of this case, considering the scheme of Sections 73 and 75 of the Act and the scheme of R. 350-A, the question must be answered in the negative.

30. This matter may be tested in another way for emphasising the difference between a tax on the capital value of the assets of an assessee a tax on land on the basis of its capital value. In the context of item 55, the capital value of the assets means the real capital value, regard being had to the encumbrances to which the lands (assuming that the assets are lands) may be subject. If a land, whose market value is Rs. 10,000/- is subject to a mortgage of Rs. 15,000 and also to other liabilities, the owner has only an equity of redemption and the value of that equity of redemption may be nothing or may be a minus

[10]1937 AC 863

quantity. Such an asset could not possibly be liable to the levy of a tax under Entry 55 of List I. All the same, the owner would not be immune from the levy of a tax upon the said land by the municipality under Entry 42 of List II, for the municipality, for levying a tax on land, is not concerned with whether the land is encumbered or unencumbered. It is only concerned with how much should be the tax on it on the basis of its capital value. Thus the distinction between the two kinds of taxes, one under Entry 55 of List I and the other under Entry 42 of List II, i.e., a tax on the capital value of the assets and a tax on lands on the basis of their capital value, is not merely academic, artificial or imaginary, but a real one. If the land is capable of beneficial enjoyment by some person, the owner thereof is rateable and would be liable to pay a tax upon it on the basis of its capital value to the municipality under Entry 42 of List II. But he would be immune from having to pay a tax on the capital value of it under Entry 55 of List I, if the real

capital value is nil by reason of the encumbrances upon it. In - *'West Bromwich School Board v. Overseers of West Bromwich*[11]*',* a question arose of the ratability of a school board in respect of a public elementary school belonging to them and it was observed by Bowen, L.J. (p. 942) :

> "..... I will assume that in the hands of the school-board it is not capable of being beneficially occupied; but we must consider whether it is capable of being beneficially occupied in the hands of any other person. If land is by law struck with sterility when in any and everybody's hands, so that no profit can be derived from the occupation of it, it cannot be rated to the relief of the poor. But if the school-house is not used by this school-board for any profitable purpose, it by no means follows that the site of it must be sterile in every other person's hands."

It is thus clear that simply because the capital value of an asset comes in both for the purpose of levying a tax under Entry 55 of List I and a tax under Entry 42 of List II, it could not be said that the two taxes are not distinct taxes and that the latter is not within the competence of the Provincial Legislature to levy.

31. An argument is advanced for the plaintiffs that if it is held that it is within the competence of the Provincial Legislature to legislate about the levy of a tax on lands on the basis of capital value thereof, the result would be that the same lands would be subject to two taxes, one under Entry 55 of List I under which it is competent to the Central Legislature to levy a tax on the capital value of assets and the other under Entry 42 of List II. The argument is that such overlapping of taxes would be bad and would be an unjustifiable burden on the property. The argument must be rejected in view of the decision in - 'AIR 1945 PC 98', to which we have already referred. It was held in that case that the excise duty which was within the exclusive competence of the Federal Legislature to levy was primarily a duty levied on the manufacturer or producer in respect of the commodity manufactured or produced and that the levy of a tax on sales or the proceeds of sale of goods was a subject within the competence of the Provincial Legislature to legislate upon. The judgment in that case went on to say (p. 101) :

> "..... The two taxes, the one levied on a manufacturer in respect of his goods, the other on a vendor in respect of his sales, may, as is there pointed out, in one sense overlap. But in law there is no overlapping. The taxes are separate and distinct imposts. If in fact they overlap, that may be because the taxing authority,

[11](1884) 13 QBD 929

> imposing a duty of excise, finds it convenient to impose that duty at the moment when the excisable article leaves the factory or workshop for the first time on the occasion of its sale. But that method of collecting the tax is an accident of administration; it is not of the essence of the duty of excise, which is attracted by the manufacture itself.

Thus, it would be perfectly legal for the Central Legislature to levy a tax on the capital value of a

person's assets and also for the Provincial Legislature to levy a tax on his lands on the basis of the capital value thereof, for in law there is no overlapping.

32. While considering the question whether the Government of India Act, 1935, intended to confer upon the Provincial Legislatures competence to legislate on the subject of levying a tax on lands on the basis of the capital value thereof, it would be useful to examine the legislative history and. practice on the subject in India before the passing of the Government of India Act, 1935. It was observed by Lord Macmillan in - *'Croft v. Dunphy*[12]*,* that (p. 19) :

> "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."

In - 'AIR 1940 Bombay 65', also their Lordships looked into the legislative practice prevailing in England and in India at the time when the Government of India Act, 1935, was passed. Beaumont, C.J. in the course of his judgment said (p. 68) :

> "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."

Mr. Justice Broomfield, who also delivered a concurring judgment in that case, observed (p. 69) :

> ".....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 favor 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 .....which is substantially the same as annual letting value, the basis of the impugned tax. Indian Income-tax Acts have followed the English practice."

We are, therefore, entitled to look to the legislative practice in India before 1935 in the matter of the Provincial Legislatures' competence to levy a tax on lands on the basis of

[12] AIR 1933 PC 16

the capital value thereof. Section 123(1)(a) of the Bengal Municipal Act, No. 15 of 1932, provides that the Commissioners might, from time to time, subject to the provisions of the Act, impose within the limits of the municipality a rate on holdings on their annual value. Section

128, Sub-Section (2), provides that if the gross annual rental is not ascertainable, the annual value of such holding shall be deemed to be an amount which may be equal to, but may not exceed, 7-1/2 'per centum' on the value of the buildings on such holding at the time of the assessment plus a reasonable ground rent for the land comprised in the holding. It is clear from the above mentioned provisions of the Bengal Municipal Act, No. 15 of 1932, that, in determining a rate on holdings, the capital value of the holdings did play an important role. It was not a factor to be ignored, but on the other hand was a factor which had a definite relationship with the question of a rate to be levied by the municipality on holdings.

33. Then we turn to the Madras City Municipal Act, No. 4 of 1919. Section 99 of the Act gives power to the Council to levy a tax on buildings and lands, at such percentages of the annual value' thereof as may be fixed by the Commissioner subject to the limitation that the aggregate of the percentage so fixed shall not, in the case of any land or building, be less than 154 per cent or greater than 20 per cent, of its annual value. Then there is Section 100, Sub-Section (2) of which says that the annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year. Then comes the important proviso to Sub-Section (2) and the proviso says :

> "Provided that (a) in the case of (i) any Government or railway building; or (ii) any building : of a class not ordinarily let, the gross annual rent of which cannot in the opinion of the commissioner be estimated, the annual value of the premises shall be deemed to be six per cent of the total of the estimated market value of the land at the time of assessment and the estimated cost of erecting the building at such time after deducting for depreciation a reasonable amount which shall in no case be less than ten per centum of such cost."

It would thus be clear that, under the Madras City Municipal Act, it was perfectly competent to take into account the market value of the land and the estimated cost of constructing the building in order to arrive at the annual value of the premises. Estimated market value of the land added to the estimated cost of construction of the buildings would be equivalent to the capital value of the premises, and the Act laid down that 6 per cent, of such capital value would be the annual value of the premises and it was upon the basis of that annual value that the tax was to be levied on the premises.

34. Then there is the U.P. Municipalities Act of 1916. Section 123(1)(i) of this Act lays down that a board may impose a tax on the annual value of buildings or lands or of both. Then there is Section 140 which defines annual value and the definition says that in the case of railway stations, hotels, colleges, schools, hospitals, factories and other such buildings, the annual value means a proportion not exceeding five 'per centum' to be fixed by rule of the sum obtained by adding the estimated present cost of erecting the building to the estimated value of the land appurtenant thereto, in other words, the estimated value of the land plus the estimated cost of

erection of the building on the land. This would also therefore show that the annual value of a building was taken to be a certain proportion of the capital value thereof.

35. These legislative measures enacted by the Provincial Legislatures of Bengal, Madras and Uttar Pradesh would show that the trend of the legislative practice in India was, before the Government of India Act, 1935, was passed, in the matter of the municipalities' competence to take the capital value of buildings or lands into consideration for determining the annual value thereof for the purpose of levying a tax thereon. The Provincial Legislatures (of Bengal, Madras and Uttar Pradesh) proceeded on the basis that there was a definite relationship between a rate on buildings and lands and the annual value thereof and further that in calculating the annual value, where the usual data for the purpose were not available, due regard was to be had to the estimated value of the lands which was to be added to the estimated value of the construction of the buildings, in other words the capital value of the property. It would thus appear from the legislative practice in India prior to 1935 that the capital value of lands or buildings was a factor which in no mistakable manner influenced the question of a rate to be levied thereupon. To put the matter in a different form, it would appear that prior to 1935, in certain provinces in India, competence was conferred by the Legislatures upon the municipalities to levy a tax on lands and buildings on the basis of the capital value thereof. There is nothing to show in the provisions of the Bombay Municipal Boroughs Act, 1925, that the said competence was sought to be withdrawn from the municipalities in the province of Bombay by the Provincial Legislature. On the contrary, 'Explanation' to Section 75 of the Act would show that the competence was in terms preserved in case of lands, because the 'Explanation' says that in the case of lands the basis of valuation may be either capital value or annual letting value. There is nothing in the language of the Legislative Lists in sch. VII to the Government of India Act, 1935, to show that the Government of India on their part also intended to withdraw the above-mentioned competence from the Provincial Legislatures to levy a tax on lands and buildings on the basis of the capital value thereof.

36. It is 'settled by the weight of authority - I would be content to refer only to two cases : - 'AIR 1940 Bombay 65' and - '(1881) 6 AC 315', that it is within the competence of the Provincial Legislature to levy a tax on property on the basis of the annual letting value thereof. Now, it could not be contended with any force that the annual letting value of property has no relation to the capital value thereof. On the other hand, there is a definite relationship between the two. If the building is not given out on rent to a tenant but is occupied by the owner himself, the annual letting value is to be determined on the basis of a rent which a hypothetical tenant would pay, due regard being had to the market value of the land, the cost of building materials, the contractor's charges and so on, in other words to the capital value of the building. Now, if the Provincial Legislatures have been held competent by the weight of authority to levy a tax on property on the basis of the annual letting value thereof, it only stands to reason that it would be competent to them to levy a tax on property on the basis of the capital value thereof. There would not appear any justifiable reason to make a distinction in the context of this subject between the annual

letting value and, the capital value. Thus, on the examination of the legislative practice in India, before the Government of India Act, 1935, was passed, on the subject of the Provincial Legislatures' competence, to levy a tax on buildings and lands, it would appear that it was not the intention of the Government of India at the time of making Legislative Lists Nos. I and II in schedule VII to the Act to-deprive the Provincial Legislatures of their competence to levy a tax within their own sphere on lands and buildings on the basis of the capital value thereof. Of course, it would not be competent to the Provincial Legislature to tax the capital value directly. But it would be perfectly open to them to levy a tax on lands and buildings and in doing so to adopt the capital value as a measure or machinery for getting at the tax.

37. On behalf of the plaintiffs, our attention is invited to the case of 'AIR 1952 Bombay 261' and it is argued that the term "assets" in Entry 55 of List I does not mean the totality of the-assets of an assessee, but includes a part of his assets as well, that the open lands of the plaintiffs are parts of their assets and that, therefore Rule 350-A, under which these lands are assessed to a rate of 1 per cent, of the valuation based on capital, impinges upon Entry 55 of List I and invades; the exclusive sphere of the Central Legislature. In - Col. *Sir Duggan v. Comr. I. T.*', it was contended, on the authority of observations made by the learned Judges in the case of - '*Sir Byramji Jeejeebhoy v. The Province of Bombay*',. that entry 55 of List I contemplated a tax on the totality of assets, and not on individual assets of an assessee; but that contention was negatived, by the learned Chief Justice. In the present appeal, it is not necessary for us to determine the scope of Entry 55 of List 1 by construing the word "assets" which occurs in that entry, since even if it be assumed that the tax levied under Entry 55 of List I is a tax on individual assets as distinguished from the totality of assets, even so the sphere of the Federal Legislature is not invaded by the impugned tax since I have come to the conclusion that the tax challenged is a tax on lands falling under Entry 42 of List II and not a tax on the capital value of the lands. However, in support of their contention that the capital value of the lands and buildings cannot be taken into consideration at all for the purpose of levying a tax under Entry 42 of List II, the plaintiffs have relied on certain observations of the learned Chief Justice in the above mentioned case of 'AIR 1952 Bombay 261' and those-observations are (p. 263) :

> ".....whereas the Provincial Legislature is competent to impose a tax on lands and buildings the Central Legislature is empowered under entry 55 of List I to impose a tax not on lands and buildings as such but on the capitalized value of lands and buildings"

and that

> "Therefore, the power of the Provincial Legislature is restricted to tax on lands and buildings without taking into consideration the capital value of lands and buildings."

With very great respect, the observations are 'obiter' and I do not think the learned Chief Justice laid down a principle that no regard : whatever should be paid to the capital value of the lands

and buildings while levying a tax on them under Entry 42 of List II. The point with : which his Lordship was directly concerned in that case was as to the scope of Entry 55 of List I, and not as to the scope of Entry 42 of List II. As no question arose in that case regarding the competence of the Provincial Legislature to levy a tax on lands and buildings due regard being had to their capital value, the attention of the learned Chief Justice was not drawn to the legislative practice on that subject in India prior to 1935. In these circumstances, I do not think that the above observations of the learned Chief Justice can help the plaintiffs in their contention that the levy of the impugned tax is outside the competence of the Provincial Legislature and therefore of the municipality.

38. Mr. Desai for the plaintiffs-respondents has drawn our attention to the relief clause in the plaint in which the plaintiffs have called the impugned tax a tax on capital value and to the fact that this allegation of the plaintiffs has not been denied by the defendant in the written statement (see paragraph 6 of the written statement). From this Mr. Desai's argument is that we must hold that the impugned tax is a tax on capital value. I am of the view that such an important point of law which "has to be decided on the charging section and upon authorities cannot be concluded by a mere statement of a party in a pleading. Mr. Desai's submission must, therefore, be rejected. The next contention of Mr. Desai is that the expression "basis of valuation may be capital value" in the 'Explanation' to Section 75 imports a notion of the return or interest on the capital value and that, therefore, in levying a rate on land we must calculate a percentage on the return or interest on the capital value and not a percentage of the capital value itself. The submission is more verbal than substantial. Let us assume that the tax on land, upon calculating a percentage on the return or interest on the capital value thereof is X rupees. Now it is always easy to express the same quantity X rupees in terms of a percentage on the capital value itself. There is therefore no substance in the contention of Mr. Desai. Where open lands are not let out as in the present case, the annual letting value may be taken to be a certain proportion or percentage of the capital value as is shown by the legislative practice in India. As a tax on lands is a certain percentage of the annual letting-value, there is a clear connection, in the shape of a percentage, between the tax and the capital value and nothing more than that was meant by the words "rate on the area of open land.... shall be levied at 1 per cent, of the valuation based on capital," in R. 350-A. I feel no doubt that in saying that the rate on the area of open and shall be levied at 1 per cent, of the valuation based on capital the rule really provided that the capital value shall be a measure of taxation and not the subject-matter of taxation.

39. For reasons stated above. I agree with the , conclusion of my learned brother that the impugned tax is not a tax on capital value, but is a tax on lands, a tax falling under Entry 42 of List II and, therefore, a tax within the competence of the Provincial Legislature and the municipality to levy. That being so, Rule 350-A of the taxation rules of the Ahmadabad Municipality must be held to be 'intra vires' of the powers of the municipality.

40. In the end therefore, I agree with my learned brother that this appeal must be allowed and the decree of the trial Court must be set aside.

Appeal allowed.