
(1941) 04 PAT CK 0008

In the Patna High Court

Babu Jhalak Prasad Singh and Others

APPELLANT

Vs

Province of Bihar

RESPONDENT

Date of Decision : 17-04-1941

Acts Referred:

Government of India Act, 1935 — Article 41 Schedule 7, 108(2)(b), 299

Citation : AIR 1941 Patna 306

Hon'ble Judges : Harries, C.J;Manohar Lall, J;Fazl Ali, J

Bench : Full Bench

Judgement

Harries, C.J.—The plaintiffs are zamindars holding a permanently settled estate in the district of Patna in this Province.

2. On 17th March 1989, a notice was served on them by the agricultural Income Tax authorities of this province u/s 17(2) and other sections of the Bihar Agricultural Income Tax Act calling upon them to make a return of their agricultural income for the previous year to enable an assessment to agricultural Income Tax to be made. The plaintiffs have declined to make such a return and claim that the provincial agricultural Income Tax authorities have no power to call for such a return. The present suit has been filed claiming declaratory relief to that effect.

3. The suit was originally instituted in the Court of the first subordinate Judge, Patna. The points involved are difficult and of very great importance and with the consent of all the parties the case was transferred to this Court for hearing and disposal. In view of the importance of the case to all persons interested in agriculture in this Province, this Special Bench has been constituted to hear the matter. In para. 1 of the plaint, it is stated that the plaintiffs are zamindars holding a permanently settled estate. Then follow a number of paragraphs purporting to describe the position of zamindars before and after the Permanent Settlement Regulation (Regn. 1 of 1793). In para. 6 it is said that the Permanent Settlement Regulation is an Act of Parliament, and in para. 7 it is pleaded that as the Bihar Agricultural Income Tax Act is repugnant to a Governor-General's Act

OP a Parliamentary Statute and purports to alter the character of the permanent settlement the previous sanction of the Governor. General was necessary to the introduction of the bill in the Legislature and further that the bill should have been reserved for signification of His Majesty's pleasure. In para. 8 it is stated that the Bihar Agricultural Income Tax Act directly infringes the rights granted by Regn. 1 of 1793 and as it repeals either directly or indirectly such regulation it is ultra vires. In para. 9 it is pleaded that the Bihar Agricultural Income Tax Act is ultra vires as the previous sanction of the Governor u/s 299, Government of India Act, 1935, and of the Governor-General u/s 108(2)(b) of that Act was not obtained before the introduction of the bill before the local Legislature. In para. 10 it is stated that the powers given in Article 41, List II, Schedule 7, Government of India Act, 1935f enable the Provincial Government only to tax agricultural income from estates other than those permanently settled. In para. 11 the fact that return was demanded from them by the Income Tax authorities is stated and in para. 14 it is said that the necessary notice u/s 80, Civil P.C., was served on 18th April 1939, on the defendants, the Provincial Government, through the Collector of Patna. The reliefs claimed by the plaintiffs are as follows:

(i) That the Court be pleased to declare that the Provincial Legislature of Bihar has or had no jurisdiction to enact the Bihar Agricultural Income Tax Act (Act 7 of 1938) and the Bihar "Agricultural" (Amendment) Act (Act 5 of 1939) imposing agricultural tax on estates settled under Permanent Settlement Regulation 1 of 1793 so long as the said regulation stands unrepealed, (ii) That the Court be further pleased to declare that the Bihar Agricultural Income Tax (Amendment) Act (Act 5 of 1939) being repugnant to the Permanent Settlement Regn. 1 of 1793 and other cognate Regulations of 1793 and to other existing Indian laws are ultra vires of the Provincial Legislature in that they seek to impose agricultural tax on permanently settled estates and are not binding on and wholly ineffective against the plaintiffs or other estates and that any act done under these Acts by any officer including the issuing of and serving of notice on plaintiffs under Sections 17(2) and 30 of Act 7 of 1938 and also assessment of agricultural Income Tax, as aforesaid is without jurisdiction illegal, invalid and ineffective, (iii) That the Court be pleased to grant the plaintiffs any other relief to which they, in the opinion of the Court, be entitled to get.

4. The defendants in their written statement deny the plaintiffs' allegations and plead that the Act was validly enacted under the provisions of the Government of India Act, 1935. They deny that it affects in any way the terms of the Permanent Settlement Regulation and plead that the plaintiffs were rightly called upon under the provisions of the Bihar Agricultural Income Tax Act to render a return of their income for the previous year for the purposes of assessment to agricultural Income Tax. The defendants deny that the plaintiffs are entitled to any relief whatsoever. Certain other pleas were taken in the written statement, but as those pleas were not pressed before us it is unnecessary to set them out in this judgment.

5. In the Court of the Subordinate Judge the following issues were framed:

1. Is the suit as framed maintainable?
2. Is the suit bad for any want of or defect in the notice u/s 80, Civil P.C.?
3. Does the impugned Acts require the previous sanctions of the Governor and the Governor-General under Sections 299(3) and 108(2), Government of India Act, 1935, or should they have been reserved for the signification of His Majesty's pleasure under the said Act? Was the previous sanction and approval of the Governor obtained?
4. Were the impugned Acts illegal, inoperative, repugnant and ultra vires?
5. Can the impugned Acts be questioned in the civil Court?
6. Does Article II in List 2, Government of India Act, 1935, empower the Provincial Legislature to make laws with respect to taxes on agricultural income arising out of estates settled under Regn. 1 of 1793 and other cognate regulations?
7. Are the impugned Acts an invasion on the rights of the landlords under the Permanent Settlement? If so, are they ultra vires of the Provincial Legislatures?
8. Whether the notices and the assessment under the impugned Acts are legal, operative and binding on the plaintiffs?
9. ...Does the Permanent Settlement create a new right or merely recognize a pre-existing right?
10. ...What other relief, if any, the plaintiffs are entitled to?

6. No evidence was called at the hearing of the suit as the defendants through the Advocate-General admitted that the plaintiffs were holders of a permanently settled estate in this Province and that they had been served with a notice by the agricultural Income Tax authorities calling upon them to make a return of their income under the Act. It was conceded that no such return had been made and the defendants further admitted that a valid notice u/s 80, Civil P.C., had been served upon them through the Collector of Patna as alleged by the plaintiffs. It is common ground that the plaintiffs' estate is a revenue paying one. No questions of fact are therefore involved in this suit and the questions to be decided are pure questions of law.

7. I shall now deal with the issues raised in the case.

Issue 1.-- It was not contended on behalf of the defendants that the suit was not maintainable in its present form and that being so this issue must be decided in favour of the plaintiffs.

Issue 2.-- The defendants now admit receipt of the notice in question and therefore this issue must be decided in favour of the plaintiffs.

Issue 5.-- The defendants did not contend that the validity of the Bihar Agricultural Income Tax Act could not be questioned in a civil Court and therefore this issue is decided in favour of the plaintiffs.

8. Issues 3, 4, 6, 7, 8, 9 and 10. -- These issues raise the questions involved in the case and the contentions of the plaintiffs can be shortly summarised as follows: (1) The whole of the Bihar Agricultural Income Tax Act, 1938, is ultra vires and not binding on the plaintiffs by reason of the fact that it purports to tax a wider range of income than is permissible under the powers given to the Provincial Legislature by the Government of India Act, 1935, and further because it does not tax all agricultural income as defined in the Government of India Act, 1935. (2) The said Act purports to deal with rights and privileges relating to land revenue and repeals or modifies the terms of the permanent settlement and as the previous sanction of the Governor was not obtained to the introduction of the bill as required by Section 299, Government of India Act, the Act was not validly enacted and is not binding on the plaintiffs. Further, the bill was not validly enacted as it was not reserved for the consideration of the Governor-General as required by the Instrument of Instructions issued to the Governor of the Province. (3) The said Act purports to repeal or modify the Permanent Settlement Regulations and in particular Regn. 1 of 1793 which is an Act of Parliament or a Governor-General's Act. The said Act was not validly enacted by reason of the fact that the previous sanction of the Governor-General was not obtained for the introduction of the bill as required by Section 108(2), Government of India Act, 1935. (4) Even assuming the said Act to be validly enacted, it does not on its true construction purport to tax agricultural income derived from permanently settled estates. The Bihar Agricultural Income Tax Act is a general Act whereas Regn. 1 of 1793 is a special Act and the former should not be held to repeal any provisions in the latter.

9. The plaintiffs' first contention is that the whole of the Bihar Agricultural Income Tax Act of 1938 and the Amending Act of 1939 are ultra vires the powers of the Provincial Legislature because they purport to tax a wider range of income than is permissible under the powers granted to Provincial Governments by the Government of India Act, 1935. The Bihar Agricultural Income Tax Act, 1938, purports to define "agricultural income" and it is contended that the definition contained in the Act is too wide and consequently the whole Act which deals with taxation of such income is ultra vires, null and void and of no effect. The power to impose a tax on agricultural income is given to the Provincial Government by Section 100 and Article dl, List n, Schedule 7, Government of India Act. Section 100(3), Government of India Act, is in these terms:

Subject to the two preceding Sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said schedule (hereinafter called the Provincial Legislative List).

10. The schedule referred to is Schedule 7 of the Act. Article 41, List n, Schedule

7 of the Act empowers a Provincial Government to impose "taxes on agricultural income." Section 311(2), Government of India Act, 1935, provides that unless the context otherwise requires the expression "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian Income Tax. In the Indian Income Tax Act, which relates to Indian Income Tax the phrase "agricultural income" is defined in Section 2(1) of the Act. The definition is as follows:

(a) "Agricultural income" means any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such ;

(b) any income derived from such land by (i) agriculture, or (ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market, or (iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in Sub-clause (ii) ;

(c) any income derived from any building owned and occupied by the receiver of the rent or revenue of any such land, or occupied by the cultivator, or the receiver of rent in kind, of any land with respect to which, or the produce of which, any operation mentioned in Sub-clause (ii) and (iii) of Clause (b) is carried on:

Provided that the building is on or in the immediate vicinity of the land, and is a building which the receiver of the rent or revenue or the cultivator or the receiver of the rent in kind by reason of his connexion with the land, requires as dwelling house, or as a store-house, or other out-building.

11. Section 110(b)(ii) prohibits a Provincial Legislature except in so far as is expressly permitted by any subsequent provisions of the Government of India Act, 1935, to make any law amending any provision of the said Act. In the Bihar Agricultural Income Tax Act, 1938, agricultural income is defined in Section 2(a). Sections 3 and 4 charge agricultural income derived from land in Bihar to agricultural Income Tax. By Section 5, however, incomes not exceeding Rs. 5000 are exempted. Sections 6 and 7 deal with modes of determining agricultural income, and Section 17 requires persons to render a return of their, agricultural income. Section 18 deals with assessment to tax, and by Section 31 the tax assessed is made payable by the assessee in four instalments. Other sections deal with matters which are incidental to the assessment and collection of the tax which are not material for the purposes of this judgment. "Agricultural income" is defined in the Bihar Agricultural Income Tax Act in. Section 2(a) which is in these terms:

"Agricultural income" means--

(1) any rent or income derived from land which is used for agricultural purposes, and is either assessed to land revenue in Bihar or subject to a local cess or rate assessed and collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act; (2) any income derived from such land by (i) agriculture, or (ii) the performance by a cultivator or receiver of rent in kind of any process ordinarily employed by a cultivator or receiver of rent in kind to render the produce raised or received by him fit to be taken to market, or (iii) the sale by a cultivator or receiver of rent in kind of the produce raised or received by him, in respect of which no process has been performed other than a process of the nature described in Sub-clause (ii).

12. It will be noted, in the first place, that Clause (c) of the definition of "agricultural income" contained in the Income Tax Act is entirely omitted from the Bihar Agricultural Income Tax Act, and it was contended that such omission rendered the whole of the Act ultra vires. It was urged that the Provincial Government could only tax agricultural income as defined in the Income Tax Act and as they had not purported to do so the Act was ultra vires. In my view the omission to include Clause (c) of the definition contained in the Income Tax Act in the definition contained in the Bihar Agricultural Income Tax Act cannot possibly make the latter Act ultra vires.

13. In effect the Bihar Government are proposing to tax less than they are entitled to do. The greater must include the less, and if the Provincial Government are entitled to tax all agricultural income as defined in Section 2(1), Income Tax Act, then they are clearly entitled to tax a part only of such income. It is impossible to hold that the omission to tax some forms of agricultural income could render the whole of the Bihar Act ultra vires and of no effect.

14. In the Income Tax Act definition, the words used are: "'Agricultural income,' means (a) any rent or revenue derived from land which is used for agricultural purposes...." In the Bihar Agricultural Income Tax Act the words used are: "'Agricultural income' means any rent or income derived from land which is used for agricultural purposes...." It was argued that there was some difference in this part of the definition, though it was not stated with any clearness as to what that distinction was. In my view the word "revenue" in the Income Tax Act is used to denote income or a revenue receipt as opposed to a capital receipt and therefore covers all income from agricultural land other than rent. No real distinction can be drawn between the expressions "rent or revenue" and "rent or income," and in my view it cannot be said that by the use of the words "rent or income" the Provincial Government are taxing something more than is permissible by the definition in the Income Tax Act. In the definition in the Bihar Agricultural Income Tax Act, the word "Bihar" is substituted for the expression "British India" which appears in the definition in the Income Tax Act. This alteration was, of course, necessary to limit the application of the Provincial Act to this province and can in no way affect the validity of the Act.

15. It was next urged that there was a material difference in the two definitions

in that the Bihar Agricultural Income Tax Act purported to tax income from land which is either assessed to land revenue or subject to a local cess or rate assessed or collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act, whereas the Government of India Act only permitted taxation of agricultural income as defined in the Income Tax Act, namely income from agricultural land which is either assessed to land revenue or subject to local rate assessed and collected by officers of the Crown as such. In the definition of "Agricultural income" in the Income Tax Act the land must be assessed to land revenue or must be subject to a local rate, whereas in the definition in the Bihar Act the land may be either assessed to land revenue or subject to a local cess or rate.

16. In my judgment the addition of the word "cess" in the definition in the Bihar Act does not widen the range of income taxable. The expression "local rate" is wide enough to cover cess which is a term used in this Province for local rates levied on immovable property for the benefit of local authorities. That being so, the addition of the words "local cess" in the definition of "agricultural income" given in the Bihar Act does not affect the matter in any way and does not in any way extend the field of taxation.

17. A more substantial point urged on behalf of the plaintiffs is that income from revenue free agricultural lands may be taxable under the Bihar Agricultural Income Tax Act though such would not be agricultural income within the definition given in the Income Tax Act. Under the Income Tax Act income from revenue free agricultural land can only be regarded as "agricultural income" if the land is subject to a local rate assessed and collected by officers of the Crown as such, whereas under the Bihar Act income from revenue free agricultural land would be agricultural income if it was derived from land subject to a local rate or cess assessed and collected under the provisions of certain local Acts, no matter how such local rate or cess was assessed or collected or by whom.

18. In other words, in the definition contained in the Income Tax Act the local rate must be assessed and collected by officers of the Crown as such, whereas under the Bihar Act the local rate or cess may be assessed or collected by persons other than officers of the Crown. It is said that cess in this province is not assessed and collected by officers of the Crown as such.

19. As I have stated earlier, the lands in this case are revenue paying lands and are clearly within both the definitions; but it is contended that if it is established that the definition in the Bihar Act is wider than that given in the Income Tax Act, the whole Act must be declared ultra vires and therefore, would not be applicable even to this case where the lands are revenue paying lands. In order to ascertain whether definition of "agricultural income" in the Bihar Agricultural Income Tax Act is wider in its scope than that given in the Income, tax Act, it will be necessary shortly to consider the provisions of the Cess Act (Bengal Act 9 of 1880) under which local cess is collected in this province. If under the provisions of that Act local cess is assessed and collected by officers of the Crown as such,

then there would be no material difference between the two definitions. Section 6, Cess Act, makes all immovable property in the province liable to a local cess. Part 2 of the Act deals with the mode of assessment. By Section 12 the Board of Revenue may order a valuation or re-valuation of property and then follow provisions as to returns to be rendered by holders of such immovable property. If returns are not furnished, the Collector is required u/s 21 of the Act to make such valuation. Where returns are untrue or incorrect the Collector can value u/s 22 and may recover the expenses of such valuation u/s 23. Sections 24 and 25 et seq., further deal with the Collector's powers in relation to valuation and by Section 37 the Collector may reduce a valuation and make a valuation and assess and levy cess upon any estate or tenure which for any reason whatever has been omitted from the valuations and assessments for the time being in force or which was not in existence when such valuation or assessment was made.

20. Chapter 3 of Part 2 of the Act deals with the rate and levy of cess. Section 38 provides that the local cess shall be levied at such rate as may be determined for such year by the District Board, and Section 40 provides for the publication of the rate and the levying of the cess. By the terms of this section it is clear that this duty devolves upon the Collector. Section 41, deals with payment of cess by holders of estates. Section 98 provides that every amount due or which may be due to the Collector under the provisions of the Act in respect of any arrears of cess may be realized by such Collector in the manner provided for the realisation of a public demand. Section 4 defines "Collector" and the term includes any person specially invested with the powers of a Collector for the purposes of this Act. By Section 100 the Board of Revenue may at any time invest any person with the powers of a Collector under the Act such powers to be exercised by such person under the control or supervision of the Collector or independently of such control and supervision, as the Board of Revenue shall direct. Section 9 of the Act provides that the proceeds of the local cess in each district shall be paid into the district fund of the district and "district fund" is defined in Section 4 as meaning the fund formed u/s 52, Bengal Local Self-Government Act of 1885.

21. From these provisions it is clear that the rate of cess to be levied is fixed by the District Board and the proceeds are paid into a district fund. It is however clear that the assessment and collection of cess is ordinarily made by the Collector, and it is conceded that a Collector is an officer of the Crown. It is however urged that when the Collector is acting under the Cess Act he is not acting as an officer of the Crown but as an officer or servant of the District Board. What he collects he pays not into any Crown or Government fund but into the district fund, and that being so, it is urged that he is acting not as a Collector and not as an officer of the Crown as such but as an officer of the local authorities.

22. In my judgment however the Collector, when he performs his duties under the Cess Act is in no way a servant of the District Boards. All the latter have to

do is to determine the rate of cess, and when once that is done they appear to have nothing further to do with the matter. Questions of valuation, assessment and collection are matters entirely for the Collector, and the Act makes him in no way responsible to the District Boards. He does not act under their supervision but under the supervision of the higher Government authorities: see Section 105(b). This Sub-section places the Collector under the supervision of the Commissioner and the Board of Revenue. There appears to be no definition of the expression "officer of the Crown," but that expression as used in the Income Tax Act clearly covers a Collector. The latter is in one sense an officer of the Provincial Government, but there can be no doubt that in India he is also an "officer of the Crown." Under the present administration at least all the senior "officers of Government" are "officers of the Crown" as that expression is understood in this country. In my judgment when the Collector performs the duties cast upon him by the Cess Act he performs them as Collector that is, as an officer of the Crown and not as an agent of the local authorities.

23. The Act however does provide that persons other than Collectors can perform the duties of a Collector under the Act. Section 100 empowers the Board of Revenue at any time to invest any person with the powers of a Collector under Part. 2 of the Act which includes powers of assessing and collecting cess, such persons, it is said, cannot possibly be officers of the Crown and are not acting as such when performing their duties under the Act. What Section 100 of the Act empowers the Board of Revenue to do is to invest a person with the powers of a Collector under the Act. Once such a person is invested with such powers, he is, as far as those duties are concerned, a Collector, and he performs his duties not as a servant or agent of the District Boards but "as a Collector."

24. In my view even such a person invested by the Board of Revenue must be regarded as a Collector and he performs his duties as a Collector, that is, as an officer of the Crown as such. That being so, it appears to me that cess in this province is assessed and collected by officers of the Crown as such and that being so there is no real difference between the two definitions as far as the assessment and collection of cess is concerned.

25. Cess however is not payable in respect of any estate within the limits of municipality: see the present proviso to Section 2, Cess Act. Such lands however are assessed to local rates: see Section 98 and the following sections of the Bihar and Orissa Municipal Act (Act 7 of 1922). These rates are [not collected by the Collector but are collected by officers or servants of the municipality: see Section 120 and the following sections of the Bihar and Orissa Municipal Act. It is, therefore, contended that the definition of "agricultural income" in the Bihar Agricultural Income Tax Act covers income from revenue free agricultural land in a municipality, whereas the definition in the Income Tax Act does not.

26. This contention is well founded. Revenue free agricultural land in a municipality is subject to a local rate collected under a Bihar and Orissa Act, and, therefore, comes within the definition given in the Agricultural Income Tax Act.

As the local rate, however, is collected by the servants of the municipality and not by the officers of the Crown as such, the income derived from such lands is not within the definition of agricultural income given in the Income Tax Act. No evidence has been led before us with a view to showing that there is any revenue free agricultural land within municipalities in this Province though doubtless there must be such land. However, the income arising from such land must be small, and it seems clear that the framers of the definition in the Bihar Agricultural Income Tax Act have overlooked this matter.

27. As the definition of the "agricultural income" given in the Bihar Agricultural Income Tax Act may include income which is not included in the expression "agricultural income" as defined by the Income Tax Act, it is argued that the whole of the Bihar Agricultural Income Tax Act is ultra vires and, therefore, not binding upon the plaintiffs who are themselves clearly within both definitions as they pay revenue for their lands.

28. It was also contended on behalf of the plaintiffs that the Act was ultra vires because it purported to tax the agricultural income of tenure-holders and raiyats of revenue free lands upon which cess was payable. It was urged that such income did not fall within the ambit of the definition of "agricultural income" in the Income Tax Act but that it was within the definition of such income given in the Bihar Agricultural Income Tax Act. The argument was that tenure-holders and raiyats of revenue free lands pay cess not to the Collector but to the person from whom they hold their interests.

29. Section 41, Cess Act, makes tenure-holders and raiyats liable to pay cess but in their case the cess is not collected by the Collector but is payable by the tenure-holder to the proprietor and by the raiyat to the proprietor or tenure-holder as the case may be. Such cess, therefore, can be said to be assessed and collected under a Bengal Act, but it cannot be said to be cess collected by an officer of the Crown as such. That being so, it is contended that agricultural income of such tenure-holders and raiyats is taxable Under the Bihar Agricultural Income Tax Act though such income is not within the definition given in the Government of India Act, 1935, and the Income Tax Act. The income of a raiyat does not fall naturally within Section 2(a)(1), Bihar Agricultural Income Tax Act, but rather falls within Section 2(a)(2)(1) of that Act. His income is derived from land by agriculture and clearly falls within the definitions given in both Acts.

30. A tenure-holder of revenue free land not himself cultivating lands does derive income from land used for agriculture upon which cess is payable by the proprietor and that cess is assessed and collected by the Collector who is an officer of the Crown, and, as I have already held, it is assessed and collected by the Collector as such. Therefore income of tenure-holders of revenue free land falls within the definition given in both the Bihar Agricultural Income Tax Act and the Income Tax Act and, therefore, the Bihar Agricultural Income Tax Act cannot possibly be held to be ultra vires upon this ground.

31. The only instance, therefore, where the Bihar Agricultural Income Tax Act taxes income not within the definition of agricultural income given in the Income Tax Act is in the case of revenue free lands in a municipality. Can this render the whole Act ultra vires? As I have stated, there can be but little of such income, but that is said to be wholly immaterial. The definition of "agricultural income", it is argued, permeates the whole Act, affects all its provisions. It is contended that it is impossible to separate such part of the definition in the Bihar Act as offends against the provisions of the Government of India Act, 1935, from the remainder, and that being so the whole Act must be held to be ultra vires. The Court, it is urged, cannot substitute the definition of "agricultural income" given in the Income Tax Act for that given in the Bihar Act as such definition was never made part of the Act by the local Legislature and was never assented to by the Governor. The definition of "agricultural income" is so inextricably mixed up with the other provisions of the Act that it is impossible to sever the offending portion of the definition, and that being so, the whole Act must be declared ultra vires.

32. Reliance was placed on two recent cases of the Privy Council, the first of which is AIR 1937 89 (Privy Council) , in which it was held that the Employment and Social Insurance Act, 1935, of the Parliament of Canada, which in substance provided for a system of compulsory unemployment insurance throughout Canada, was ultra vires of the Dominion Parliament. In pith and substance, the Act was an Insurance Act affecting the civil rights of employers and employed in each province and was accordingly within the exclusive competence of the Provincial Legislature u/s 92, head 13, British North America Act, 1867, which provided that, "in each Province the Legislature may exclusively make laws in relation to... (13) property and civil rights in the province." It was held that the Act was ultra vires by reason of the fact that the other parts of the Act were so inextricably mixed up with the insurance provisions of Part 3 that it was impossible to sever them.

33. The other case relied upon by the plaintiffs was Attorney General for AIR 1937 93 (Privy Council) , in which it was also held that the offending portion of the Natural Products Marketing Act, 1934, as amended by the Natural Products Marketing Act, 1935, was so inextricably interwoven with the other portions of the Act that the whole Act must be held to be ultra vires.

34. In my view, however, it is possible in the present case to hold that the Bihar Agricultural Income Tax Act, in so far as it taxes agricultural income falling within the definition given in the Income Tax Act, is intra vires and only ultra vires in so far as it taxes income which falls outside the definition of "agricultural income" given in that Act. It is, in my judgment, open to this Court so to limit the definition given in the Bihar Act as to bring it within the competence of the local Legislature.

36. In *Macleod v. Attorney General for New South Wales* 1891 A.C. 455, their Lordships of the Privy Council construed a definition of "bigamy" given in Section 54, Criminal Law Amendment Act, 1883, so as to bring the Act within the

competence of the New South Wales Legislature. Section 54, Criminal Law Amendment Act, 1883, enacted that

whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.

37. Their Lordships held that these words must be intended to apply to those actually within the jurisdiction of the Legislature, and consequently that there was no jurisdiction in the Colony to try the appellant for the offence of bigamy alleged to have been committed in the United States. Their Lordships construed the words "whosoever being married" as meaning "whosoever being married, and who is amenable at the time of the offence committed to the jurisdiction of the Colony of New South Wales" and construed "wheresoever" as meaning "wheresoever in this Colony the offence is committed."

38. The Advocate-General who appeared for the Province also relied on *Great Weast Saddlery Co. v. The King* AIR 1921 P.C. 148 and *Newcastle and Humber River Steamship Co. Ltd. v. Attorney General for the Commonwealth* 29 Com. L.R. 357 in which it was held that when the offending portions of an Act, where severable, only such portions should be held to be ultra vires and the remainder of the Act should be held to be intra vires. Further, it seems clear from a recent decision of the Federal Court that in a case such as the present one the whole Act should not be held to be ultra vires.

39. In AIR 1941 47 (Federal Court) the question arose whether the Madras Agriculturists Belief Act, 1938, was ultra vires the powers of the Provincial Legislature. By the terms of that Act the Courts were entitled to interfere with and reduce interest on loans granted to agriculturists. It was contended that the Act was ultra vires by reason of the fact that it empowered Courts to reduce interest on bills of exchange and promissory notes which were subjects in the Federal list and which could not be affected in any way by legislation of a Provincial Legislature. The Federal Court (Sulaiman J. dissenting) held that on the facts of that particular case the question whether the Act was ultra vires or not did not arise. Sulaiman J. however held that the Act was ultra vires in so far as it purported to deal with interest on negotiable instruments but only to that extent. The Act applied to all debts payable by an agriculturist and "debt" was denned as meaning any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue Court or otherwise. The definition of debt was wide enough to cover debts due on negotiable instruments, and Sulaiman J. was of opinion that in so far as it dealt with such debts the Act was ultra vires but only to that extent. Varadachariar J., though he held that the point did not strictly arise, observed at page 192:

The argument of total invalidity need not be dealt with at any length, not only because it was not seriously pressed, but also because there is little force in it. If

an enactment deals in part. with matters beyond the competence of the Legislature which enacted it it must be held to be wholly invalid only in cases where the valid and invalid provisions are inseparably intermixed or the innocent provisions are merely ancillary to the of. fending provisions. This cannot be said to be the position in the present case. Further, as there is no provision in the Act dealing in terms with negotiable instruments, any objection based on the wide scope of the Act may be obviated by so interpreting the general terms used in the Act as to limit them to cases with which alone the Legislature was competent to deal.

40. From these observations it would appear that Varadachariar J. would also have been prepared to hold that even if the provisions of the Madras Agriculturists' Belief Act dealt with matters upon which the Provincial Legislature could not legislate, nevertheless the whole Act would not be invalid upon that ground. The Act would only be ultra vires in so far as it purported to deal with matters outside the jurisdiction of the Provincial Legislature. In AIR 1939 74 (Federal Court) Sulaiman J. observed:

It is a well established principle that if the invalid part of an Act is really separate in its operation from other parts and the rest are not inseverably connected with it then only such part is invalid, unless of course the whole object of the Act would be frustrated by the partial exclusions. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power the Act can be ultra vires in the former while intra vires in the latter. The test is said to be whether a statute with the invalid portions omitted would be a substantially different-law as to the subject-matter dealt with by that remained from what it would be with the omitted portions forming part of it: see *King v. Commonwealth Court of Conciliation* (1910) 11 Com. L.R. 1.

41. It appears to me that these principles should be followed in this case. A Court might be bound to hold that the Bihar Agricultural Income Tax Act was ultra vires in so far as it purported to tax income from revenue-free estates in a municipality, but on the other hand, the Court could and should hold that in so far as it deals with other agricultural income the Act is intra vires. To hold that the Bihar Agricultural Income Tax Act, 1938, does not tax agricultural income from revenue free lands in a municipality would not affect the remainder of the Act which would apply to all other income rightly within its scope. For these reasons I am satisfied that the Bihar Agricultural Income Tax Act, 1938, and the amending Act cannot be held to be ultra vires because the definition given in that Act does cover some income not falling within the definition of "agricultural income" in the Income Tax Act.

42. The next contention urged by the plaintiffs was that the Bihar Agricultural Income Tax Act, 1938, was ultra vires in so far as it purported to tax income of zamindars holding permanently settled estates and in the alternative it was argued that if the Act is not ultra vires it should be held that on its true construction it did not tax income of zamindars holding permanently settled

estates but only the income of zamindars holding estates temporarily settled. Shortly stated, the argument was that the rights and privileges of permanently settled zamindars are governed by the Permanent Settlement Regulation, Regulation 1 of 1793, which is an Act of Parliament or a Governor-General's Act. By Section 108(2) no Provincial Legislature can enact legislation which repeals, amends or is repugnant to any provision of an Act of Parliament or any Governor-General's Act without the previous sanction of the Governor-General. As the previous sanction of the Governor-General was not given in this case, the Provincial Legislature had no power to legislate in a manner affecting the rights and privileges of permanently settled zamindars. It was also contended that by reason of Section 299, Government of India Act, no bill affecting the zamindar's rights or privileges in respect of land revenue could be introduced in the local Legislature without the previous sanction of the Governor and as no such sanction was given the Act was not validly passed. Further, it was argued that in assenting to the Bihar Agricultural Income Tax Act His Excellency the Governor had acted contrary to the Instrument of Instructions issued to him and therefore the Act had not been validly passed.

43. In dealing with these contentions, it will be necessary to consider what is the true meaning of the Permanent Settlement Regulation in order to see whether the provisions of the Bihar Agricultural Income Tax Act are in conflict with the provisions contained in such Regulations and whether the Act repeals, varies or modifies those provisions in any way. Mr. P.R. Das who appeared for the plaintiffs in a detailed and elaborate argument on this part of the case invited us to come to a finding as to the precise legal position of zamindars before the Permanent Settlement Regulations came into force. Mr. Das cited passages from numerous authoritative works and original documents such as Field's Regulations of the Bengal Code, Phillips's Land Tenures of Lower Bengal, Minutes of the Marquis Cornwallis and Sir John Shore. In my view it is not necessary to consider whether the zamindars were or were not proprietors of the land in the true sense of the term before the Permanent Settlement Regulations, and I am fortified in this view by an observation of Lord Russell in AIR 1930 209 (Privy Council) in which their Lordships were called upon to consider the effect of the Permanent Settlement Regulations. I shall have to deal with this case at some length later in the judgment, but at this stage it is only necessary to refer to Lord Russell's observation relating to this historical argument. At page 440 he observed:

Incidentally to this argument, the Board was invited to consider and, indeed, pronounce upon the question, mainly historical, of the position of the governing authority immediately before the permanent settlement in regard to ownership of the land or of some proprietary interest therein. The attention of their Lordships was called to the various views expressed in such works and documents as Field's "Regulations of the Bengal Code" Phillips's "Land Tenures of Lower Bengal" and Shore's Minutes. Their Lordships were also referred to certain reported decisions of the Courts. Their Lordships, however, are of opinion that there is here no occasion for any pronouncement by them upon the question of

the exact nature of the rights and interests in relation to the land which existed in the governing authority before 1793, but that this appeal falls to be determined upon a consideration of the language of the Regulations and of the Indian Income Tax Act, 1922.

44. It will appear later that their Lordships of the Privy Council were called upon in AIR 1930 209 (Privy Council) to consider much the same argument as that addressed to us in this case, and in my judgment it is unnecessary in this case to come to any definite conclusions as to the respective rights of the governing authority and the zamindars in the land before the Permanent Settlement Regulations, and this case as AIR 1930 209 (Privy Council) falls to be decided upon a consideration of the Regulations themselves.

45. The state of affairs immediately preceding the Permanent Settlement Regulations is clearly described by Ghosh J. in *King-Emperor Vs. Rajah Probhat Chandra Baruah*, he observed:

From the period of the East India Company's accession to the financial administration of Bengal, Bihar and Orissa by the Dewany Grant of 1765, one settlement of land revenue only, that of 1772, was concluded by Warren Hastings for a term of five years and this was made chiefly with farmers, to the exclusion of the hereditary landholders. With this exception, the settlements of revenue, mal and sayer, were in general adjusted from year to year, in some instances with the landholders and in others with farmers, e.g., the settlement for 1777, 1778, 1779 and 1780. When the zamindars or landholders declined to enter into engagements in respect of the revenue demanded from them, the rents payable by the under-tenants were collected immediately from them under what was known as khas management by the officers of Government, an allowance, usually one-tenth of the actual receipts from the lands, when held khas, being given to the dispossessed zamindar or landholder. It was a system which was described by the Court of Directors as inimical to the general prosperity of the country and a striking provision in Pitt's India Act of 1784 (24 Geo III, C. XXV) declared that and whereas complaints have prevailed, that divers Kajas, zamindars, polygars, talukdars and other native landholders within the British territories in India have been unjustly deprived of or compelled to abandon and relinquish their respective lands, jurisdiction, rights, and privileges, or that the tributes, rents, and services required to be by them paid or performed for their respective possessions to the said united Company, are become grievous and oppressive; And whereas the principles of justice, and the honour of this country, require that such complaint should be forthwith enquired into and fully investigated, and if founded in truth effectually redressed. Be it, therefore, enacted, that the Court of Directors of the said united Company shall, and they are hereby accordingly required forthwith to take the said matters into their serious consideration, and to adopt, take and pursue such methods for enquiring into the causes, foundation and truth of the said complaints, and for obtaining a full and perfect knowledge of the same and of all circumstances relating thereto,

as the said Court of Directors shall think best adapted for that purpose; and thereupon, according to the circumstances of the respective cases of the said Rajas, zamindars, etc., to give orders and instructions to the several Governments and Presidencies in India, for effectually redressing, in such manner as shall be consistent with justice and the laws and customs of the country, all injuries and wrongs which the Rajas, zamindars, polygars, talukdars and other native land-holders, may have sustained unjustly in the manner aforesaid, and for the settling and establishing upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which their respective tributes, rents and services shall be in future rendered and paid to the said united Company.

46. Thereafter enquiries and investigations followed and in 1790-91 a complete Code of Regulations for the conclusion of a new settlement of the land revenue for Bengal, Bihar and Orissa was promulgated by Lord Cornwallis. Decennial settlement of 1790-91 was made permanent by Regulation 1 of 1793. The settlement embraced, roughly speaking, the tracts of the country now comprised in the divisions of Burdwan, the Presidency, Rajshahi, Dacca, Chittagong, Patna and Bhagalpur, exclusive of part of the Santal Parganas. It also extended to Hazaribagh and Manbhum districts in the Chhota Nagpur Division and Jalpaiguri and Goalpara, then forming part of the Rangpur Collectorate. From the above it will be seen that conditions were somewhat chaotic before the Permanent Settlement Regulations were enacted. The zamindar was never certain as to what revenue would be demanded from him. Whenever it was thought that his position had improved reassessment was made and a larger sum demanded from him as revenue. In cases where the zamindar refused to pay he was dispossessed and the land given to farmers or administered directly by Government officer, the zamindar being given a small sum for his maintenance. This state of affairs was regarded by the British Parliament and by the Court of Directors of the East India Company as inimical to the best interest of the Company itself and of the inhabitants of the territory administered by the Company. In order to remedy the matters, Lord Cornwallis came to this country in 1786 and immediately caused investigation to be made into the question of land revenue. As a result of prolonged and detailed investigation he came to the conclusion that it was desirable that the lands in Bengal, Bihar and Orissa should be permanently settled with the zamindars which would give them fixity of tenure and render certain the jama to be thereafter payable by them. Lord Cornwallis appears to have been determined that zamindars should no longer be penalized by increased assessments whenever they were able to improve their estates and their financial condition.

47. In the year 1793 a large number of regulations were enacted giving effect to this policy of permanent settlement, but the most important regulation is Regn. 1 of 1793. In argument before us other regulations have been referred to; but it appears to me that this case must be decided upon the construction to be given to Regn. 1 of 1793 and particularly Article 6 thereof as observed by Lord Russell

in AIR 1930 209 (Privy Council) :

In regard to this part of the case, their Lordships desire to make this observation. The Bengal Regulations of 1793 are lengthy and numerous. In the course of the arguments before the Board attempts were made to support the respective arguments by a phrase picked from one regulation or a passage chosen from another, even though the particular regulation only purported to deal with some matter incidental to the permanent settlement. In the opinion of their Lordships, this part of the case falls to be determined primarily upon a consideration of the language of Regulation 1 of 1793. While bearing in mind the passages in other regulations, to which their attention was drawn, their Lordships feel that the above mentioned regulation is the master regulation for the immediate purpose before the Board, and that its provisions constitute the overriding feature in the present case.

48. In that case their Lordships were called upon to consider what was the precise assurance or undertaking given to the zamindars by the permanent settlement, and in the view of their Lordships such would have to be gathered from Regn. 1 of 1793. In my judgment the observations of Lord Russell apply with equal force to the present case, and this case also falls to be decided primarily upon a consideration of the language of Regn. 1 of 1793. Regulation 1 of 1793 bears date 1st May 1793, but is retrospective and operates as from 22nd March 1793. The last mentioned date was the date of a proclamation to certain articles of which the regulation gave legislative effect. The material provisions of Regn. 1 of 1793 are as follows:

(1) The following articles of the proclamation relative to the limitation of the public demand upon the lands, addressed by the Governor-General in Council to the zamindars, independent talukdars, and other actual proprietors of land paying revenue to Government, in the provinces of Bengal, Bihar and Orissa, are hereby enacted into a Regulation, which is to have force and effect from 22nd March 1793, the date of the proclamation.

(2) Article 1.-- In the original regulations for the decennial settlement of public revenues of Bengal, Bihar and Orissa, passed for those provinces, respectively on 18th September 1789, 25th November 1789 and 10th February 1790, it was notified to the proprietors of land, with or on behalf of whom a settlement might, be concluded, that the jama assessed upon their lands under those regulations would be continued after the expiration of 10 years and remain unalterable for ever, provided such continuance should meet with the approbation of the Honourable Court of Directors for the affairs of the East India Company and not otherwise.

(3) Article 2.-- The Marquis Cornwallis, Knight of the most noble Order of the Garter, Governor-General in Council, now notifies to all zamindars, independent talukdars and other actual proprietors of land paying revenue to Government, in the provinces of Bengal, Bihar and Orissa, that he has been empowered by the

Honourable Court of Directors for the affairs of the East India Company to declare the jama, which has been or may be assessed upon their lands under the regulations above-mentioned, fixed for ever.

(4) Article 3.-- The Governor-General in Council accordingly declares to the zamindars, independent talukdars and other actual proprietors of land with or on behalf of whom a settlement has been concluded under the regulations above mentioned, that at the expiration of the term of the settlement no alteration will be made in the assessment which they have respectively engaged to pay, but that they and their heirs and lawful successors will be allowed to hold their estates at such assessment for ever.

(5) Article 4.-- The lands of some zamindars, independent talukdars and other actual proprietors of land "having been held khas" or let in farm, in consequence of their refusing to pay the assessment required of them under the regulations above mentioned the Governor-General in Council now notifies to the zamindars, independent talukdars and other actual proprietors of land whose lands are held khas, that they shall be restored to the management of their lands, upon their agreeing to the payment of the assessment which has been or may be required of them, in conformity to the regulations above mentioned, and that no alteration shall afterwards be made in that assessment, but that they and their heirs and lawful successors, shall be permitted to hold their respective estates at such assessment for ever; and he declares to the zamindars, independent talukdars and other actual proprietors of land, whose lands have been let in farm, that they shall not regain possession of their lands before the expiration of the period for which they have been farmed (unless the farmers shall voluntarily consent to make over to them the remaining term of their lease, and the Governor-General in Council shall approve of the transfer), but that the expiration of that period, upon their agreeing to the payment of the assessment which may be required of them, they shall be reinstated, and that no alteration shall afterwards be made in that assessment, but that they, and their heirs and lawful successors, shall be allowed to hold their respective estate at such assessment for ever.

(6) Article 5.-- In the event of the proprietary right in lands that are, or may become, the property of Government being transferred to individuals, such individuals, and their heirs and lawful successors, shall be permitted to hold the lands at the assessment at which they may be transferred for ever.

(7) Article 6.-- It is well known to the zamindars, independent talukdars and other actual proprietors of land, as well as to the inhabitants of Bengal, Bihar and Orissa, in general, that from the earliest times until the present period the public assessment upon the lauds has never been fixed but that according to established usage and custom, the rulers of these provinces have from time to time demanded an increase of assessment from the proprietors of land; and that, for the purpose of obtaining this increase, not only frequent investigations have been made to ascertain the actual produce of their estates, but that it has been the practice to deprive them of the management, of their lands, and either

to let them in farm or to appoint officers on the part of Government to collect the assessment immediately from the raiyats. The Honourable Court of Directors, considering these usages and measures to be detrimental to the prosperity of the country, have with a view to promote the future case and happiness of the people, authorized the foregoing declarations; and the zamindars, independent talukdars and other actual proprietors of land, with or on behalf of whom a settlement has been or may be concluded, are to consider these orders fixing the amount of the assessment as irrevocable, and not liable to alteration by any persons whom the Court of Directors may hereafter appoint to the administration of their affairs in this country.

The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs or successors, by the present or any future Government for an augmentation of the public assessment in consequence of the improvement of their respective estates.

49. It was contended that this regulation contains a promise, undertaking or assurance that the public demand would never be increased. According to the plaintiffs, this public demand was in the nature of a tax, and as the agricultural Income Tax is a tax on -such profits, the passing of the Bihar Agricultural Income Tax Act is a breach of the assurance or undertaking given by Lord Cornwallis and is an attempt to repeal or modify the provisions of the Permanent Settlement Regulation. It is true that the amount of the jama fixed at the time of the permanent settlement was fixed after a consideration of the profits or income then derived from the land, but in my view Regn. 1 of 1793 contains no assurance or undertaking to the zamindar that he would for ever thereafter be immune from taxation such as that imposed by the Bihar Agricultural Income Tax Act. The regulation merely contains an assurance that the jama or land revenue payable by the zamindar would never be increased: It must be remembered that Regn. 1 of 1793, as its name implies, was a settlement regulation. The decennial settlement had been made for ten years, and Lord Gornwallis by the regulation made that settlement permanent. The jama which the zamindar had engaged to pay in the decennial settlement was made permanent and was not to be increased in consequence of the improvement of the zamindars' estates. What was to be fixed for ever was the annual payment which the Kamindars had undertaken to pay as a condition of holding their estates. The zamindara were recognized as proprietors, and the payment which was a condition of such recognition was declared to be for ever fixed. The effect of the regulation is that re-assessment and re-settlement of the lands should be for ever barred and the Government would no longer be entitled to increase the jama by reason of an increase in the zamindar's income.

50. There was a considerable conflict of legal opinion in this country as to the

effect of Permanent Settlement Regulation, Regn. 1 of 1793; but, in my view, that conflict has now been set at rest by the decision of their Lordships of the Privy Council in AIR 1930 209 (Privy Council) . In this case the Income Tax authorities had assessed the appellant to Income Tax under the Income Tax Act, 1922, in respect of income, profits and gains other than agricultural income derived from his zamindari. The assessee objected to such assessment, and the matter came before a Bench of the Calcutta High Court. As there were conflicting decisions in that Court, the matter was referred to a Pull Bench consisting of five Judges.

51. The main question to be decided in the case was whether, having regard to the terms of the Permanent Settlement Regulation, income derived from land in permanently settled estates subject to the exemption provided by the Legislature was liable to assessment to Income Tax. Ghose, Buckland and Panton JJ. held that such non-agricultural income was liable to be assessed under the Income Tax Act, whereas Mukerji and Suhrawardy JJ. took a different view. On appeal to His Majesty in Council their Lordships held that while the Bengal Regulations contained assurances against any claim to an increase of the jama, based on an increase of the zamindari income, they contained no promise that zamindar should in respect of the income which he derived from the zamindari be exempted from liability to any future general schema of property taxation, or that the income of a zamindari should not be subjected with other incomes to any future general taxation of incomes.

52. Accordingly, they held that under the Income Tax Act, 1922, the zamindar of a permanently settled estate was assessable to tax under the Act in respect of income profits and gains derived from his zamindari, subject to the exemptions in Section 4, Sub-section (3) of the Act (agricultural income), and the assessment should be computed after making proper allowance u/s 12, Sub-section (2) in respect of the jama assessed and paid. In this case their Lordships had to consider the effect of the Permanent Settlement Regulation, Regn. 1 of 1793, which they pointed out was the master regulation and which contained the provisions most favourable to the assessee, the zamindar. At p. 446, Lord Russell, who delivered the opinion of the Board, observed:

Their Lordships, after careful consideration of the regulations, have arrived at the conclusion that the argument of the appellant cannot succeed. They are unable to find in the regulations any statement or assurance that a zamindar will never be liable to taxation in respect of the income derived from his zamindari, or (to put the matter from another point of view) that a zamindar will, as to so much of his property as consists of income derived from his zamindari, be exempt from schemes of taxation applicable generally to the incomes of the inhabitants of British India.

The language used in Regn. 1, Article 6, does not, in their Lordships' opinion, mean anything other than this: "You have in the past been liable to have the amount of the jama increased according as the actual produce of the estate

increased; to enable the Government to obtain this you have been subjected to frequent investigations to ascertain the actual produce and you have even been deprived of the management of your estates. All this shall cease. You shall have fixity of payment and fixity of tenure. If you improve the revenue of your zamindari, you shall enjoy the fruits of your improvements without fear of the Government claiming that because the revenue produced by the estate has increased the payment you make to Government as a condition of holding that estate shall be increased also.

Their Lordships have ventured to paraphrase Article 6, but they think that their paraphrase expresses with sufficient accuracy the true intent and meaning of the article. In their Lordships opinion, while the regulations contain assurances against any claim to an increase of the jama, based on an increase of the zamindari income, they contain not promise that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation, or that the income of a zamindari shall not be subjected with other incomes to any future general taxation of incomes.

Their Lordships agree with the views expressed by Ghose 3. in the following passage from his judgment:

There was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a general tax upon incomes of all persons irrespective of the fact whether they are zamindars with whom the permanent settlement was concluded or not.

53. It is to be observed that a very similar view as to the true meaning of Regn. 1 of 1793, had been expressed in earlier cases. In *Freeman v. Fairlie* (1836) 1 M.I.A. 305, the Lord Chancellor at p. 342 observes:

I think it is to be collected from those Regulations that the proprietors of land in India had an absolute ownership and dominion of the soil; that the soil was not vested generally in the Sovereign; that the proprietors did not hold at the will of the Sovereign; but held the property as their own with the power of disposing of it absolutely; and if not disposed of, that it descended to their families. It is liable, indeed, to a tribute to the Government but it appears that the tribute was not fixed but was increased at the arbitrary will of the Government; and it appears further that if the tribute was not paid Government had the power of taking possession of the lands for the purpose of obtaining payment. Still notwithstanding these circumstances and these charges I think it impossible to read those Regulations which were prepared obviously with great caution and consideration by persons well acquainted with the subject and possessing every means of obtaining the most accurate information on it, and as far back as 1793, without coming to the conclusion that the zamindars and the taluk, dars were owners of the soil subject only to a tribute such as I have stated to Government, and it was the object of those Regulations of 1793 to make the tribute which had

been considered as dependent on its amount on the vail of the governing power fixed and permanent.

54. In *Haradas Acharjya v. Secy. of State* AIR 1917 P.C. 86, Lord Buckmaster, who delivered the judgment of the Board, at page 601 observes: "The object of the permanent settlement was to confirm the zamindars in their holdings at a fixed and immovable rent." Lord Buckmaster here was, I think, using the word "rent" not in its strict sense but rather as meaning as payment which was a condition of holding the estate. In both these cases, the jama is not regarded as a tax as that term, is usually used but rather as a tribute or payment which was a condition of holding the estate as owners. It appears to me that the decision of their Lordships in *Barua's* case concludes the matter and compels me to hold that the tax imposed on agricultural income by the Bihar Agricultural Income Tax Act, 1938, is in no way an infringement of the rights granted to zamindars by the Permanent Settlement Regulations.

55. Counsel for the plaintiffs attempted to distinguish *Prabhatchandra Barua's* case on the ground that it dealt with the non-agricultural income of a zamindar and not with his agricultural income, and it was urged that the case would have been decided otherwise, if agricultural income was sought to be taxed. It must be remembered, however, that under the provisions of the Income Tax Act, 1922, agricultural income as defined in that Act was expressly exempted from taxation see Section 4(3) of the Act; but, it is clear from the question propounded that no distinction was made between agricultural and non-agricultural income. I have already set out the question which the Courts were called upon to answer, and that question was in the most general terms; whether income derived from land in permanently settled estates subject to the exemptions provided by the Legislature was liable to assessment to Income Tax. In their judgment their Lordships draw no distinction whatsoever between the two classes of zamindari income and hold that a tax on zamindari income is no breach of any undertaking or assurance contained in the Permanent Settlement Regulation. But for the express exemption of agricultural income contained in Section 4(2), Income Tax Act, the case would have applied with equal force to agricultural income. Counsel for the plaintiffs was compelled to concede that if the exemption of agricultural income from taxation in the Income Tax Act, was removed *Prabhatchandra Barua's* case would apply, and we would be bound to hold that agricultural as well as non-agricultural income would be taxable. It was contended, however, that different principle applies when an Act was passed which purported to tax agricultural income only. It was argued that as the Bihar Act taxes agricultural income only, it imposes not a tax on income but a tax on land in the nature of a public demand as that expression is used in the Permanent Settlement Regulations. It was said that Income Tax is a tax on income generally without reference to its source and that a tax on income with specific reference to its source is not in reality a tax on income from that source but rather a tax on the source itself.

56. Reference was made in support of the argument to *London County Council v. Attorney-General* (1901) A.C. 26, in which Lord Macnaghten observed:

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

57. I must confess that I am unable to follow this contention. The charging section of the Income Tax Act is Section 6 and that in terms charges all income from five sources, and it is clear that the tax is not a tax on each of these five sources but a tax on income derived from any one or more of the sources. The tax imposed by the Bihar Agricultural Income Tax Act is a tax on income though limited to income derived from agricultural sources. It is in no sense a tax on the land because it is imposed on the income derived from the land and not on the land itself. If there is no income, there is no tax, and the greater the income the greater the yield from the tax, whereas if the tax was imposed on the land itself it would be payable irrespective of the rise or fall in income, A tax on land which is based in valuation or such like is not like the present tax which is a variable one rising and falling with the income which is derived from the land. In my judgment, the present Act clearly imposed a tax on income and is in no sense a land tax or any payment in the nature of a jama.

58. It was further argued that even if the tax could be regarded as a tax on income the principles laid down in the *Prabhatchandra Barua's* case could have no application to the present case. Their Lordships of the Privy Council have held that the Permanent Settlement Regulation contained no assurance that zamindars would be immune from any general scheme of property taxation or would not be liable with other citizens to a general tax on income. It is urged that the Bihar Agricultural Income Tax Act, imposes a tax on the assessee in their capacity as zamindars and not as members of the public. The tax, it is said, is a tax on a particular class of persons and is in short a zamindar's tax. As it is specifically directed at the zamindars the principles of *Barua's* case cannot apply, and the tax must be regarded as a breach of the assurance contained in the Permanent Settlement Regulations.

59. It is clear however that the tax imposed by the Bihar Agricultural Income Tax Act is not a tax on zamindars only. It imposes a tax on income derived from lands used for agriculture and from agriculture. Tenure-holders and raiyats are liable to taxation just as much as zamindars, and zamindars of non-permanently settled areas are in the same position as zamindars holding permanently settled estate. The Act applies generally to persons deriving income from agriculture and lands used for agriculture. It does not create a special tax upon the income of

permanently settled zamindars. Further this Act merely abolishes the exemption in favour of agricultural income contained in the Income Tax Act, 1922. What was specifically exempted from taxation is now made liable to taxation, and persons deriving income from agriculture and lands used for agriculture are placed on a similar footing to persons deriving income from other sources. There is only one difference, and that is that the tax on agricultural income is to be imposed under the terms of the Government of India Act, 1935, not by the Central Government which imposes Income Tax generally but by Provincial Governments. The result of the Bihar Agricultural Income Tax Act is that zamindars in this Province like all other citizens, are now liable to Income Tax on all their income, though the tax on such portion of their income as is derived from agriculture or from lands used for agriculture is levied and collected not by the Central authority but by the Province.

60. In my view no valid distinction can be drawn between the present case and Barua's case and that being so, it cannot be said that the Bihar Agricultural Income Tax does in any way purport to affect, vary or repeal any provision in the Permanent Settlement Regulations. That being so plaintiffs' claim for the declarations set out in their plaint must fail.

61. Assuming however I am wrong in holding that the Bihar Agricultural Income Tax Act does not modify or vary in any way the terms of the Permanent Settlement Regulations, can it be said that the Act is invalid? Section 299(3), Government of India Act, 1935, requires the previous sanction of the Governor of a Province for legislation extinguishing or modifying rights or privileges in respect of land revenue, and it is common ground that no such previous sanction was obtained. The Governor of the Province however assented to the bill, and by reason of Section 109(2)(a), Government of India Act, an Act cannot be held to be invalid by reason of the failure to obtain the Governor's sanction before the bill was introduced. That Sub-section expressly provides that no Act; of a Provincial Legislature and no provision in any such Act shall be invalid by reason only that some previous sanction of the Governor was not given if the Governor subsequently assented to such Act.

62. It is therefore clear that the Act cannot be held to be invalid by reason of Section 299, Government of India Act. Paragraph 18 of the Instrument of Instructions to Governors requires a Governor to reserve for consideration of the Governor-General any bill which would repeal or be repugnant to any provision of law in British India or any bill which would alter the character of the permanent settlement. It is conceded that the Governor of this province did not reserve this bill for the consideration of Governor-General; but even assuming that the bill does alter the character of the permanent settlement, such failure to reserve the bill for consideration would not make the present Act invalid. The Instrument of Instructions to Governor was issued under the provisions of Section 53, Government of India Act, and Sub-section (2) of that section provides that

the validity of anything done by the Governor of a Province shall not be called in

question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him.

63. There is no provision in the Government of India Act itself requiring such a bill to be reserved for the consideration of the Governor-General, and that being so the Act cannot be held to be invalid by reason of the Governor's failure to reserve the bill as directed by Para. 18 of the Instrument of Instructions. On the other hand, however, if the Bihar Agricultural Income Tax Act, 1938, varies, modifies or repeals any portion of the Permanent Settlement Regulation, 1 of 1793, the Act would require the previous sanction of the Governor General if the Permanent Settlement Regulation, 1 of 1793, is an Act of Parliament. Section 108(2), Government of India Act, provides that

unless the Governor-General in his discretion thinks fit to give his previous sanction there shall not be introduced into or moved in a Chamber of Provincial Legislature any bill or amendment which (a) repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India....

64. It is argued on behalf of the plaintiffs that Regulation 1 of 1793 is an Act of Parliament extending to British India. On behalf of respondents, however, it was pointed out that British India is defined in Section 311(1), Government of India Act, in these terms: "British India" means all territories for the time being comprised within the Governors' Provinces and Chief Commissioners' Provinces. The Permanent Settlement Regulation of 1798 applies in the main to Bengal, Bihar, Assam and Orissa and does not apply to very large tracts, territory within other Governors' Provinces and Chief Commissioners' Provinces. That being so, it was argued that even if the Settlement Regulation was an Act of Parliament Section 108(2)(a) would have no application whatsoever. The plaintiffs contended that the expression "British India" in Section 108(2), Government of India Act, must mean British India or any part thereof; but when such was intended the Legislature has in other sections used appropriate language. In Section 110, for example, it is provided that

nothing in this Act shall be taken (a) to affect the power of Parliament to legislate for British India, or any part thereof.

65. If the expression "British India" meant British India or any part thereof, it would be necessary to add the words "or any part thereof" in this particular section. It may, therefore, be argued that provisional sanction of the Governor-General is only necessary when a Provincial Act is repugnant to the provisions of an Act of Parliament affecting the whole of the British India and that such sanction is not necessary if the Act of Parliament applied to a province or some of the provinces only in British India. I do not find it necessary to decide this question because I am unable to hold that Regulation 1 of 1793 is an Act of Parliament. "Act of Parliament" is not defined in the Government of India Act, and Regulation 1 of 1793 cannot be said to have been enacted in the usual manner in which an Act of Parliament is passed. In the ordinary meaning of the

expression, an "Act of Parliament" is an Act which has been passed by the House of Commons, the House of Lords and assented to by the King. Regulation 1 of 1793 was an enactment of the Governor-General in Council in India and was never before Parliament in England. It is clear, however, that this Regulation together with the other Permanent Settlement Regulation were enacted pursuant to the provisions and directions contained in Section 39, Pitt's India Act of 1784, (24 Geo. III, c. 25). That section, which I have earlier in this judgment quoted at length, required the authorities in India to give orders

for settling and establishing upon principles of moderation and justice, according to the laws and constitution of India, the permanent rules by which their respective tributes, rents and services of the rajas, zamindars, polygars, talukdars and other native holder should be in future rendered and paid to the United Company.

As I have already stated, the Marquis Cornwallis arrived in India in 1786 and immediately instituted enquiries into the land system and the assessment of revenue, and in 1793 the Permanent Settlement Regulations, including Regn. 1 of 1793 were promulgated by the Governor-General in Council. Regulation 1 of 1793 is headed:

A regulation for enacting into a regulation certain articles of a Proclamation, bearing dated 22nd March 1793 passed by the Governor-General in Council, on 1st May 1793.

In para, 1 of the regulation it is stated that

the following articles...are hereby enacted into a regulation which is to have force and effect from 22nd March 1793, the date of the proclamation.

66. It is clear, therefore, that the regulation purports to be an enactment of the Governor-General in Council and not an enactment of the Parliament in England. The Governor. General in Council did have legislative powers which had been granted by Section 36, East India Company Act, 1773, (13 Geo. III, c. 63). By that section the Governor. General in Council was empowered

to make and issue such rules, ordinances, and regulations for the good order and civil government of the said United Company's settlement at Port William aforesaid, and other factories and places subordinate or to be subordinate thereto, as shall be deemed just and reasonable, (such rules, ordinance, and regulations, not being repugnant to the laws of the realm), and to set, impose, inflict and levy, reasonable fines and forfeitures for the breach or non-observance of such rules, ordinances trad regulation; but nevertheless, the same or any of them, shall not he valid or of any force or effect, until the same shall be duly registered and published in the said supreme Court of Judicature, which shall be, by the said new charter, established with the consent and approbation of the said Court....

67. It is said that this provision only empowered the Governor-General in Council

to legislate for the actual settlement in Calcutta; but it is to be observed that the power was given not only to legislate for the settlement at Fort William but also other factories and places subordinate or to be subordinate thereto. It may be that this (English Act did not empower the Governor-General to enact the Permanent Settlement Regulations, and such appears to be the view of many authors of works on the Indian Constitution. It must be remembered how-ever, that at this time the East India Company were de facto sovereign if not de jure. It has been said that the Company exercised sovereign powers in trust for the Crown. Be that as it may, they were in fact the sovereign of the territories affected by the permanent settlement and as such undoubtedly claimed the right to legislate for such territory and its inhabitants.

68. It appears to me that the Marquis Cornwallis must have enacted these regulations by virtue of the powers of legislation given to or assumed by the Governor-General in Council, and that being so, it cannot be said that the Permanent Settlement Regulation, 1 of 1793 is in any sense an Act of Parliament. The plaintiffs, however, contended that the Governor-General in Council has no such power to legislate as to enable him to enact Regn. 1 of 1793, consequently that regulation must be regarded as an executive order or as a kind of regulation or by law made in pursuance of powers given by an Act of Parliament. If such was the case, it is urged that the regulation forms part of the Act of Parliament itself.

69. Reliance was placed on the case in *Willing v. Noris* (1909) 1 K.B. 57, in which it was held that where a statute gives power to an authority to make regulations, a breach of the regulation so made is an offence against the provisions of the statute. In that case the Commissioners of Police were empowered to make regulations under an Act of Parliament, and it was held that a breach of those regulations was a breach of the provisions of the Act. Bigham J., at p. 66 observed: "In my opinion to break the regulations made under the authority of a statute is to break the statute itself," and Walton J., at p. 67 observed:

That Act gives power to make regulations and I think there is involved in this that regulations so made must be obeyed, and if so it follows that a breach of such regulations is a breach of the law contained in that section.

70. Another case relied upon by counsel for the plaintiffs was *Powell v. Apollo Candle Co.* (1885) 10 A.C. 282 in which their Lordships of the Privy Council, held certain duties levied by an Order in Council u/s 133, Customs Regulation Act, were levied by authority of the Legislature and not of the executive. Here the section in question expressly empowered the Governor to direct a duty to be levied on substitute for dutiable articles. In my judgment there is little in common between these cases and the enactment of the Permanent Settlement Regulation by the Governor. General in Council. The latter did have or assume power to legislate and did legislate, though it may be that the validity of such legislation was questionable at the time it was enacted. The Permanent Settlement Regulations however have been regarded as validly enacted for a

century and a half, and it is now too late to question their validity. As the regulations cannot be regarded as an Act of Parliament, the Bihar Agricultural Income Tax Act is not invalid by reason of the provisions of Section 108(2)(a), Government of India Act. It was faintly argued that the Bihar Agricultural Income, tax Act was invalid by reason of the fact that it was repugnant to a Governor-General's Act, and reliance was placed on Section 108(2)(b), Government of India Act. In my view, the expression "Governor-General's Act" in Section 108(2)(b) refers to Acts which are contemplated in Section 44, Government of India Act, 1935, that is, to Acts enacted by the Governor. General after the Government of India Act came into force. The Permanent Settlement Regulation was in no sense an Act of the Governor-General but was an Act of the then Governor-General in Council. That being so, Section 108(2)(b), Government of India Act, can in no way render the legislation invalid.

71. Lastly, it was contended that assuming that the provisions of the Bihar Agricultural Income Tax Act are repugnant to Regn. 1 of 1793 and assuming further that the Bihar Act was validly enacted the latter Act on its true construction should not be held to repeal or affect in any way the provisions of Regn. 1 of 1793. It was argued that the Bihar Agricultural Income Tax Act is general Act, whereas Regn. 1 of 1793 is a special Act dealing with permanently settled estates. On a true construction of the Bihar Act, it was contended that this Court should hold that it applied to non-permanently settled estates only and not to permanently settled estates. In the view I have taken of the effect of Regn. 1 of 1793 the question as to the true construction of the Bihar Act does not really arise, but I refer to the question shortly in deference to the elaborate argument which has been addressed to us.

72. Regulation 1 of 1793 is undoubtedly a special enactment dealing with permanently settled estates, whereas the Bihar Agricultural Income Tax Act deals generally with income derived from agricultural lands and from agriculture within the Province of Bihar. It must be remembered however that Bihar was one of the areas which was permanently settled under the Permanent Settlement Regulation and that most of the zamindars of this Province hold permanently settled estates. The Government of India Act, 1935, empowers all provinces to tax agricultural income, and no distinction is drawn between Bengal, Bihar and Orissa in which lands are permanently settled and other provinces in which lands are temporarily settled. Each province is given the right to tax agricultural income. It is clear from the provisions of the Government of India Act, 1935, that the British Parliament had the permanent settlement in mind. As I have already pointed out Section 299 affords some protection to persons enjoying privilege relating to revenue and permanently settled zamindars to enjoy such privilege, though not to such an extent as zamindars holding revenue free lands. Again, the Instrument of Instructions issued to the Governors expressly provides that Governors of provinces should reserve for the consideration of the Governor-General any bill purporting to affect the permanent settlement and the rights thereunder. As it is clear that the Legislature had not overlooked the permanent

settlement, can it be said that it was not the intention of the Legislature to permit the Provincial Government of Bengal Bihar and Orissa to tax agricultural income of zamindars holding permanently settled estates? Did the Legislature merely intend that in provinces in which land had been permanently settled the Provincial Government should only have the right to tax the income of temporarily settled zamindars who would be few in number?

73. The rule that general words in a later statute should not be held to repeal earlier legislation upon a particular matter is clearly laid down by Lord Selborne in *Seward v. Vera Cruz* (1885) 10 A.C. 59. He observed:

Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of particular intention to do so.

74. Counsel for the plaintiffs also relied on *Associated Newspapers Ltd. v. Corporation of London* (No. 2) (1916) 2 A.C. 429. In that case the occupiers of certain hereditaments situate in the City of London and forming part of the area reclaimed from the river Thames, were rated to so much of the general rate levied under the City of London (Union of Parishes) Act, 1907, as represented the consolidated rate and the police rate, which was imposed by the City of London Police Act, 1939. The land had been reclaimed under the provisions of 7 Geo. III, c. 37 and u/s 51 of that Act owners of such reclaimed lands were to be "free from all taxes and assessments whatsoever." The City of London Sewers Act, 1848, which provided for the levying of the sewer rate and the consolidated rate, enacted by Section 169 that every such rate shall be made upon every occupier of any house or building in the city

whether such parson shall be now liable in respect of such house or building to be assessed to the relief of the poor, or be not liable to be assessed to the relief of the poor in respect thereof by reason of such house or building being situate in any precinct or extra-parochial place, or otherwise.

75. It was held (Lord Sumner dissenting) that Section 169, City of London Sewers Act, 1848, did not impliedly repeal the exemption from all taxes and assessments so far as the consolidated rate was concerned. Another case relied upon by the plaintiffs was *Pole-Carew v. Craddock* (1920) 3 K.B. 109. A ferry was established and maintained by an Act of 1790, which was to be deemed to be public Act, and which contained provisions that the then proprietors, or their respective heirs or assigns, shall not be rated or assessed for or towards the payment of any tax, rate or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry...

76. The owners of the ferry were assessed to Income Tax, but the Court of appeal held that the exemption granted by the statute extended to parliamentary

taxes whether in existence at the date of the Act or not, and therefore included Income Tax, although that tax was first imposed subsequently to the passing of the Act of 1790. It was contended that the principles laid down in these case apply to the present case and that this Court must hold that the Bihar Agricultural Income Tax Act does not repeal or modify any of the provisions of the permanent settlement. In my view, however, the Court would be bound to hold that the Bihar Agricultural Income Tax Act repeals by necessary implication any provision in the earlier Regn. 1 of 1793 which is inconsistent with it. The Provincial Government of Bihar which is province made up in the main of permanently settled estates has been specifically given the power to tax income derived from agricultural land. When that power was given to Bihar, it seems to me clear that it was intended that the Provincial Government of this province should be able to tax income derived from agricultural land whether such land was permanently settled or not. A subsequent general Act will repeal the provisions of an earlier special Act if the provisions of the subsequent Act are clear and unambiguous and clearly apply to the matters dealt with by the earlier special legislation.

77. In the present case all agricultural income is made taxable without distinction, and that being so, any protection afforded to agricultural income by any earlier Act is repealed by the present Act. The view which I have expressed is in accordance with the view expressed by Rankin J. in *Probhat Chandra Barua Vs. Emperor*, and by the majority of the Full Bench of the Calcutta High Court in *King-Emperor Vs. Rajah Probhat Chandra Baruah*, . As I have stated however the point does not really arise in this case.

78. For the reasons which I have given, I am satisfied that the plaintiffs are not entitled to the relief claimed, and would dismiss their suit with costs. The questions as to whether the Bihar Agricultural Income Tax Act is ultra vires the powers of the Provincial Legislature or is ultra vires in so far as it purports to tax agricultural income of permanently settled zamindars involve substantial points of construction of the Government of India Act, 1935, and I would, therefore, grant a certificate to the plaintiffs u/s 205(1) of that Act.

Fazl Ali J.

79. The plaintiffs who are the proprietors of a permanently settled estate in the district of Patna have brought this suit against the "Province of Bihar" as defendant, for a declaration that the Bihar Agricultural Income Tax Act (7 of 1938) and the Bihar Agricultural Amendment Act (5 of 1939) are ultra vires of the Provincial Legislature and that at any rate they cannot affect the permanently settled estates of the province including the plaintiffs' estate. According to the plaint every step taken by the defendant to promote this piece of legislation between the date of the introduction of the Bills in the Provincial Assembly and the date when they became law constituted a distinct cause of action for the plaintiffs but apparently their principal cause of action was the service upon them of a notice dated 4th August 1939 by which they were assessed with agricultural

Income Tax and which they wish to be pronounced as being "without jurisdiction, Illegal and invalid."

80. The suit was originally instituted in the Court of the Subordinate Judge at Patna, but on the application of the plaintiffs it was transferred to this Court. Before it was transferred, a written statement had been filed on behalf of the defendant and no less than ten issues had been framed by the Subordinate Judge. In the written statement, the defendant contested the view of law set forth in the plaint and asserted that the Act was in no sense an invasion of the rights enjoyed by the zamindars under the Permanent Settlement Regulations; and, even if it were so that would not make the Act void. The defendant also pleaded that the court-fee paid by the plaintiffs was insufficient; that the plaintiffs had no cause of action; that the notice required by Section 80, Civil P.C., had not been properly served and that the Acts challenged by the plaintiffs could not be questioned in the civil Court; but these pleas have been abandoned and the parties have confined their dispute before us to issues 3, 6 and 7 which embrace two main questions, namely (1) whether the whole Act is ultra vires of the Provincial Legislature and (2) whether the Act even if intra vires, affects the permanently settled estates. Section 100, Clause (3), Government of India Act, provides that

subject to the two preceding Sub-sections, the Provincial Legislature has and the Federal Legislature has not power to make laws for a province or any part thereof with respect to any of the matter enumerated in Schedule 2 hereinafter called the Provincial Legislative List.

81. As agricultural income is item 41 of the Provincial List otherwise called list 2, the Provincial Legislature of Bihar purporting to act under this section enacted what is known as the Bihar Agricultural Income Tax Act in 1938 and some time later it passed another small Act slightly amending the provisions of the former Act. The Bihar Act 7 of 1938 which is the main Act, received the assent of the Governor of Bihar on 20th August 1938 and was published in the Bihar Gazette of 12th October 1938. Section 2 of the Act defines agricultural income and Section 3 provides that the agricultural Income Tax at the rate or rates specified in the schedule to the Act shall be charged for each financial year in accordance with and subject to the provisions of the Act on the total agricultural income of the previous year, of every person. Sections 5 to 15 which are the remaining sections in chap. 2 contain provisions as to the limits of taxable income and other cognate subjects such as what class of owners of agricultural property are to be exempted and how the tax on other class of persons is to be assessed. Chapter 3 enumerates the class of Income Tax authorities appointed under the Act and Sections 17 and 18 of chap. 4 provide respectively for the submissions of return of agricultural income and assessment of tax upon such income by the Agricultural Income Tax Officer. The other provisions of the Act deal with a number of other matters with which we are not concerned in the present case.

82. With these introductory remarks I shall now proceed to state the principal

points which were urged on behalf of the plaintiffs before this Court. These points were as follows: (1) That inasmuch as the definition of agricultural income, as given in the Bihar Act, is in some respects narrower and in some respect wider than the definition adopted by the Government of India Act, the Provincial Act must be held to be ultra vires. (2) That the Agricultural Income Tax Act is also ultra vires for the following reasons: The Permanent Settlement Regulation 1 of 1793 and other connected Regulations of that year have fixed the public demand on the agricultural lands of all permanently settled estates and provided that there shall be no augmentation of the demand in future.

83. The agricultural Income Tax now imposed under the Provincial Act is substantially an augmentation of the demand and therefore it virtually repeals the regulation. But as the Permanent Settlement Regulation 1 of 1793 must, having regard to the circumstances under which it was passed, be regarded as an Act of Parliament, no measure repealing the regulation could be introduced into the Provincial Legislature without the previous sanction of the Governor-General and in any event the Governor-General's assent not having been obtained to the Act, the Act must be declared to be ultra vires. (3) That item 41 in list 2 of the Government of India Act, 1935, does not empower the Provincial Legislature to make laws with respect to taxes on agricultural income arising out of estates settled under Regulation 1 of 1793 and on the true construction of the Bihar Act, all that can be held is that it does not affect permanently settled estates but applies to such agricultural income only as does not arise out of such estates.

84. For the purpose of dealing with the first point it is necessary to refer to Section 811, Clause (2) and Section 141(1), Government of India Act, respectively. In Section 311(2) the expression "agricultural income" is defined as follows: "Agricultural income means agricultural income as defined for the purposes of the enactments relating to Indian Income Tax." Section 141(1) provides that no bill of amendment varying the meaning of the expression "agricultural income" as defined above shall be introduced or moved in either Chamber of the Federal Legislature except with the previous sanction of the Governor-General in his discretion. Now in order to appreciate the argument which was advanced before us it will be useful to set out the definition of "agricultural income" as given in the Income Tax Act side by side with the definition of that expression as given in the Bihar Agricultural Income Tax Act:

Section 2(1), Income Tax Act: Section 2 (a), Bihar Agricultural "Agricultural income" means: (a) any rent | Income Tax Act: or revenue derived from land which is used for | "Agricultural income" means: (1) agricultural purposes, and is either assessed to | any rent or income derived from land revenue in British India or subject to a | land which is used for local rate assessed and collected by officers of | agricultural purposes, and is the Crown as such; (b) any income derived from | either assessed to land revenue in such land by : (i) agriculture, or (ii) the | Bihar or subject to a local cess performance by a cultivator or

receiver of rent | or rate assessed and collected in kind of any process ordinarily employed by a | under any Bengal Act or under any cultivator or receiver of rent in kind to render | Bihar and Orissa Act or under any the produce raised or received by him fit to be | Bihar Act; (2) any income derived taken to market, or (iii) the sale by a | from each land by : (i) cultivator or receiver of rent in kind of the | agriculture, or (ii) the produce raised or received by him, in respect of | performance by a cultivator or which no process has been performed other than a | receiver of rent in kind of any process of the nature described in Sub-clause | process ordinarily employed by a (ii); (c) any income derived from any building | cultivator or receiver of rent in owned and occupied by the receiver of the rent or | kind to render the produce raised revenue of any such land, or occupied by the | or received by him fit to be taken cultivator, or the receiver of rent in kind, of | to market, or (iii) the sale by a any land, with respect to which, or the produce | cultivate or receiver of rent in of which, any operation mentioned in sub-cl. | kind of the produce raised or (ii) and (iii) of Clause (b) is carried on : | received by him, in respect of Provided that the building is on or in the | which no process has been immediate vicinity of the land and is a building | performed other than a process of which the receiver of the rent or revenue or the | the nature described in Sub-clause cultivator or the receiver of the rent in kind by | (ii). reason of his connection with the land, requires as a dwelling house, or as a store-house, or other out building.

85. It will be noticed that the definition given in the Bihar Act differs from the definition given in the Indian Income Tax Act in two important respects: firstly, Clause (c), Income Tax Act, which deals with the income derived from any building owned and occupied by receiver of rent, etc, has been wholly omitted in the Bihar Act; secondly, Clause (a), Income Tax Act, is not couched exactly in the same terms as the latter provision. It is quite clear that as the result of the omission of Clause (c), the definition given in the Bihar Act is somewhat narrower than the definition given in the Income Tax Act, but in my opinion this fact by itself will not make the Act ultra vires. If it is assumed that the Bihar Legislature, having regard to the terms of the Government of India Act, is competent to levy tax on income derived from land as well as buildings of certain description it is clearly competent to tax income from land only for the present it being open to it to tax the income from buildings referred to in Clause (c), Income Tax Act, if and when it chooses to do so in future. The Legislature has therefore in no way exceeded its power and I am not prepared to hold that it has contravened the provisions of the Government of India Act by merely adopting a definition which is narrower than the definition given in that Act. The second contention however is a more serious one because the substance of that contention is that Clause (i), Bihar Act, is wider than Clause (a), Income Tax Act, and so the definition enables the Bihar Legislature to tax income which it has not been empowered to tax under the Government of India Act. For the purpose therefore of determining whether this contention is correct, we have to compare carefully the two corresponding provisions.

86. The first difference which has been pointed out to us between the two provisions is that the Bihar Act substitutes the word "income" for revenue in Clause (i). But as revenue in Clause (a), Income Tax Act, is used in the same sense as income, the difference in the two provisions is merely a difference in phraseology and not a difference in substance. The Bihar Legislature was also perfectly justified in substituting the word "Bihar" for "British India" in the following sentence "land which is assessed, to land revenue in British India." The real difference however between the two provisions is to be found in the concluding lines and may be summarised as follows: (i) whereas the Income Tax Act uses the expression "subject to a local rate only" the Bihar Act has used the words "subject to a local cess or rate" and (ii) whereas the Income Tax Act makes it necessary that the local rate to which the agricultural land is to be subject, should be assessed and collected by officers of the Crown as such, all that the Bihar Act requires is that the "local cess or rate should be assessed and collected under any Bengal Act or under Bihar and Orissa Act or under any Bihar Act." It omits the words "by officers of the Crown as such" and substitutes the words "under any Bengal Act," etc. The contention put forward on behalf of the plaintiffs is that this change is a vital one and unduly widens the scope of the definition. The plaintiffs object to the word "cess" on the ground that it is neither assessed nor collected by officers of the Crown as such, though they concede that it may be regarded as a local rate which presumably means a rate or tax for the benefit of local authorities such as District Boards and Municipalities, etc. The cess in Bihar is levied under Act 9 of 1880 which was an Act

to amend and consolidate the law relating to rating for the construction, charges and maintenance of district communications and other works of public utility and of provincial public works.

87. Section 5 of the Act provides that from the commencement of the Act all immovable properties in any district shall be liable to the payment of a local cess. The other provisions show that the cess is to be levied on lands as well as on mines, railway and other immovable property. As we are concerned with the cess levied on land only in the present case, it will be necessary to refer to some of the provisions relating to this subject. Mr. P.R. Das, who appears on behalf of the plaintiffs, relies upon Sections 9 and 38 of the Act in support of his contention that "cess" is not assessed by officers of the Crown but by the District Board. Section 9 provides that the proceeds of local cess in each district shall be paid into the local funds of the district and Section 38 provides that the cess shall be assessed and levied at such rate as may be determined for such year by the District Board. This last provision seems at the first sight to support the contention of Mr. Das, but when the other provisions of the Act are taken into consideration it becomes manifest that the authority which assesses the cess is not the District Board but the Collector. The District Board has merely an advisory function and its knowledge of the local conditions is utilized for the purpose of determining the rate, but after the rate is so determined, the Collector publishes the rate in the Gazette and otherwise specifies from which

date it will take effect. The Collector then fixes the amount of the cess payable by each person or estate upon the valuation of the lands. This shows that the final act of assessment rests with the Collector though the assessment is made according to the rate determined by the District Board.

88. There can also be no doubt that the cess payable under the Act is collected by the Collector. This is clear from a number of provisions which are to be found in the Act, e.g., Section 98 which provides that every amount due or which may be due to any Collector under the provisions of this Act in respect of any arrears of cess, etc., may be realized by such Collector by any process provided by law for the realization deemed to be a public demand under such law. The difficult question, however, which is raised on behalf of the plaintiffs is whether the Collector in assessing and collecting the cess acts as an officer of the Crown as such. Mr. P. R. Das refers us in this connexion to Section 100, Cess Act, which runs as follows:

The Board of Revenue may at any time invest any person with the powers of a Collector under this part to be exercised by such person under the control or supervision of the Collector or independently of such control or supervision as the Board of Revenue shall direct.

89. Mr. Das contends that this section shows that the powers of the Collector are derived from certain specific provision in the cess Act and are not exercised by virtue of his being an officer of the Crown. It is further contended by him that inasmuch as Section 100 provides that any person, whether he be an officer of the Crown or not, may be appointed to exercise the function of the Collector by the Board of Revenue, the Act does not contemplate that the power exercised under its provision should necessarily be exercised by an officer of the Crown.

90. Mr. Das in support of his argument refers us to *Gilbert v. Corporation of Trinity House* (1886) 17 Q.B.D. 795 and *Metropolitan Meat Industry Board v. Sheedy* (1927) 1927 A.C. 899.

91. In the former case it was held that the Corporation of Trinity House in whom the superintendence and management of all light-houses and beacons in England were vested not by virtue of the Act constituted servants of the Crown.

92. In the latter case it was held that a debt due to the Metropolitan Meat Industry Board who were entrusted with the maintenance and control of the slaughterhouse and meat markets in Sydney and adjoining districts was not a debt due to the Crown. In my judgment both the cases relied on by Mr. Das are distinguishable and the cess payable under the Cess Act must be held to be assessed as well as collected by officer of the Crown. The Corporation of Trinity House was, as pointed out in the case relied on by Mr. Das, nothing more than an amalgamation by the authority of the State of a vast number of bodies having general authority over the light-houses and beacons throughout the country for the general convenience. Thus, in view of its nature and origin the Corporation of Trinity House could not be regarded as an emanation from the Crown. Similarly,

the Meat Industry Board could not be regarded as a representative of the Crown, because the powers conferred upon it were to be exercised at its own discretion and without consulting the direct representatives of the Crown, and also because the charges it levied went to its own fund.

93. The position in this case however is not the same. I think that inasmuch as in India both the Government at the centre and in the province, is carried on in the name of the Crown, the expression "officers of the Crown" occurring in an Indian statute may be taken to be synonymous with the expression "officers of the Government." The Collector of the District undoubtedly exercises his authority as a representative of the Government and the cess is also levied by the Government, though what is collected under the Act is allotted to the District Board for the purpose of maintaining roads, etc. If any person other than the Collector is appointed under the Act, to assess and collect cess, he must be deemed also to act as a representative of the Government and the powers which are given to him are to be exercised not at his own discretion, but under the supervision of the Board of Revenue which is a department of the Government. In my opinion the test is whether the cess is a levy by a private or local body or whether it is Government levy. If it is levied and collected on behalf of the Government, then, no matter how the money is spent, the persons who levy and collect it must be regarded as officers of the Crown.

94. So far the definition of "agricultural income" as given in the Agricultural Income Tax Act may be supported, but it appears to me, that the omission of the words "assessed and collected by officers of the Crown as such" was unfortunate, because, it is conceivable that in some cases at least a local rate may be assessed and collected under a Bengal or Bihar Act and yet it may not be assessed and collected by officers of the Crown as such. Such is the case with a local rate levied by the municipality to which the Cess Act does not apply. The rate levied by the municipality is assessed and collected under the Municipal Act by the officers of the municipality and not by officers of the Crown as such.

95. If therefore there are any estates in Bihar which are revenue free and which are not liable to pay cess, being situated within a municipality, and because they are liable to municipal rates under the Municipal Act, the income from the lands of such estates will clearly be agricultural income under the Bihar Act though it is not such "income" under the Income Tax Act. It has not been pointed out to us that there are in fact any such estates in Bihar, but assuming that there may be such estates we have still to consider whether that fact alone will make the whole Act ultra vires.

96. We must remember that one of the objects of defining agricultural income in the Government of India Act was to ensure that that expression may not be differently understood by the Central and Provincial authorities. Therefore it would be going too far to say that the framers of the Bihar Act had not power to introduce even verbal changes in the definition of agricultural income as adopted in the Government of India Act. All that they were required to guard against was

that there was no change in the meaning or scope of the expression "agricultural income" and the definition in the Bihar Act was not wider than that to be found in the Income Tax Act. If however the definition is found to be wider, it does not, in my judgment, necessarily follow that the whole Act thereby becomes ultra vires. We have on this point for our guidance a number of authoritative pronouncements which have laid down that if a part of an Act can be held to be valid and another part invalid, then if the offending provisions are so interwoven into the other scheme of the Act they are not severable from the other provision, the whole Act is ultra vires, but if the two parts are severable then the Act will be partly valid and partly invalid, it being invalid only in regard to the offending provisions.

97. This view has been clearly set out in the judgment of Sulaiman J. in AIR 1941 47 (Federal Court) and 180 and in AIR 1939 74 (Federal Court) and 488. In the last mentioned case his Lordship stated the principle in these terms:

It is a well established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless, of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the act can be ultra vires in the former, while intra vires in the latter.

98. In my opinion the principle enunciated above must govern this case. I have already stated that it has not been shown to us that there are any revenue paying estates situated within the limits of a municipality in Bihar, but if there are such estates it will be legitimate to hold that no agricultural Income Tax can be imposed on their income. The plaintiffs, however, are the proprietors of a revenue paying estate and it cannot be said that the definition of agricultural income does not cover their estate. Mr. P.R. Das relied in this connexion on Attorney General for AIR 1937 93 (Privy Council) and AIR 1937 89 (Privy Council) . In the first case the Natural Products Marketing Act, 1934, of the Parliament of Canada as amended by a later Act was held to be ultra vires and Lord Atkin who delivered the judgment in that case summed up the view of the Privy Council as follows:

In the result therefore there is no answer to the contention that the Act in substance invades the Provincial field and is invalid. It was, however, urged before us that portion of the Act, notably Section 9 in part 1, and the whole of part 2, are within the competence of Parliament.... There appear to be two answers. In the first, place, it appears to their Lordships that the whole texture of the Act is inextricably interwoven, and that neither Section 9 nor part 2 can be contemplated as existing independently of the provisions as to the creation of Board and the regulation of produces.... In the second place, both the Dominion and the British Columbia in their cases filed on this appeal assert that the sections now said to be severable are incidental and ancillary to the main legislation. Their Lordships are of opinion that this is true, and that as the main

legislation is invalid as being in pith and substance an encroachment upon the Provincial rights the sections referred to must fail with it as being in part nearly ancillary to it.

99. In the second case another Act was held to be ultra vires of the Dominion Parliament of Canada on similar grounds, it being held that in pith and substance the Act was an encroachment upon the Provincial field and that part of the Act which did not encroach were so inextricably mixed up with the offending provisions, that it was impossible to sever them. In my opinion neither of these cases can be of help to the plaintiffs. Agricultural income being one of the subjects mentioned in list 2 otherwise called the Provincial List of the Government of India Act, it cannot be said that in pith and substance this Act is an encroachment upon the rights of the Central Government. It is true that the definition has been somewhat carelessly drafted, but all that can be said is that if there is any estate the income of which cannot be regarded as agricultural income according to the definition of that expression as given in the Income Tax Act then such part of the Act as purports to be income of such estate shall be held to be invalid.

100. The learned Advocate-General in meeting the argument of P.R. Das referred us to *Macleod v. Attorney General for New South Wales* (1891) A.C. 455, *Great Western Saddlery Co. v. The King* AIR 1921 P.C. 148 and *Newcastle and Hunter River Steamship Co. Ltd. v. Attorney General for the Commonwealth* 29 Com. L.R. 357; but it seems to me that the principles of "pith and substance" and "severability" are so well established and their application to the present case is so clear that it is wholly unnecessary to discuss these.

101. Before concluding this topic, I might mention that according to Mr. P.R. Das owing to the omission of the words "cess assessed and collected by the officers of the Crown as such," the tenure-holders and raiyats holding lands within the estates of Bihar cannot also be taxed under the Bihar Act, because it is contended that these lands are neither subject to the payment of land revenue nor subject to cess assessed and collected by officers of the Crown as such. The argument, however, cannot be accepted because the income of these persons clearly comes within Clause (2), Sub-clause (i), (ii) and (iii) of the definition of agricultural income as given in the Bihar Act which correspond exactly to Clause (b), Sub-clause (i), (ii) and (iii) of the definition to be found in the Income Tax Act. The argument further overlooks an important fact. If the lands in possession of tenure-holders and raiyats are situated within a revenue paying estate, then there can be no doubt that inasmuch as the revenue is payable upon all the lands within that estate, their lands also must be held to be assessed to land revenue. If, however, the estate is revenue free, then unless the estate is situated within a municipality, the zamin-dar must pay the cess for all the lands of the estate including those in possession of the tenure-holders and raiyats under him. The mere fact that the tenure-holders and raiyats pay cess into the lands of the zamin-dar does not alter the position. What we have to see is

whether the land which they hold is subject to cess or not. In my opinion therefore the argument that tenure-holders and raiyats cannot be taxed under the Act is untenable. The point, however, is not material, because the plaintiffs are neither tenure-holders nor raiyats but are admittedly the proprietors of a revenue paying estate.

102. The second point urged on behalf of the plaintiffs was that the Agricultural Income Tax Act, in so far as it affects the permanently settled estates, is ultra vires of the Bihar Legislature, because that Legislature had no power to pass an Act inconsistent with the Permanent Settlement Regulation without following the procedure laid down by the Government of India Act. In urging this point Mr. P.R. Das, counsel for the plaintiffs, read out to us extracts from certain despatches which had passed between Lord Cornwallis and the directors of the East India Company and from the minutes recorded by Sir John Shore before the enactment of Regn. 1 of 1793 in order to show firstly that the permanent settlement was made on the footing that the landlords were the proprietors of the soil and secondly, that the jama or the revenue which was fixed at the time of the permanent settlement was a land tax.

103. Learned Counsel also read to us all the relevant sections of the permanent settlement regulation and certain other regulations to support his contention that these regulations had declared in clear terms that beyond the jama which was already fixed there shall be no new or additional demand or assessment upon the permanently settled estates. His next argument was that the Bihar Agricultural Income Tax Act being passed in violation of the terms of the Permanent Settlement Regulation had in effect repealed the latter enactment. Lastly he argued that inasmuch as the Act was passed without following procedure laid down by Sections 108 and 299, Government of India Act, it is wholly ultra vires.

104. Section 108, Clause (2) provides among other things that unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into or moved in Chamber of Provincial Legislature any bill or amendment which repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India; or repeals, amends or is repugnant to any Governor-General's Act or any ordinance promulgated in his discretion by the Governor-General. Section 299, Clause (3) provides that no bill or amendment making any provisions for the extinguishment or modification of rights in any land including rights or privileges in respect of land revenue shall be moved in a Chamber of Provincial Legislature without the previous sanction of the Governor in his discretion.

105. It was recognized by Mr. Das that these sections are to be read with Section 109 (2) of the Act which provides that no Act of Provincial Legislature and no provision in any such Act shall be invalid by reason only that some previous sanction or recommendation was not given, if assent to that Act was given (a) where the previous sanction or recommendation required was that of the Governor, either by the Governor, by the Governor-General, or by His Majesty;

(b) where the previous sanction or recommendation required was that of the Governor-General, either by the Governor-General or by His Majesty.

106. It is however contended that in the present case the subsequent assent of the Governor does not cure the defect, because the Permanent Settlement Regulation was an Act of Parliament and therefore required at least the assent of the Governor-General u/s 109, Clause (a) after the measure had been enacted.

107. The first question which arises for consideration is whether the Agricultural Income Tax Act in any way affects the Permanent Settlement Regulation or, as Mr. Das puts it, whether the imposition of the tax under the Act amounts to an augmentation of the jama. In my opinion this is the most important question in the case, because if it is answered in the negative no further question arises.

108. I am also of the opinion that it has to be answered in the negative, because it is also answered by the Privy Council in AIR 1930 209 (Privy Council) which must be regarded as the last word on the subject and which I accordingly propose to discuss at some length. It appears that prior to 1926 conflicting views had been expressed by the Calcutta High Court as to whether income derived from permanently settled estates was liable to Income Tax notwithstanding the Permanent Settlement Regulation: see *Probhat Chandra Barua Vs. Emperor*, and *Metropolitan Meat Industry Board v. Sheedy* (1927) A.C. 899. In May 1926 Barua's case came up before a Bench consisting of Sanderson C.J. and Rankin J., who referred the following question among others for decision to a Full Bench:

Whether having regard to the terms of the Permanent Settlement Regulation, income derived from land in permanently settled estates subject to the exemptions provided by the Legislature is liable to assessment to Income Tax.

109. This question was answered by the majority of the Judges constituting the Pull Bench in the affirmative and their view was upheld by the Privy Council. His Lordship after referring to certain provisions of the Income Tax Act summarised his conclusion as to the effect of these provisions as follows:

Upon this part of the case therefore their Lordships are of opinion that the Income Tax Act, 1922 by Sections 6 and 12 brings into charge for the purposes of Income Tax the income derived from a zamin-dari and that a zamindar is assessable in respect of incomes, profits and gains derived from that source.

110. His Lordship then proceeded to consider whether the imposition of Income Tax in respect of the income derived from zamin-dari was to any and what extent inconsistent with the provisions of the regulation. On the subject, his Lordship thought that Regn. 1 of 1793 was the master regulation though a number of other regulations also had been referred to before the Privy Council and that the case fell to be determined primarily upon the consideration of the language of that regulation and specially the third sentence of Article 6 of the regulation which clearly set out the promise on which the assessee based his cases. This sentence runs as follows:

The Governor-General in Council trusts that the proprietors of land, sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them or their heirs or successors by the present or any future Government for an augmentation of the public assessment in consequence of the improvement of their respective estates.

111. His Lordship having reproduced this sentence proceeded to paraphrase it in these words:

You have in the past been liable to have the amount of the jama increased according as the actual produce of the estate increased, to enable the Government to obtain this you have been subjected to frequent investigation to ascertain the actual produce and you have even been deprived of the management of your estate. All this shall cease. You shall have fixity of payment and fixity of tenure. If you improve the revenue of your zamindari you shall enjoy the fruits of your improvements without fear of the Government claiming that because the revenue produced by the estate has increased, the payment you make to Government as a condition of holding that estate shall be increased also.

112. His Lordship then summarised his conclusions thus:

In their Lordships' opinion, while the regulations contain assurances against any claim to an increase on the jama, based on an increase of the zamindari income they contain no promise that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation, or that an income of a zamindari shall not be subjected with other incomes to any future general taxation of incomes.

113. His Lordship also quoted with approval the following passage from the judgment of Ghose J. in the Full Bench case:

There was no promise or engagement of any description whatsoever by which the Government of the day surrendered their right to levy a general tax upon income of all persons irrespective of the facts whether they are zamindars with whom the permanent settlement was concluded or not.

114. In my opinion the decision of the Privy Council establishes the following points: (1) That for the purpose of deciding the matter in controversy, it is not necessary to decide whether the landlords were proprietors of the soils or what was "the exact nature of the rights in relation of the land which existed in the Government authority before 1793." (2) That the jama was payment by the zamindars to the Government as a condition of holding the estate, or, in other words, it is more like rent than a tax on income. (3) That though there was a clear assurance given in the Regn. 1 of 1793 that there would be no increase of jama based on the increase of the zamindari income, it contained no promise

that should there be any scheme of taxing income generally in future, the zamindari income will not be brought into the general scheme and will be exempt from taxation, even though other income may be subjected to taxation. The last two propositions clearly imply that jama is not a tax on income and if a statute was enacted by competent authority in India to tax income from zamindari such statute could not be regarded as being inconsistent with or repugnant to the permanent settlement regulation.

115. Both Mr. P.R. Das and Sir Sultan Ahmad, who appeared on behalf of the plaintiffs, tried to show that the decision of the Privy Council is not applicable to the present case, but, in my opinion, they have not succeeded in doing so. Sir Sultan Ahmad pointed out to us that the case before the Privy Council did not relate to agricultural income but certain classes of nonagricultural income such as "jalkar or rent received from fisheries, ground-rent from land used for potteries, ground rent for land used as brickfields, fees received from tying of boats against the assessee's land, fees received from cart stands" etc. His contention was that their Lordships of the Privy Council intended to draw a distinction between zamindari income by which they meant agricultural income and income derived by a zamindar from his zamindari which according to him was a wider expression including non-agricultural income.

116. In my opinion, however, the two expressions have the same meaning and I do not agree with his contention that their Lordships intended to draw any distinction between them. Their Lordships however did recognize the distinction between agricultural income and other income derived from zamindari, because as was pointed by them, though in Section 4(3), Income Tax Act, 1922, which enumerates the incomes to which the Act shall not apply, agricultural income is included, the wider expression "income derived from a zamindari" is not included in the section. The decision of the Privy Council, in my opinion, is fully applicable to this case, because the chief point to be decided in Barua's case was the same as in this case and the argument for the assessee as reproduced in certain reports and as summarized in the judgment of the Privy Council was more or less the same as the argument advanced in the present case.

117. Mr. P.R. Das tried to distinguish the Privy Council case by following a different line of argument. He conceded that notwithstanding the Permanent Settlement Regulation, the state may impose a tax on income, but he strenuously contended that the tax which is imposed under the Agricultural Income Tax Act is not a tax on income but is a land tax, or in other words, a tax of the same description as the jama or revenue payable by the zamindar. According to Mr. Das the land tax is different from the Income Tax, because where as the former is referable to the land which is being taxed, the Income Tax is a tax levied on income in general irrespective of and without any reference to the sources from which the income may be derived. This says, Mr. Das, is sufficient to distinguish the present case from Barua's case for that case only lays down that the zamindari income may consistently with the Permanent

Settlement Regulation be charged to Income Tax.

118. In my opinion at least one of the main premises upon which this argument is based is not correct. Even assuming for the sake of argument that the jama is a kind of land tax, it is difficult to say that the tax imposed under the Bihar Act is not an Income Tax but a land tax. Whatever may be the origin of the jama it is quite clear that it has no longer any reference to the income off the estate, because such income may rise or fall, but the jama remains the same. On the other hand, the tax which the Bihar Act proposes to levy is to be assessed in proportion to the income of the estate and it has a direct reference to that income. Mr. Das in the course of his argument referred to the following observations made by Lord Macnaghten in *London County Council v. Attorney-General* (1901) 1901 A.C. 26:

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

119. According to Mr. Das, this passage supports the view that an Income Tax in the true sense of the term must bear no reference to the source from which the income is derived and the moment there is a reference to the source, it ceases to be an Income Tax because in the present case the source of the alleged income is land, so it is land tax. The argument is a novel one, to say the least about it, and I have to deal with it only in deference to Mr. Das and because he has asked us to record our opinion about it. In my judgment all that Lord Macnaghten wished to emphasize was that though income may be derived from different sources, the Income Tax was one tax and not a collection of taxes in the sense that in every case you have to tax income only and nothing else which does not answer the description of income. He never meant to suggest that an Act which purports to tax income should not refer to the sources of income or as soon as there is a reference to the source the tax would cease to be an Income Tax. In the Income Tax Act, no less than five definite sources of income are set out and agricultural Income Tax is defined and excepted. It will be fantastic to suggest that the tax levied under the Act is not an Income Tax, because the sources of the in. come are indicated.

120. As the Provincial Legislature has now been empowered to tax agricultural income, income may for the purpose of taxation be divided under two broad heads, (1) agricultural income and (2) non-agricultural income. Non-agriculture income is taxed by the Central Government, whereas the agricultural may be taxed by the Provincial Government. We have therefore first to have a clear notion as to what is the meaning of "income" and then to find out whether the

agricultural Income Tax is a tax on income or otherwise. As to what is income, though the word is not defined in the Income Tax Act we have the most authoritative pronouncement about its meaning in AIR 1932 138 (Privy Council) and "agricultural income" has been defined in the Income Tax Act, that definition being also adopted by the Government of India Act. Thus, all that we have to see is whether the income which the Bihar Act purports to tax comes within the definition of agricultural income as defined in the Income Tax Act. If it does then there can be no doubt that it can be taxed by the Provincial Legislature.

121. I have already indicated that in view of the observations made by the Privy Council in AIR 1930 209 (Privy Council) , it is unnecessary to discuss what was exactly the status of the zamindars and the nature of the jama payable by them at the time of the permanent settlement but as Mr. Das persists in his contention that the present case is not covered by Barua's case and asks us to record our views in regard to these two matters also, I shall as briefly as possible, summarise my conclusions in regard to them. As to the status of the zamindar I shall only quote an extract from a judgment delivered by Saunders J. and myself in *Sonabati Kumari v. Krityanand Singh* AIR 1935 Pat. 306. The passage occurs at pp. 110 and 112 of the report and runs thus:

In 1789 the E.I. Co., adopted an important measure which is known as the decennial settlement. Before this settlement was concluded an extensive enquiry was held as to, among other matters, the persons with whom the settlement should be made and the amount of assessment to be fixed on the land. A keen controversy then arose as to whether the zamindars had been treated as proprietors of the soil or not under the Moghul rule. Mr. Shore who subsequently became Lord Teignmouth quoted in his Minute of 1788 the common expression of the people, which according to him from its universality was proverbial, "that the land belongs to the zamindar and the rent to the King." This view was supported by two Indian experts, Ghulam Husain, the author of "Sairul-Mutakhrine" and Roy Royan in their answer to the questions put to them: see Harrington's Analysis, Vol. III, p. 328. The answer of the former to the twentieth question which asked why the King purchased lands since he was the lord of the country was "The Emperor is proprietor of the revenue issuing out of the territory under his authority; but he is not the proprietor of the soil." On the other hand Mr. Grant maintained that it was the fundamental principle in all the native estates of Asia "that the Sovereign is sole universal proprietary lord of the land; and the ryots, who are husbandmen or peasantry, hold directly of the prince, by immemorial usage, as perpetual tenants in capite; subject to the annual payment of a certain fixed portion of the gross produce of the soil in money or kind... (Ibid, p. 860). Colonel Wilks thought that the fact which settled the controversy was that the share of the produce which went to the proprietor was an infinitesimal one as compared with the share which went to the King and he expressed himself thus: "It is absurd to distinguish as proprietor the person entitled to one-tenth" (Colonel Wilks subsequently attempted to show that the real share of the zamindar was one-twentieth)" while the remaining nine-tenths

are called "a duty, a tax or a quit rent" (Ibid, p. 377). Confronted with these divergent views the Directors of the East India Company pronounced no decision on the historical question but dealt with the matter on ground of expediency. We read in the fifth report, Vol. 1, p. 30, that "Whatever might be the difference of opinion among those who were officially consulted on the critical question of proprietary right in the soil a general concurrence prevailed In favour of the settlement being made with the zamindari." The report then goes to state (Ibid, p. 32):

In the progress and conclusion of this improvement transaction, the Government appeared willing to recognise the proprietary right of the zamindars in the land; not so much from any proof of the existence of such right, discernible in his relative situation under the Moghul Government in its best form as from the desire of improving their condition under the British Government, as far as it might be done consistently with the permanency of the revenue and with the rights of the cultivators of the soil. Whatever may have been the position of the zamindar in theory under the Moghul Government, there is no doubt that great dignity attached to his office by reason of his being in a sense a Government official having charge of the maintenance of peace and order in the area under his control as well as of the zamindari, and the practice of making successive settlements with the same person or his heirs fostered the growth of the conception of ownership. The East India Company for political reasons confirmed him in the position which he had already substantially attained by a formal recognition of his proprietary rights in the soil. So in the Regulations passed on 18th September and 25th November 1789 and 10th February 1790, "It was notified to the proprietors of the land on behalf of whom the settlement might be concluded that the jama assessed upon the lands under these Regulations would be continued after the expiration of the tenures and remain unalterable for ever, provided such continuance should meet with the approbation of the Hon^{ble} Court of Directors for the affairs of the East India Company and not otherwise".

In the same judgment I also quoted at p. 187 the following observations of Lord Parker in *Ranjit Singh v. Kali Dassi Debi* AIR 1917 P.C. 8:

Passing to the settlement of 1793 it appears to their Lordships to be beyond controversy that whatever doubts be entertained as to whether before the English occupation the zamindars had any proprietary interest in the lands comprised within their respective districts, the settlement itself recognizes and proceeds on the footing that they are the actual proprietors of the land for which they undertook to pay the Government revenue. The settlement is expressly made with zamindars, independent taluqdars and other actual proprietors of the soil": see Regn. 1, Section 3 and Regn. 8, Section 4. It is clear that since the settlement the zamindars have at least a prima facie title to all lands for which they pay revenue such lands being commonly referred to as *malguzari* lands.

122. The above passage states very clearly the effect of the Permanent Settlement Regulation of 1793. But in the famous case in *Thakooranee Dossee v.*

Bisheshur Mookerjee (1865) 3 W.R. 29, which was heard by fifteen Judges of the Calcutta High Court Trevor J. expressed the opinion that though Regn. 1 of 1793 recognized the zamindars as proprietors of the soil, it never recognized them as being possessed of an absolute estate in their zamindari. The actual passage in his judgment in which this opinion is expressed runs as follows:

That, though recognised as actual proprietors of the soil, that is owners of their estates, still zamindars and others entitled to a settlement were not recognized as being possessed of an absolute estate in their several zamindarees; that there are other parties below them with rights and interests in the land, requiring protection just in the same way as the Government above them was declared to have a right and interest in it which it took care to protect by law; that the zamindar enjoys his estate subject to, and limited by, those rights and interests; and that the notion of an absolute estate in land is as alien from the Regulation law as it is from the old Hindu and Mahomedan law of the country.

123. The view taken by Trevor J. is confirmed to some extent by the fact that at the time of the permanent settlement the zamindars had to execute kabuliyats in favour of the governing authority in respect of the estates settled with them; but the matter need not be pursued any further because for the purpose of this case it is not necessary to qualify the statement made in the Permanent Settlement Regulation as to the zamindars being the proprietors of the soil. There remains now the question as to the nature and origin of the payment which is called "jama" in the regulations and "Government revenue" in the later documents. It was contended on behalf of the plaintiffs that the jama is nothing but a tax on the land of each particular estate and this argument was supported by reference to certain despatches which passed between Lord Cornwallis and the Court of Directors prior to the enactment of the Permanent Settlement Regulation. In one of these despatches, Lord Cornwallis is reported to have written as follows:

We think this is an appropriate opportunity to observe that if at any future period the public exigencies should require an addition to your resources, you must look for this addition in the increase of the general wealth, and commerce of the country and not in the augmentation of the tax of the land.

124. Similar expressions were used in regard to "jama" by the Court of Directors as well as other contemporary writers on the subject one of whom Colonel Wilks called it "a duty, tax or quit rent." It must also be conceded that the word "tax" would not be an inappropriate description of jama, if it is assumed that the zamindar was a proprietor of the soil. If he was a proprietor of the soil, he was entitled to retain the entire produce of the soil and if the Government took from him any part of the produce that was prima facie in the nature of a tax. At the same time, if one were to examine the matter historically, one might feel inclined to doubt whether "tax" is an appropriate expression. The Moghul authorities quoted in Harrington's analysis called it a tribute or rent and in *Freeman v. Fairlie* (1836) 1 M.I.A. 305 the Lord Chancellor is reported to have said:

Zamindars and talookdars were owners of the soil, subject only to a tribute such as I have stated to Government; and it was the object of those Regulations of the year 1793, to make that tribute which had been considered as dependent in its amount on the will of the governing power, fixed and permanent.

125. Again in Field's Regulation of the Bengal Code we find that zamindari tenure is described as follows:

It is an absolute right of proprietorship in the soil subject to the payment of a fixed amount of revenue to the Government. If this revenue falls into arrears, the estate may be put up to auction and sold to the highest bidder. The purchaser acquires the estate free from all encumbrances created since the time of the permanent settlement and obtains statutory title.

126. Such consequences as are described above are Seldom attached to the non-payment of a mere tax and I think it will not be incorrect to say that the jama is more like rent than a tax. It is, as Lord Russel has pointed out, a payment made by the landlord from ancient times to the sovereign authority as a condition for holding the land. Now assuming that the zamindar is a proprietor of the soil and the jama is a land tax the question still remains whether the imposition of the agricultural Income Tax amounts to an augmentation of the jama. It seems to me that though in both cases payment has to be made to the Crown, the two payments are historically and in essence of a different description and it will not be correct to say that the imposition of the agricultural Income Tax is an augmentation of the Government revenue.

127. I will now assume for the sake of argument that the jama is a tax and the tax imposed under the Agricultural Income Tax Act is essentially a tax of the same kind as the jama. I will also assume that the Agricultural Income Tax Act, in so far as it affects the permanently settled estates, has the effect of repealing the Permanent Settlement Regulation. These assumptions however can be of no assistance to the plaintiffs, unless as was contended by Mr. Das, the Permanent Settlement Regulation 1 of 1793 is deemed to be an Act of Parliament and the case falls u/s 108(2) read with Section 109(1)(2), for otherwise the subsequent assent of the Governor is sufficient to validate the Act. The plaintiffs, as I have already said, relied in this connexion on Sections 108(2) and 299(3) and therefore if, as Mr. Das contends, the Permanent Settlement Regulation 1 of 1793 is to be regarded as an Act of Parliament, the Act should have been introduced into the Legislature with the previous sanction of the Governor-General or it should have at least received the assent of the Governor-General or His Majesty.

128. Now, I must frankly confess that I find it difficult to hold that Regulation 1 of 1793 was an Act of Parliament. This regulation was never considered by the two Houses of Parliament nor did it receive the assent of His Majesty the King. It was enacted in India by the Governor-General, there being nothing in its preamble or anywhere else to show that it was enacted under any authority delegated to the Governor-General by the British Parliament. Mr. Das contends

that it became an Act of Parliament, because it was enacted in obedience to Pitt's India Act of 1784, but, in my opinion, there is no warrant for such a conclusion. The Act of 1784 after reciting certain complaints made on behalf of a number of Rajas, zamindars etc., states that such complaints should be investigated and if founded in truth, should be redressed. It directed the Court of Directors of the East India Company,

to adopt, take and pursue such methods for enquiring into the causes, foundation and truth of the said complaints, and for obtaining a full and perfect knowledge of the same and of all circumstances relating thereto, as the said Court of Directors shall think best adapted for that purpose; and thereupon, according to the circumstances of the respective cases of the said Rajas, zamindar, etc., to give orders and instructions to the several Government and Presidencies in India, for effectually redressing, in such manner as shall be consistent with justice and the laws and customs of the country, all injuries and wrongs which the Rajas, zamindars, polygars, talukdars, and other native landholders, may have sustained unjustly in the manner aforesaid, and for the settling and establishing upon principles of moderation and justice according to the laws and constitution of India, the permanent rules by which their respective tributes, rents and services shall be in future rendered and paid to the said united company.

129. This Act was passed in 1784 whereas the regulation in question was enacted in 1793. The Act, as we have seen, gave a free hand to the Court of Directors and merely directed them to redress the grievances, if founded in truth. It is true that the directors held an elaborate enquiry in pursuance of the Act but they exercised their own independent judgment in devising measures for the redress of such grievances as appeared to them to be legitimate. As a constitutional point, it is difficult to say whether the Parliament exercised any sovereignty over Bihar and Orissa at the time the enactment was passed, but as by virtue of the grant of diwani in 1765 the task of administering the land revenue of a part of India had devolved upon the East India Company, it seems that it could enact the regulation in question through the Governor-General even apart from any authority derived from British Parliament. How can the regulation be regarded in these circumstances as an Act of Parliament it is difficult to understand. Mr. Das has referred us to many writers who have dealt with the constitutional history of India relating to the period during which the regulation was passed but none of the writers has said that it was an Act of Parliament.

130. Mr. Das also relied on *Willing v. Noris* (1909) 1 K.B. 57 and *Powell v. Apollo Candle Company* (1885) 10 A.C. 282 in support of his contention, but in my opinion these cases have very little bearing on the question before us. In the first of these cases it was held that where a statute gives power to an authority to make regulations, a breach of the regulations so made is an offence against the provisions of the statute. The point which arose in that case was this: u/s 4, London Hackney Carriages Act, 1850, the then Commissioners of Police were

authorized to make regulations in regard to the boundaries of standings for hackney carriages and the number of carriages to be allotted on a standing and certain other matters. They did make certain regulations in pursuance of the authority conferred upon them by the Act and one of these regulations being broken, it was held that the breach of regulations made under the authority of the statute was a breach of the statute itself.

131. In the second case it was held that certain duties levied by an Order in Council issued u/s 133, Customs Regulation Act of 1879, must be deemed to have been really levied under the authority of the Act under which the order was issued, because the Legislature had not parted with its perfect control over the Governor and had the power at any moment of withdrawing or altering the power which they had entrusted to him. These decisions are not applicable, because the Permanent Settlement Regulation did not consist of mere bye-laws or rules made under an Act of Parliament, but was an independent measure enacted in India by a de facto governing authority.

132. It was contended in this connexion by the learned Advocate-General that even if it is assumed that Regn. 1 of 1793 is an Act of Parliament, Section 108, Clause (2)(a) does not apply to the present case, because it is not an Act of Parliament extending to British India. The expression "British India" has been defined in Section 311, Government of India Act, as follows: "'British India" means all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces." The learned Advocate-General emphasised the expression "all territories" in this definition and contended that British India means the whole of British India and not a part of British India. He also argued that where the Act contemplates any reference to a part of British India, it says so expressly as will appear from the language of Section 110 and certain other sections of the Act.

133. Finally, he argued that inasmuch as the Permanent Settlement Regulation related only to a part of British India, that is to say, the provinces of Bengal, Bihar and Orissa, this Regulation cannot be said to be an Act of Parliament extending to British India and so Section 108(2)(a) has no application to the present case. Now, all I wish to say in regard to the argument is that prima facie the construction put by the learned Advocate-General appears to be rather narrow, but it is really unnecessary to decide whether the construction is correct or not because, as I have already stated, Regn. 1 of 1793 cannot by any stretch of reasoning be described as an Act of Parliament.

134. The last point urged by Mr. P.R. Das was that even if it be assumed that the Agricultural Income Tax Act is not ultra vires of the Bihar Legislature yet if the Act is construed, according to certain well recognized principles, it must be held that it cannot affect the permanently settled areas. The principle of construction upon which Mr. Das relied is that if there is an earlier statute on a special subject and also a subsequent enactment of a general nature, the Court will not hold that the earlier and the special legislation has been indirectly repealed or altered

merely by force of the general words used in the subsequent legislation without any indication of a particular intention to do so: see *Seward v. Vera Cruz* (1885) 10 A.C. 59.

135. This principle was applied by Mr. Das to the present case in the following manner. According to Mr. Das, Regn. 1 of 1793 which was an earlier and special legislation contained a promise that there shall be no further tax on the income of estate of which the jama had been fixed (permanently settled estates). Then followed a subsequent general Act which purports to tax agricultural income. As this Act does not use specific words to show that the Permanent Settlement Regulation was intended to be repealed, the two statutes must be read together as if they were quite consistent with each other and the object of the Bihar Act must betaken to tax only such agricultural income as could be taxed consistently with the promise made in the Regulation of 1793. In other words, according to Mr. Das the Bihar Act, when properly construed, cannot be held to apply to agricultural income derived from permanently settled estates, though it may be applicable to similar income from tenures, raiyati lands and the estates which are not permanently settled as for example temporarily settled estates within the Government khas mahal.

136. Now this question can arise for consideration only, if it is held that the tax levied" under the Bihar Act is a tax of the same-kind as the jama and is in reality an addition to "the burden of the land" which was fixed in 1793 and which was to remain unalterable for ever. Such a view however as I have already pointed out is not open to us to take in view of the decision of the Privy Council in Barua's case which as I have already stated should be taken to be the last word on the subject. Even however if we assume that such a view is open to us to take, it seems to me that the position is not quite so simple as Mr. Das suggests. It was not seriously disputed before us that in spite of the assurance given in Regn. 1 of 1793 it was within the power of the Indian Legislature to revoke the declaration contained in the regulation. The earlier history of the Income Tax law shows that notwithstanding the Permanent Settlement Regulation agricultural income has been taxed in the past. It was certainly taxed under the Income Tax Act, 1860, but the tax was given up in 1865. Again an Income Tax was levied on all income including agricultural income between 1869 and 1873-1874. In 1886 a regular Income Tax Act was passed but agricultural income was specifically exempted under that Act and the exemption is still in force.

137. The reason however for exempting agricultural income was, as has been pointed out by some writers, not that the landlords paid revenue to Government but that they paid a cess on land, whereas the other persons paying Income Tax had not to pay any such cess. As Mr. Sunderam has stated in his commentary on the Indian Income Tax Act, in those days when the Cess Act was passed and Income Tax was levied on agricultural income the owners of permanently settled estates carried on a powerful agitation against these imposts on the ground that the new taxation constituted a breach of the permanent settlement, but the

Government met these complaints not by exempting permanently settled estates as such from Income Tax but by exempting all agricultural income whether the lands were permanently settled or not.

138. From this brief history of the Income Tax law, it appears that the Central Government did tax agricultural income when it wanted to do so but for many years past for certain reasons of policy such income was exempted from taxation. Then came the Government of India Act which expressly authorized the province to tax agricultural income the authority so conferred being as unqualified as the exemption given in regard to agricultural income under the Income Tax Act. Why should not then the Bihar Agricultural Income Tax Act be taken to be a repeal of the earlier enactment, because the language which is used in this Act is universal and comprehensive. The Act purports to tax "the total agricultural income of every person" (Section 2) and Section 4 recites in express terms the Act shall apply to all agricultural income derived from land situated in the province of Bihar. There is nothing in the Act to suggest that it was intended to apply to lands other than those comprised within the permanently settled estates, or so exclude the liability of so large a class of taxpayers as are holders of permanently settled estates in Bihar. If these persons were intended to be excluded the Legislature would have used apt words to express its meaning.

139. I think that I might usefully quote here the following observations of Hamilton J. which were quoted by Rankin J. in *Probhat Chandra Barua Vs. Emperor*, :

Can Section 33...in view of that history and of its subject-matter, be so read as to make it subject to an unexpressed exception in favour of the rights of Exeter under its charters?

After quoting this, Rankin J. added:

There is no rule which entitles Courts of law to demand express words from the Legislature, or to refuse the office of interpreter in the absence of express words; but the point is that the Legislature dealing with a matter, as to which equality or uniformity may well have been thought a cardinal consideration, has used the plainest and the most express language. The head and front of its offending is that the words are general, but *prima facie* they import a calculated universality.

140. If therefore the other arguments of Mr. Das fall and it is held that the Bihar Legislature was competent to pass the Agricultural Income Tax Act in the terms in which it has been passed, it might well be argued that the Act has repealed the provisions of an earlier enactment. It seems to me that the "calculated universality" of the language used in the Bihar Agricultural Income Tax Act is sufficient to show that the permanently settled estates were not meant to be excluded. This, in my opinion, is sufficient to dispose of the last point raised by Mr. Das. But I must repeat once more that I have dealt with this point only in deference to Mr. Das's argument and on the assumption that the tax imposed by

the Bihar Act is an augmentation of the jama which was fixed under the Permanent Settlement Regulation.

141. Thus, the conclusions which I have arrived at may be summed up as follows: (1) The definition of the agricultural income as given in the Bihar Act seems to be somewhat defective but that does not invalidate the whole Act. On a careful examination of its language, it appears that it goes beyond the terms of the definition given in the Government of India Act in regard to such revenue free estates as lie within the limits of a municipality. We do not definitely know whether there are any such estates in Bihar and if there are, what is the total number of such estates; but assuming that such estates do exist, all that can be said is that such estates cannot be taxed and the Act is ultra viros in so far as it purports to tax them. (2) That there is no declaration or promise in the Permanent Settlement Regulation that the zamindars will not be liable to pay Income Tax like the other receivers of income and accordingly the Bihar Act is neither repugnant to nor purports to repeal the Permanent Settlement Regulation. (3) That the Permanent Settlement Regulation is not an Act of Parliament and can be repealed by the Legislature of the Province or Provinces affected by it, provided that the procedure set out in the Government of India Act is followed. In the present case the Act cannot be questioned as the Governor has given his assent to it after it was passed, (d) That the Agricultural Income Tax Act purports to tax all lands and estates permanently settled or otherwise and it will not be correct to hold that by this Act the income from permanently settled estates cannot be taxed.

142. In my opinion the suit must fail and should be dismissed with cost.

Manohar Lall J.

143. The plaintiffs, who are zamindars holding permanently settled estates in the district of Patna in Bihar, have instituted this suit on 7th October 1939 for a declaration that the Provincial Legislature of Bihar has no jurisdiction to enact the Bihar Agricultural Income Tax Act (Act 7 of 1938) as amended by the Bihar Agricultural Amendment Act (Act 5 of 1939)(hereinafter to be referred to as the Act) imposing agricultural Income Tax on their estate which was settled under the Permanent Settlement Regulation 1 of 1793 (hereinafter to be referred to as the regulation) so long as the said regulation stands unrepealed, and for a further declaration that the issuing of and serving of the notice on the plaintiffs by the agricultural Income Tax officer under Sections 17(2) and 30 of the Act with a view to their proposed assessment for agricultural Income Tax was without jurisdiction, illegal, invalid and inoperative. The main defence to the action on behalf of the Province of Bihar was that the impugned Act was competently enacted and did not purport to alter the character of or infringe the conditions of, the permanent settlement under the regulations so that the imposition of agricultural Income Tax is not an invasion on the rights of the zamindars under the permanent settlement. It was also pleaded that the plaintiffs have no right to maintain the suit in that their only remedy was to raise

their objection in the course of the assessment before the Agricultural Income Tax Officer--the requirement of Section 80, Civil P.C., were also stated not to have been fulfilled. A number of issues were struck by the first Subordinate Judge of Patna which are to be found at p. 7 of the paper book. The suit was originally valued at Rs. 187-8-0 but upon the objection raised by the defence the valuation was increased to Rs. 10,001 and the requisite court-fee has been paid thereon. By an order of this Court on hearing the parties and with their consent, this suit has been transferred for trial to this Court as it involves a decision of important and difficult questions concerning the whole province.

144. When the hearing of this case began on 26th February 1941, the learned advocate for both sides agreed that the relevant facts, which are necessary to decide the suit, are not denied by either side including the facts relating to the validity of the notice u/s 80, Civil P.C., and that the only issue which required to be decided was issue 8, namely, whether the notices and the assessment under the impugned Acts are legal, operative and binding on the plaintiffs? Issues 1, 3, 4, 6, 7 and 9 are merely matters of argument. Issue 5 was given up on behalf of the defence.

145. The plaintiffs then, being zamindars holding their estate permanently settled with their predecessor or under the provision of regulation, challenge the validity of the Act upon three grounds, firstly, that the Act has not been validly enacted under the provisions of the Government of India Act, 1937 (hereinafter to be referred to as the India Act), secondly, that if it is held to be validly enacted it cannot apply upon its true construction to a permanently settled estate and lastly, that if the Act can be construed to operate as a repeal of the legislative provisions of the regulation, this involves a direct breach of the promise given under the regulation. It will be convenient in the first instance to examine the scope of the Act in order to find out the nature of the imposition so that it may be decided to what extent the imposition is inconsistent with the provisions of the regulation. The Act which received the assent of the Governor on 12th October 1938, states in the Preamble that this is "an Act to provide for the imposition of a tax on agricultural income" and contains the Preamble that whereas it is expedient to impose a tax on agricultural income arising from lands situated in the province of Bihar, it is hereby enacted as follows.

146. Agricultural income is denned by Section 2 (a). The rest of the Act is divided into six chapters of which only Chap. II is relevant for the present purpose. That chapter is en-titled "charge of agricultural income tax" and consists of 13 sections. Section 3 is so framed as to charge agricultural Income Tax at the rate which may be specified from time to time; the tax is stated to be charge "on the total agricultural income of the previous year of every person" and by Section 4 it is enacted that the Act shall apply to "all agricultural income derived from land situated in the province of Bihar" save as income hereinafter provided. The limits of the taxable income are fixed by Section 5, and the mode of its determination is enacted in Sections 6 and 7. Charitable or religious trusts and wakfs are

exempted by Sections 8 and 9.

147. The other provisions in this chapter are not relevant for the present inquiry, but it may be stated that by Section f, agricultural Income Tax is only payable, if the total agricultural income of the previous year exceeds Rs. 5000 and that no tax is payable by a person who received agricultural income as defined in Section 2(a)(1) or by those who are in cultivating possession of less than 200 acres of land. It will be noticed therefore that the Act imposes a taxation on agricultural income arising from all lands situated in the Province of Bihar subject to the stated exceptions briefly narrated above and does not exempt the agricultural income of zamindars which they receive from permanently settled estates and applied to all persons who receive agricultural income, e.g., raiyats, under raiyats, tenure-holders, lessees, temporary or permanent, and zamindars.

148. Such being the ambit of this Act, it is now pertinent to consider the question whether the imposition of agricultural Income Tax in respect of agricultural income derived by a zamindar from his permanently settled estate is to any, and if so to what extent, inconsistent with the provisions of the Regulation. Fortunately, so far as this Court is concerned, there is an authoritative decision of their Lordships of the Judicial Committee in the celebrated case in AIR 1930 209 (Privy Council) which must guide in deciding this question. This Court must accept the pronouncement given by Lord Eussel of Killo-wen while delivering the judgment of their Lordships and must reject an attempt to distinguish that decision upon the grounds which will be indicated hereafter. His Lordship after examining all the relevant provisions in the various Bengal Regulations of 1793 came to the conclusion that the regulation was a master regulation and then proceeded to examine its terms and specially Article 6 which was relied by counsel before their Lordships (as it has been mainly relied upon by counsel for the plaintiffs before this Court) and held that their Lordships are unable to find in the regulation any statement or assurance that a zamindar will never be liable to taxation in respect of the income derived from his zamindary or (to put the matter from another point of view) that a zamindar will, as to so much of his property as consists of income derived from his zamindary be exempt from schemes of taxation applicable generally to the incomes of the inhabitants of British India.

149. His Lordship then gives a most valuable paraphrase of Article 6 which may be usefully quoted here:

You have in the past been liable to have the amount of the jama increased according as the actual produce of the estate increased; to enable the Government to obtain this you have been subjected to frequent investigations to ascertain the actual produce and you have even been deprived of the management of the estate. All this shall cease. You shall have fixity of payment and fixity of tenure. If you improve the revenue of your zamindari you shall enjoy the fruits of your improvement without fear of the Government claiming that because the revenue produced by the estate has increased, the payment

you make to Government as a condition of holding that estate shall be increased also,

and a few lines later:

In their Lordships' opinion while the regulations contain assurances against any claim to an increase of the jama, based on an increase of the zamindari income, they contain no promise that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation or that the income of a zamindari shall not be subjected with other income to any future general taxation of incomes.

150. I have already shown that the Act imposes a general tax on all agricultural incomes and as the regulations never promised that the income of a zamindar shall not be subject to any future general taxation of incomes (as laid down in Baruas' case), the Act cannot be held to be a breach of that promise.

151. But it was strongly contended that the words of Lord Russel quoted above cannot be brought into aid by the defendant because the Act is not an Act to tax all incomes but to tax agricultural incomes only. The argument was that whereas an Income Tax is a general tax on all income irrespective of the sources and can be imposed upon agricultural and non-agricultural incomes of permanently settled zamindaris the tax being a tax on agricultural incomes only and with reference to a particular source it cannot be validly imposed even according to the decision in Barua's case. I do not understand this distinction. If the Income Tax Act can validly tax all incomes including agricultural and non-agricultural incomes I do not see why the same taxation cannot be imposed by two competent bodies the one taxing non-agricultural income and the other taxing agricultural income of the zamindar assessee. This is exactly what has been provided by the present India Act. But for the exception given in Section 4(3), Income Tax Act, it would be payable upon agricultural income also. That tax can now be imposed by the Provincial Legislature by giving it that power by inserting it as item 41, in list 2, Schedule 7. The argument that Income Tax is a tax on income without any reference to a source loses sight of the sections in the Income Tax Act which specifically mention the sources, e.g., Section 4, Section 6 and Section 12.

152. It is proper that I should state here the other grounds upon which the decision in Barua's case was sought to be distinguished. It was argued by Sir Sultan Ahmad, who gave a forcible reply on behalf of the plaintiff that that case only decided the taxability of the non-agricultural income arising from the estate of the assessee and that therefore the observations of Lord Russel should be taken to mean only that there was no promise that non-agricultural income will not be assessed by any future general scheme of property taxation but that either it must be held that the promise under the Regulation was to exempt agricultural income from further taxation or that the point was never decided and remains open to argument. I am unable to accept this contention as sound. At

the top of p. 7 the argument of the appellant before the Privy Council has been stated to be in these words:

Ha (that is to say, the zamindar assesses appellant) alleges that the jama was a tax and not a rent or rent-charge, and that by the Regulations a legislative assurance of guarantee was given that no tax beyond the amount of the fixed jama would be imposed upon the income of the permanently settled estate.

153. This income of the permanently settled estate, in my opinion, means both agricultural and non-agricultural income and it is not permissible to argue that the income of the permanently settled estate means in that judgment only the non-agricultural income of the permanently settled estate. This argument was also developed in this way:

154. The Government land revenue is a tax on agricultural income, the limit of that tax was fixed by the regulation and therefore the proposed tax by the Act on agricultural income is a breach of that promise which ensured to the zamindars that all fruits of their own good management and industry will be exclusively enjoyed by them and. that the present or any future Government will never ask for an augmentation of the tax on agricultural income in consequence of the improvement of their respective estates. An analogy was also sought to be drawn between the Indian revenue system and the English land tax system. It is true as pointed out by Viscount Dunedin while delivering the judgment of the Board in *Bomanji Ardeshir Wadia v. Secy. of State* AIR 1929 P.C. 34 that

the root idea of British Rule in India is that he who has the soil must pay, not in kind like a proper tithe, but in money, a certain proportion of what he gets from" cultivation, and this money payment can be raised from time to time so as to maintain the proportion to the fruits of cultivation which have increased.

155. But the observations of Lord Porter while delivering the judgment of the Board in AIR 1940 82 (Privy Council) are useful to show that in considering the way in which land revenue is regarded in India no comparison with tenures in England is of such (if any) assistance. Its universality, its quantum, and the tendency of the Indian outlook to regard the Government as a sharer in all the produce of the land are matters of importance.

156. That was a case in which the question arose as to whether land revenue must be deducted in calculating the gross annual profit of a property and it was pointed out that it must be so deducted (these two cases did not concern permanently settled estates). It is also true that

whatever doubts be entertained as to whether before the British occupation the zamindars had any proprietary interest in the lands comprised within their respective districts, it is now established by high authorities that the permanent settlement itself recognises and proceeds on the footing that they are the actual proprietors of the land for which they undertake to pay the Government revenue : Per Sir George Lowndes in AIR 1931 89 (Privy Council) approving the

well known passage from the judgment of Lord Parker in *Ranjit Singh v. Kali Dassi Debi* AIR 1917 P.C.

157. But the assessee, the plaintiff, ignores the position of zamindars which is expressly provided by Articles 3, 4 and 5 of the Regulation, that is to say the zamindars are "allowed to hold their estates at such assessment for ever."

158. In *Haradas Acharjya v. Secy. of State* AIR 1917 P.C. 86. Lord Buckmaster while considering the question as to how the external boundaries of a permanently settled estate should be decided made these observations at p. 91:

Pushed to its extreme it would result in this: that whenever a zamindari had been the subject of permanent settlement and there was any dispute as to its external boundaries the zamindars would never be able to establish title to any portion of it if it happened to be traversed by a navigable river of variable course, unless they could show what were the exact boundaries of that course at the date of the permanent settlement. Such a conclusion their Lordships wholly reject. The object of the permanent settlement was to confirm the zamindars in their holdings at a fixed and immovable rent, and, if assumptions are made, one way or the other, they ought to proceed upon an attempt to do justice to the title rather than to render it insecure.

159. In *Rajah Sutto Surrin Ghosal v. Mohesh Chunder Mitter* (69) 11 W.R. 10 their Lordships of the Judicial Committee observed at p. 13 that the general principle upon which all legislations subsequent to 1793 have proceeded in India was that of putting a purchaser at a sale for arrear of revenue in the position of the party with whom the perpetual settlement of the estate was made. This has been the accepted view as to the rights of a purchaser who purchased a zamindari sale for arrears of land revenue and this was clearly enacted in Section 37, Bengal Land Revenue Sales Act (Act XI of 1859). Incidentally attention may be drawn to Section 2 of this Act which makes reference to the kist or instalment of land revenue which is payable by the proprietor of a permanently settled estate. That section shows that the kist or instalment is to be paid in accordance with the original settlement and kistbandi of the mohal. These kabuliats are kept in the office of the Collector to which reference is made from time to time in cases arising under the Land Revenue Sales Act of 1859.

160. In the *Barua*'s case Lord Russell in the paraphrase of Article 6 which I have already quoted expressly used the words

that a zamindar shall have fixity of payment and fixity of tenure and rejected the argument advanced on behalf of the assessee as unsound that the jama was a tax, not a rent or rent charge.

161. In my opinion these quotations from these high authorities are quite sufficient to confirm me in the view which I take that all that the zamindar has been promised is a right to remain in quiet possession of his permanently settled estate provided he pays regularly the amount which he agreed to pay by the

engagement endorsed by the kabuliat executed in pursuance of the regulation. It should be stated here that after the promulgation of the regulation the zamindars were called upon to enter into kabiats with the Government of India through the Collector and in these kabiats they expressly applied that the estates of which they were in possession as zamindars should be settled with them. But the actual settlements were made with the zamindars in possession only if they agreed to pay the assessment fixed after an elaborate investigation by the officers and if they did not agree to pay the amount of the proposed assessment the estate was settled with other persons who agreed to make that payment.

162. This conclusively shows that the payment which is being made was made in pursuance of the permanent settlement of the estate which could be made and was made in many cases, not with the old proprietor but with anybody who on agreeing to pay the jama was placed in possession of the estate with a promise that if he or his lawful successors would go on paying the assessment which they have engaged to pay they will be allowed to hold the estate at such assessment for ever. (In the Pachete case, Secy. of State v. Jyoti Prashad Singh Deo AIR 1926 the kabuliat will be found quoted in the judgment of Lord Phillimore at p. 108.)

163. Upon the view which I take of the applicability of the Barua's case, it is unnecessary for me to consider the elaborate argument which was advanced as to the intention and historical origin of Article 6 of the regulation. We were taken at great length through many historical documents before the permanent settlement including the charter of the East India Company, various Statutes of George III, William IV and Queen Victoria, Field's Regulations of the Bengal Code, Phillips' Land Tenures of lower Bengal and the various minutes of Sir John Shore, of Warren Hastings and of Lord Cornwallis. But, in my opinion, no useful purpose can be served by examining these materials after the decision of their Lordships in the Barua's case. I therefore conclude that the Act does apply to the permanently settled estate and does not involve a direct breach of the promise given under the regulation.

164. I now proceed to consider the next argument that the Act has not been validly enacted under the provisions of the India Act. This argument may be conveniently examined under various heads: (i) the Act is ultra vires because the definition of agricultural income given in Section 2 is different from that contained in the India Act; (ii) the sanction of the Governor-General ought to have been taken because the Act repeals an Act of Parliament extending to British India; and (iii) by the Instrument of Instructions the Governor of Bihar should not have assented in the name of His Majesty to the bill which alters the character of the permanent settlement.

165. Firstly as to the effect of the definition in the Act. Section 311(2), Government of India Act, defines agricultural income to mean "agricultural income as defined for the purpose of the enactments relating to Income Tax." By

Section 2 of Act 11 of 1922 (income tax Act) agricultural income has been defined. The Act by Section 2 has also defined agricultural income. It will be observed that the whole of Sub-clause (c) which is found in the Income Tax Act definition has been omitted from the definition in the Act and Sub-section (1) of Sub-clause (a) has been altered changing the words "assessed to land revenue in British India" to "assessed to land revenue in Bihar" and by changing the words "subject to the local rate assessed and collected by officers of the Crown as such" to "subject to the local cess or rate assessed and collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act." It was therefore argued that by the analogy of Section 141, Government of India Act, the Provincial Legislature has no power to vary the meaning of the expression "agricultural income" and therefore the whole Act is ultra vires. But Section 141 does not seem to be of much assistance as it provides that

no bill or amendment which imposes or varies any tax or duty in which Provinces are interested, or which varies the meaning of the expression "agricultural income" as defined for the purposes of the enactments relating to Indian Income Tax, etc., shall be introduced or moved in either Chamber of the Federal Legislature.

166. The Act was not passed by the Federal Legislature. But the important question to consider is whether the power of the Provincial Legislature to impose tax on agricultural income in item 41 in list 2 of Schedule 7 includes the power to impose tax on agricultural income beyond what is defined in the Income Tax Act. In other words, has the definition in the Act substantially varied the definition of agricultural income in the Income Tax Act? I do not think by the changing of the words "British India" to "Bihar" any variation has been made. The Provincial Legislature having power to impose a tax only in Bihar must have the power to mould the definition so as to suit the provincial condition. Nor does the omission of (c) help the argument of the plaintiff; the omission narrows the definition but does not enlarge the scope.

167. I am also not impressed by the argument that a substantial change has been made because the Bihar Act uses the word income and not revenue in the opening lines of Section 2(a)(1). Revenue derived from land connotes in the subject under consideration the same meaning as income derived from land. The serious objection however is that the words "local rate assessed and collected by officer of the Crown as such" have been completely altered. This argument has to be examined in some detail.

168. The Indian Income Tax Act speaks of a local rate, assessed and collected by officers of the Crown as such. The local rate has been amplified in the Bihar Act as a local cess or rate. I do not think this is any substantive variation. The Bihar Act has merely used the words "assessed and collected under any Bengal Act or under any Bihar and Orissa Act or under any Bihar Act." The critical question to consider is whether the local cess or rate assessed and collected under these Acts is assessed and collected by officers of the Crown as such. To begin with it is

clear to me that if any local cess or rate is assessed and collected under these Acts not by officers of the Crown as such then agricultural income on those lands which are subject to such cess or rate cannot be brought within the taxation of the Bihar Act. This was conceded by the learned Advocate-General who appeared for the defendant and in my opinion rightly.

169. It was argued at great length that the cess which is imposed and collected under the Cess Act (Bengal Act 9 of 1880) is not assessed and collected by officers of the Crown as such. But a perusal of the provisions of Part 2 makes it clear that the valuation of the land is made under the orders of the Board of Revenue by the Collector of the district who is defined to be the officer in charge of the revenue administration of a district and includes any person specially invested with the powers of a Collector for the purposes of this Act.

Sections 14, 16 and 17 describe the procedure which must be adopted by the Collector requiring the holders of an estate or tenure of a certain description to lodge at his office return of all the lands comprised therein. By Section 18 the omission to furnish a return involves the liability to pay a daily fine until the valuation of the lands has been ascertained and determined by the Collector. By Section 22 the Collector is empowered, if he is not satisfied as to the correctness of the return, to fix an annual value of the lands by making independent enquiry. These provisions show that the assessment is made by a Collector who is an officer of the Crown.

170. The rate at which the cess is to be assessed on the annual value of the land determined under Chap. 2 is fixed in the manner provided in chaps. 1 and 3. The collection of the cess is provided in Section 41 which enjoins every holder of an estate to pay to the Collector annually the entire amount of local cess and by Section 45 it is provided that if the instalment of the local cess or a part thereof payable to the Collector is not made, within the time fixed the amount of such instalment may be recovered with interest thereon at 6 per cent, per annum. It seems to me therefore that this local cess is assessed and collected under the Cess Act by the Collector, an officer of the Crown. But it was argued that as the proceeds of the local cess in each district and all sums levied or recovered as interest or otherwise in respect thereof are to be paid u/s 9 into the district fund of the district, the collection is made on behalf of the District Board. In my opinion, this argument is not sound because the destination of the amount of cess collected has nothing to do with the capacity in which the cess is collected.

171. Attention however was drawn to the provisions of chap. 9 which empower the District Committee to determine the rate of the cess for the year in order to prepare an estimate of the income and expenditure of the Committee for the year then next ensuing. It is true that the Committee by Section 148 is required to determine the rate at which it will be necessary to levy the local cess for the year, but Section 150 directs that every such estimate by the Committee u/s 146 shall be forwarded through the Collector of the district to the Commissioner and what is more important is that "the Commissioner may approve and estimate

and the rate be determined by the Committee." It seems to me therefore that these provisions are based upon the view that it is expedient to take advantage of the local knowledge of the District Committee in order to see what should be the proper rate at which cess should be levied.

172. The final authority, it will be noticed, is not the Committee but the Commissioner. Section 152 also provides that the Commissioner when re-considering the estimates submitted to him u/s 151 may either sanction the estimate and rate as determined by the Committee or may submit such estimate together with the reasons recorded by the Committee for adhering to the original view to the Lieutenant-Governor, and by Section 153 the Lieutenant-Governor finally decides the rate and the estimate which should be published so that by Section 156 the rate which is thus published in the Gazette becomes leviable in the district for the year. These provisions strengthen me in the view which I take that the local cess is assessed and collected under the Cess Act by the officers of the Crown as such.

173. It was then urged that the Collector under the Cess Act cannot be styled as an officer of the Crown as such because, so it was argued, there is no bar to any private person being specially invested with the powers of a Collector for the purposes of Cess Act. This argument, though attractive, loses sight of the fact that the Collector or the Collector of the district as defined under the Cess Act becomes an officer of the Crown the moment he is invested with the powers of the Collector for the purpose of the Cess Act. The Collector is almost invariably a member of the Indian Civil Service and the Provincial Civil Service.

174. It was then argued that as the definition admittedly embraces lands which may be subject to a local cess or rate like that under the Bihar Municipal Act which is neither assessed nor collected by an officer of the Crown as such, the whole definition becomes ultra vires as it is not permissible to dissect it so as to make it applicable to those lands which are subject to local cess and rate assessed and collected by officers of the Crown as such. A sufficient answer to this argument is afforded by the case in *Macleod v. Attorney General for New South Wales* (1891) 1891 A.C. 455. In that case the question for consideration was the extent of the definition of Section 54, Criminal Law Amendment Act, 1883, (45 vic, c. 17). That section enacted that

whosoever being married marries another person during the life of the former husband or wife wheresoever such second marriage takes place shall be liable to penal servitude for seven years.

175. It was held by their Lordships in the judgment delivered by Lord Halsbury, L.C. that these words must be intended to apply to those actually within the jurisdiction of the Legislature and therefore there was no jurisdiction in the colony to try the appellant accused for the offence of bigami alleged to have been committed in the United States of America. Now it will be observed that the word, "whosoever" is of such width that in its proper meaning it must

comprehend all persons all over the world, natives of whatever country. Similarly, there is no limit to the applicability of the word "wheresoever" which is equally universal in its application. Notwithstanding the universal application of these two words, according to one construction their Lordships construed the words so as to make the enactment within the jurisdiction of the colony to enact it. The words of Lord Halsbury at p. 458 may be usefully quoted here:

Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so as to include those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim which has been more than once quoted *extra territorium jusdicenti impime non paretur*, would be applicable to such a case. Lord Wensleydale, when Baron Parke, advising the House of Lords in *Jefferys v. Boosey* (1854) 4 H.L.C. 815 expresses the same proposition in very terse language.... It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the colony by any means whatsoever and that therefore if that construction were given to the statute, it would follow as a necessary result that the statute was ultra vires of the Colonial Legislature to pass. Their Lordships are far from suggesting that the "Legislature of the colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the colony.

176. It has not been shown to us that the Bihar Legislature had meant to exercise so wide a jurisdiction that they intended to impose a tax on agricultural income from those lands which could not be reached by India Act definition. The more reasonable theory to adopt is that the language was used bona fide believing that they were legislating only for those lands which were actually within their jurisdiction. But reliance was placed upon the observation of the late Sir Shah Mohammad Sulaiman in the Federal Court judgment in AIR 1941 47 (Federal Court) :

But I am not aware of any case in which the same section containing similar provisions for contract as for the decree based on it has been considered to be severable so as to make the latter valid, while the former is invalid,

and therefore it was argued that it is not permissible to dissect the definition of agricultural income in the Act in order to find out that some portion is invalid and the rest is valid. I do not agree with this argument because, as pointed out by Varadachariar J. in the same case at page 196:

Any objection based on the wide scope of the Act may be obviated by so

interpreting the general terms used in the Act as to limit them to cases with which alone the Legislature was competent to deal.

177. Sulaiman J. in the passages relied upon was only pointing out that a part of an Act can be held valid and another part invalid if they are severable and that if the offending provisions are so interwoven into the scheme that they are not severable, the whole is ultra vires. Indeed in AIR 1939 74 (Federal Court) he himself pointed out that

it is a well established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless of course, the whole object of the Act would be frustrated by the partial exclusion. If the subject which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be ultra vires in the former while intra vires in the latter,

and then he makes the observation which has been relied upon. In the present case it is within the province of the Bihar Legislature to tax agricultural income provided the agricultural income is as defined in the Government of India Act. If the definition unwittingly extends beyond the limit prescribed by the definition of the India Act the whole Act cannot be held to be ultra vires because the subject which is beyond its legislative power is perfectly distinguishable from that which is within its power. I do not propose to deal with the argument as to severability at any length because this has been sufficiently dealt with in the Federal Court judgment from which I have just been quoting.

178. But I may usefully draw attention to the judgment of their Lordships of the Privy Council in Attorney General for Canada v. Attorney General for British Columbia (1930) A.C. 111 where Lord Tomlin who delivered the judgment of the Board laid down four propositions which he deduced from the decisions of the Judicial Committee in deciding questions of conflict between the jurisdiction. Applying those propositions I reach the same conclusion.

179. Lastly it may be pointed out that it will be quite permissible to adopt the definition of agricultural income as given in the Income Tax Act (which is the definition under the India Act) in order to find out whether the land, the agricultural income whereof is sought to be taxed, satisfied the requirements of that definition. In other words, the definition given in the Act may be either ignored or construed so as to make it apply to the subjects within the ambit of the definition given in the Income Tax Act. Perhaps this question is not of importance in this case because it is not shown that the land of the plaintiff from which agricultural income is derived, which is proposed to be taxed, is not subject to land revenue, nor has it been shown to be the subject of local cess or rate which is not collected and assessed by the officer of the Crown as such. If there is such a land the agricultural income from that land will, as stated above, not be liable to taxation under the Act. Secondly, as to the want of the sanction of the Governor-General. The argument advanced was based upon the terms of

Section 108(2)(a) of the India Act which provide that unless the Governor-General in his discretion thinks fit to give his previous sanction, there shall not be introduced into, or moved in a chamber of a Provincial Legislature, any bill or amendment which repeals, amends or is repugnant to any provisions of any Act of Parliament extending to British India.

180. It was argued that the Act conflicts with the Regulation, which is an Act of Parliament, extending to British India. The learned Advocate-General on the other hand argued that the regulation does not extend to British India because it applied only to a part of British India, namely Bengal, Bihar and the other permanently settled estates in some of the provinces whereas British India has been defined by Section 311 of the India Act to mean "all territories for the time being comprised within the Governors' Provinces and the Chief Commissioners' Provinces."

181. He also pointed out that the India Act itself has drawn a distinction between British India and part thereof and referred to Section 110(a) and Section 110(b). He argues in the second place that the regulation is not an Act of Parliament. I do not see any escape from the conclusion that the India Act has deliberately drawn a distinction between British India and a part of British India. It appears also that the Governor-General, is required to exercise his discretion only where the Provincial Legislature proposes to introduce a bill which is repugnant to any Act of Parliament extending to the whole of British India and where the bill is not repugnant to any provision of an Act of Parliament extending to the whole of British India but is repugnant to an Act of Parliament which extends to a particular province only the Legislature and the Governor of that province may well be left with the discretion to deal with the condition of their own province. But be that as it may, as the India Act itself has drawn a distinction between British India and a part of British India in various sections of the Act, I must accept the argument advanced on behalf of the defendant that the regulation is not an Act of Parliament extending to the whole of British India. Is the regulation an Act of Parliament? An elaborate argument was advanced before us to ascertain the position of the East India Company at the time when the Regulation was promulgated. It was argued that at that time the only legislative power was in the Parliament and had not been conferred either upon the East India Company or upon the Governor. General in Council and therefore the regulation was an Act of Parliament. It is true that the position of the East India Company was somewhat anomalous and it is impossible to discover the precise date when the Company exchanged the character of subject for that of sovereign and obtained for the Crown the rights of sovereignty.

182. But for the purposes of this case it is sufficient to make reference to the following observations made by Sir Arthur Wilson while delivering the judgment of the Board in *Hemchand Devchand v. Azam Sakarlal Chhotamal* (06) 33 Cal. 219. The passage is at page 15:

The time under consideration divides itself naturally into two periods, that of the

Government of British India by the East India Company down to 1858, and that of direct government by the Crown after that date. The legal and constitutional position of the Company during the former of these periods was established in a series of judicial decisions and was finally and fully defined in *Secy. of State v. Kamache Boyee Sahiba* (1857) 7 M.I.A. 476. The Company exercised a delegated sovereignty over the territories under the Government with all the powers in connection with the external of those territories incidental to the exercise of that sovereignty subject, of course, to such restrictions as were imposed by order or by statute. It is obvious that the sovereign power thus delegated to the Company could be exercised by it in India only through its agents and officers in the country. Before the Regulating Act of 1773 (13 Geo. III, c. 63) the three Presidencies in India were wholly independent of one another; in the government of each and in the dealings of each with the Native States in its neighbourhood, the Company acted through its officers charged with the administration of that Presidency. By the Regulating Act the Governments of Madras and Bombay were placed under the superintendence and control of the Governor-General of Bengal (since become Governor-General of India) and his Council, and close restrictions were placed upon their power of making war or concluding treaties without the approval of the general Central Government. Subsequent statutes expressed with greater clearness the subordination of the lesser Governments and repeated the restriction upon the exercise by them of various sovereign powers. But subject to that subordination and to those restrictions, those statutes never took away those powers, but, on the contrary, repeatedly recognised their existence. And accordingly in *East India Co. v. Syed Ali* (1857) 7 M.I.A. 555 this Board held that a treaty entered into by the Government of Madras, after compliance with the statutory condition, was a valid exercise of sovereignty. By the Government of India Act, 1858, the delegation of sovereign power to the Company was determined, and it has since been exercised directly on behalf of the Crown, in India (speaking generally) through the same authorities as before in England through the Secretary of State. Under the sovereign power thus delegated for so long to the Company and since 1858 exercised directly on behalf of the Crown, the British Empire in India has been built up.

183. If the Regulation was promulgated by East India Company or by its officers, namely, the Governor-General of Bengal the regulation was promulgated by a body to whom sovereign power has been delegated. This was pointed out by Lord Selbourne in the celebrated case in *Empress v. Burah* (77) 4 Cal. 172 that the

Indian Legislature has power expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits which circumscribe these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as largo, and of the same nature, as those of Parliament itself.

184. But if on the other hand the East India Company or the Governor-General of Bengal had not power to make this legislation then how can it be held that it was an Act of Parliament?

185. Mr. P.R. Das, who argued the case as an *amicus curiae* on behalf of the plaintiff, with his usual ability and ingenuity, argued that Section 36, Regulation Act of 1773, is the only section under which the Governor. General was given the power to legislate for the East India Company and that upon a true construction of this section it must be held that the power to legislate was only confined to the city of Calcutta. He, therefore, argued that the regulation was a piece of legislation which must be attributed to the Parliament and, therefore, was an Act of Parliament.

186. In the first place, I do not agree that Section 36 did not give the power to the Governor-General to legislate for the territories of the company beyond the city of Calcutta. The words, "for the territories subordinate thereto" are quite comprehensive to include the territories which were for the time being *de facto*, though not *de jure*, under the delegated sovereign power of the East India Company. But even if the argument of Mr. Das is accepted that the Governor. General had no power to legislate for the territories beyond the city of Calcutta in 1773 it does not follow that the Regulation was an Act of Parliament, because no Act of Parliament is shown to have promulgated or approved the promulgation of this Act. All that is pointed out is that the Parliament desired that the Court of Directors should order its officers, namely the officers of the East India Company, to remove the abuses which had been brought to the notice of the Parliament relating to the recovery of rent, taxes and other impositions from the zamindars and that if those complaints be found to be based on truth they should be speedily removed. It will be observed that the Court of Directors was the sole Judge as to whether the abuses complained of actually existed and ought to be or have been removed. The truth of the matter is that the East India Company was a trading company from 1600 to 1764; it obtained a permanent lease of the Dewani in 1765 from the Moghuls and, therefore, the Parliament could not legislate as a *de jure* sovereign of the territories which were placed under the Dewani and the Nizamat of the East India Company by a permanent lease from the sovereign of India.

187. For these reasons I am of opinion that the Regulation was not an Act of Parliament and that it did not extend to the whole of British India. It follows that the Act is not illegal on these grounds which I have examined.

188. Thirdly, as to the disregard of the provisions in the Instrument of Instructions. By Clause 18 of the Instrument of Instructions to the Governor it is provided that:

Our Governor shall not assent in Our name to, but shall reserve for the consideration of Our Governor-General, any bill of any of the classes herein specified, that is to say: (a) any bill the provisions of which would repeal or be

repugnant to provisions of any Act of Parliament extending to British India; (c) any bill which would alter the character of the Permanent Settlement.

189. The argument is that the provisions of Sub-clause (c) of this clause have been violated and, therefore, the assent given by the Governor to the Act on 12th October 1938 was a disregard of these express instructions. Section 13 of the India Act contains provisions as to the Instrument of Instructions which is issued to the Governor-General and Section 53 contains provisions as to the Instrument of Instructions which is issued to the Governor of a Province. But by Sub-clause (2) to Section 53 it is distinctly provided that the validity of anything done by the Governor of a Province shall not be called in question on the ground that it was done otherwise than in accordance with any Instrument of Instructions issued to him.

190. It follows that the violation of the provisions of Clause 18(c) of the Instrument of Instructions to the Governor of Bihar cannot be called in question as expressly provided in the Indian Act. But it may also be observed that notwithstanding the provisions in Clause 18(a) of the Instrument of Instructions provisions have been made in Section 108(2)(a) that no bill shall be introduced in a Provincial Legislature if it is repugnant to the provisions of any Act of Parliament extending to British India. This shows that wherever the intention was that the proceedings would be invalid if these are contrary to any direction in the Instrument of Instructions a provision has been made directly in the Act itself.

191. Having thus carefully considered the interesting argument under all the three heads I am unable to hold that the Act has not been validly enacted under the provisions of the India Act.

192. For these reasons I would dismiss the suit with costs.