

PATNA HIGH COURT

Pratap Singh Bahadur

Vs

Province of Bihar

Misc. Judicial case No. 118 of 1946

(Agarwala, C.J. and Meredith, J.)

15.09.1948

JUDGMENT

Agarwala, C.J.

1. This is a reference under Section 25 (2), Bihar Agricultural Income-tax Act, 1938, at the instance of Maharaja Pratap Singh Bahadur through the Manager of the Gidhour Court of Wards Estate.

2. For the year 1942-43, the assessee's 'net agricultural income for the year ending 31st march 1942, was assessed at Rs. 1,52,634 which included a sum of Rs. 14,359-9-9 received from Government as malikana. In appeal this was reduced and the case was remanded for revision of the assessment after reconsideration of certain items with which we are not concerned at present. The assessee's claim that the sum received as malikana was not assessable was rejected.

The question referred to us for decision is: "Whether income received as malikana paid by Government under Regulation VII [7] of 1822 is agricultural income assessable to agricultural income-tax?" On the ground that malikana is not agricultural income the amount received by the assessee on this account has been assessed to tax under the general Income-tax Act which exempts agricultural income from taxation, it having been held that it is not agricultural income within the meaning of the Income-tax Act, 1922, which defines agricultural income as-"Any rent or revenue derived from land which is used for agricultural purposes " For the purposes of the Bihar Agricultural Income-tax Act, 1938, however, it has been held that malikana is agricultural income, with the result that the recipient has again been assessed on the amount received. The Bihar Agricultural Income-tax Act, 1938, defines agricultural income as-"Any rent or income derived from land which is used for agricultural purpose....."

3. Although in one Act the word "income" is used, and in the other, the word "revenue", there is no real difference in the two definitions.

4. In order to bring the sum received as malikana within the definition of agricultural income-tax the Revenue Authorities must show either that it is rent or that it is income derived from land used for agricultural purposes. It is, therefore, necessary to consider the nature of malikana. In

1793 the then Government proposed to settle land with the then proprietors on terms which included the payment of revenue amounting to nine-tenths of the estimated yield. Regulation VIII [8] of that year provided that the lands of those proprietors who refused to enter into engagements on those terms should either be let in farm or held khas by Government and that the dispossessed proprietors should be paid by Government an allowance in consideration of their proprietary right at such rate as the proper authority might determine. This allowance was called malikana. In the case of lands let in farms the person with whom they were settled was required to pay to Government, in addition to the revenue settled, an additional sum which Government itself would have to pay to the dispossessed proprietor as malikana. It appears, however, that even before the enactment of the Regulation of 1793 some zamindars were in receipt of malikana. This is dealt with in Phillips's "Land Tenures of Lower Bengal," pp. 121 to 126. The learned author says,

"It has been questioned whether a zemindar could be ousted... It was however probably only in later times, when the zemindar's rights were at their highest pitch, that dismissal was so rare; for we know that during the vigorous times of Mahomedan rule, the zemindars were often expelled.... The claims of the ancient zemindars and village headman, when thus displaced, were usually recognized to the extent of giving them an allowance for subsistence; and sometimes they continued to receive this allowance in the shape of payments from the new occupants called russoom-i-zemindares. This practice probably accounts for the payment, to a displaced zemindar by his successor, of malikana for the subsistence of his family. Some times, when the zemindar was incompetent, Government appointed an officer to take khas possession of the zemindary; and in such cases, as also when the revenues were farmed, it was usual in the later Mahomedan and British periods to allow the zemindar malikana, at least in Behar, at the rate of ten percent on the revenue although the zemindar performed none of the functions of the office."

5. It will thus be seen that the malikana allowance was not regarded as rent paid to the displaced proprietor, but merely as a subsistence or compassionate allowance for himself and his family. In *Herranund Sahoo v. Mt. Ozeerun*¹, it was held that a right to malikana is not the same thing as a right to receive rent, but is a proprietary right constituting an interest in land. In *Mt. Ozeerun v. Baboo Heeranund Sahoo*², it was held that malikana is a

"money payment, and neither rent nor maintenance; in other words, it is to be regarded like a bond or other debt, the non-payment of which within a certain legal period, bars an action to recover it."

In *Bhoalee Singh v. Mt. Neemo Behoo*³, a Bench of three Judges held that malikana is not rent, nor has it the elements of rent. Later, in *Sped Shah Najamuddin Hyder v. Sped Zahid Hussein*⁴, also it was held that malikana is not a claim for rent. A passage in the judgment of Garth, C. J. in *Mullick Abdool Guffoor v. Muleka*⁵, was referred to by the learned Advocate-General:

"There is nothing in principle, so far as we can see, to distinguish a malikana right from a right to receive rent or the dividends payable upon Government paper."

What the learned Chief Justice was considering there was whether a right to receive malikana could legally be the subject of a gift under the Muhammadan law, and what he decided was that such a right could be the subject of a gift in the same manner as other incorporeal property of that nature. The cases to which I have referred above, in which it was held that malikana, is not rent, were not dissented from. On the authorities, I think it is clear that a right to receive malikana is not a right to receive rent.

6. The next question, therefore, is whether a sum received as malikana is income derived from land within the meaning of the Act. In support of his contention that malikana is income derived from land used for agricultural purposes, the Advocate-General has referred to cases in which there are observations that malikana is a proprietary right or an interest in immovable property. See *Herranund Sahoo v. Mt. Ozeerun*, 9 W. R. 102(SUPRA) and *Bhoalee Singh v. Mt. Neernoo Behoo*⁶, In these and similar cases, such as *Budhrul Hug v. Court of Wards*⁷, and *Mt. Ozeerun v. Baboo Heeranund Sahoo*⁸, what was being considered was the period of limitation governing a suit to recover malikana, and that matter was being considered in relation to the Limitation Act of 1859. In *Jaggo Bai v. Utsava Lal*⁹, the Privy Council left open the question whether a right to receive malikana is immovable property but held that a suit for its recovery is not governed by Article 141 but by Article 120, Limitation Act of 1908. The explanation to Article 132 of that Act declares that malikana is "deemed" to be money charged on immovable property which implies that it is not really so.

7. If the right to receive malikana be regarded as a proprietary right, it is difficult to resist the conclusion that the person with whom land of a dispossessed proprietor was settled under the Regulation of 1793 was a tenure-holder or tenant of some kind under the person entitled to receive the malikana, i. e., the dispossessed proprietor, and that it was rent, but the very case referred to in this connection held that it is not rent. Furthermore, if the person entitled to receive malikana be regarded as the proprietor of the land, certain other consequences would seem to follow, e. g., that he is entitled to the underground rights in the land, unless he has expressly parted with them and to accretions. There is no authority for the proposition that he is entitled to the underground rights and his right to accretions has been negatived in *Soudamini Dassya, v. Secretary of State*¹⁰, In that case, Rankin J. as he then was, held that although the right to receive malikana may be described as a quasi rent-charge it is not a tenure or dominium and that when a proprietor was dispossessed in consequence of his refusal to enter into an engagement for the payment of the revenue demanded in 1793 his interest in the land was extinguished. The question may also be looked at from another point of view. Malikana is payable whether the land in respect of which it was originally granted exists or not. That is not disputed. How can it be said to be derived from land used for agricultural purposes in a case where the land no longer exists or no longer exists as agricultural land?

8. The question whether malikana is income "derived" from land must, I think be determined in accordance with the principle laid down by the Privy Council in *Commissioner of Income-tax v. Kamakshaya Narayan Singh*¹¹, What their Lordships were considering in that case was whether interest on arrears of rent is derived from lands used for agricultural purposes within the meaning of Section 2, Income-tax Act, 1922. They observed as follows:

"The word 'derived' is not a term of art, Its use in the definition indeed demands an enquiry into the genealogy of the product. But the enquiry should stop as soon as the

effective source is discovered. In the genealogical tree of the interest land indeed appears in the second degree, but the immediate and effective source is rent, which has suffered the accident of non-payment. And rent is not land within the meaning of the definition."

Similarly, in the case of malikana the person entitled to its receipt derives it from the statutory obligation of Government to pay it, and although, so far as malikana under the Regulation is concerned, Government recouped itself from the person with whom the land was settled, land in the genealogical tree of malikana appears in the second degree, its immediate and effective source is the Government's statutory obligation to pay it, and this obligation is not land within the meaning of the definition. In *Mustafa Ali Khan v. Commissioner of Income-tax*¹², the Privy Council considered the question whether the malikana received by the Utraula Estate in the United Provinces was entitled to exemption from assessment under the Income-tax Act, 1922. The facts with regard to it were thus stated in the order of the appellate Assistant Commissioner:

"During the days of the Nawabs of Oudh Raja of Utraula was recognised as the Pargana lord and as such retained the right to a small feudal tribute and to manorial dues. From the beginning of the 19th century till the annexation, the Rajas of Utraula could not manage their estate properly on account of the continued warfare between the neighbouring estates. During this period they transferred, made grants of or sold a large number of villages to certain persons for monetary consideration. In doing so they surrendered all their Zamindari and proprietary rights and lost all their title to real property in respect of those villages. They, however, retained the right of a small annual cash payment by virtue of their position as the old pargana lord. This cash allowance came to be called the Malikana. The villages otherwise became quite independent and the exclusive property of the purchasers, grantees or transferees.

8. The amount of the malikana was fixed by a settlement decree and is not variable. It is payable whether the land on which it is supposed to be a charge is used for agricultural purposes or not or whether it yields any profits or not. It is admitted that suits for the recovery of this due are cognizable by Civil Courts and not by Revenue Courts. This being so, it is impossible to describe this due as rent or as agricultural income. There is no relation of landlord and tenant between the appellant and the proprietors who are liable to pay this amount...."

Their Lordships observed:

"It may be conceded that it would never have become payable to the ancestors of the assessee had they not been feudal proprietors of the land. But that does not mean that it is now rent or revenue derived from the land: on the contrary it is paid just because the original proprietors relinquished their claims to the land and it represents the consideration for that relinquishment. The land is in no real sense its source; and even if it is to be regarded as secured by a charge on the land that is no more decisive of the question in the present case than it was in *Maharaja Kumar Gopal Saran Narain Singh v. Commissioner of Income-tax, Behar and Orissa*¹³,

9. Nor has the Revenue Department proved that the land in respect of which the malikana was

originally fixed is land used for agricultural purposes. Whether it is such land has been held to be a question of fact to be determined by reference to the use to which the land is being put: see *In re Bijay Chand Mahtab Bahadur of Burdwan*¹⁴, The finding of fact in the present case is:

"There is no trace at present of the lands or village to which the allowance might be said to relate and nothing is, therefore, known as to the present use to which they have been put."

In *Mustafa Ali Khan v. Commissioner of Income tax*¹⁵, with regard to the assessee's claim that he was entitled to exemption from taxation under the Income. tax Act, 1922, in respect of the sale proceeds of forest trees on the ground that such proceeds constituted agricultural income, their Lordships observed:

"It appears to their Lordships that, whether exemption is sought under Section 2 (1) (a) or 2 (1) (b), the primary condition must be satisfied that the land in question is used for agricultural purposes. His case fails if he does not prove that the land is used for agricultural purposes "

10. In my opinion, therefore, it has not been established in the present case that malikana is rent or that it is income derived from land, or that the land in respect of which the obligation to pay was originally undertaken is being used for agricultural purposes. I would, therefore, answer the question referred to us for decision in the negative. The assessee is entitled to the costs of this reference which we assess at Rs. 250 including the Rs. 100 deposited for the reference.

Meredith, J.- I agree.

Answer in the negative.

Cases Referred.

Cases Referred.

19 W. R. 102

27 W. R. 336

312 W. R. 498 : (4 Bang. L. R. A. C. 29)

4S C. L. J. 300

510 Cal. 1112 at p. 1125

612 W. R. 493

710 W. R. 302

87 W. R. 336

951 ALL. 439: (AIR (16) 1929 P.C. 166)

1050 cal. 822: (AIR (11) 1924 cal. 197)

11 P.C. A. No. 23 of 1944, D/-6th July 1948 : (AIR (36) 1949 P.C. 1)

12P.C. A. No. 33 of 1917, D/-12th July 1948: (AIR (36) 1949 P.C. 13)

1362 I. A. 207 : (AIR (22) 1935 P.C. 143 : 14 Pat. 552 P.C.)

141910-8 I. T. R. 378 (Cal)

15P.C. A. No. 33 of 1917, D/-12th July 1948: (AIR (36) 1949 P.C. 13)