
(1924) 01 CAL CK 0031
In the Calcutta High Court

Probhat Chandra Barua

APPELLANT

Vs

Emperor

RESPONDENT

Date of Decision : 08-01-1924

Acts Referred:

Income Tax Act, 1922 — Section 2, 66(2)

Citation : AIR 1924 Cal 668

Hon'ble Judges : Rankin, J;Page, J

Bench : Full Bench

Judgement

Rankin, J.—This is a Reference made by the Commissioner of income tax, Assam, u/s 66, Sub-section (2) of the Indian income tax Act (XI of 1922) for the opinion of the Court. The question for determination is stated thus:

Whether the following classes of income derived from permanently settled estates are liable to income tax:

- (1) Income from fisheries.
- (2) Income from land used for stacking: timber.
- (3) Income from pasturage.

2. The question as regards income from pasturage is not now in dispute, and I agree with the Commissioner and the learned Vakil who appears for the Crown in thinking it to be reasonably plain that income from pasturage is derived from land which is used for "agricultural purposes," and is, therefore, in the case of a permanently settled estate, within the exemption given by Section 4, Sub-section (3), Clause (viii) of the Act to "agricultural income" as defined by Section 2, Sub-section (1), Clause (a). In the circumstance that such income is derived from fees realised from graziers who graze their cattle in the forest areas and waste lands, there is nothing to render inapplicable the definition of "agricultural income" contained in Clause (a).

3. As regards both of the other classes of income abovementioned, learned

Counsel for the Assessee has contended that independently of any exemption given by the Indian income tax Act, and notwithstanding the wide language of Sections 4 and 6 which are the charging sections and of Section 12, the Assessee as the holder of a permanently settled estate is entitled to be considered as outside the scope of the Act as regards all forms of income derived from his estate. This contention is grounded upon the language of solemn promise employed in, more than one of the Articles of Regulation I of 1793. It is not suggested that an Act of the Indian Legislature can be regarded as invalid in so far as it is shown to revoke or curtail, the declarations contained in the Regulation. But it is contended that in the circumstances the Indian income tax Act must be approached with strong presumption against double taxation, and against any intention on the part of the Legislature to revoke by implication historic and explicit promises. Accordingly, it is said, mere wide and general language in the charging section-

All income, profits or gains as described or comprised in Section 6 from whatever source derived accruing or arising or received in British India.-

is not enough, particularly, if it is found that in practice revenue derived from permanently settled estates has not been assessed to income tax.

4. So put, the case for the Assessee must be regarded as an argument upon the proper construction of a statute; and must be determined as such upon purely judicial considerations. In construing a fiscal statute the Court has no concern with disputable questions of distributive justice - this upon the plainest ground, that by very strong presumption the Legislature has not intended that questions of equality or fairness in taxation should be left to any decision save its own.

5. Two matters may first be dealt with, and put aside.

6. Some reference was made at the bar to the practice of the Revenue Authorities since 1886 as regards fisheries in permanently settled estates, but there is no agreement as to what that practice - if there be a practice - has been. Assuming that it would have been open to us to place some degree of reliance upon an interpretation settled by practice as *contemporanea expositio* we are in fact without any such assistance.

7. Some reference was also made to what has been called a "presumption against double taxation." In *Manindra Chandra Nandi v. Secretary of State* (1907) 34 Cal. 251, royalties from a coal mine were held liable both to cess under the Cess Act, 1880, and to income tax under the Act of 1886, but it was said that,

it may be conceded that Courts always look with disfavour upon double taxation, and Statutes will be construed, if possible, to avoid double taxes.

8. Reference was made to certain dicta of American Courts and to the English case of *Carr v. Fowle* (1893) 1 Q.B. 251. But the only observation in this case was to the effect that the statute presumably did not intend that a vicar should

in effect pay the same tax (land tax) twice on the same hereditament. This is plain enough. Thus the income tax is one tax, and income assessed under one schedule cannot be assessed all over again under another. That there is any legal presumption of a genera character against "double taxation" in any wider sense is a proposition to which I respectfully demur as a principle for the construction of a modern statute. In *Manindra Chandra Nandi v. Secretary of State* (1907) 34 Cal. 251, it did not avail to cut down clear, though absolutely general, language.

9. We have first, then, to examine Regulation I of 1793 as a statutory exemption from future taxes. The particular sanad of the predecessors-in-title of the present Assessee is not before us, and the case was argued at the bar on the basis of this Regulation. In *Chief Commissioner of income tax v. Zamindar of Singampatti* AIR 1922 Mad. 325, cited by learned Counsel for the Assessee, the sanad and the Regulation (Madras Regulation XXV of 1802) were read together, and were construed to contain an explicit exemption applicable to taxes which might be imposed thereafter as well as to taxes in force at the time. In reaching this conclusion the Pull Bench of the Madras High Court put much reliance on the decision of the House of Lords in a rating case arising in the City of London *Associated Newspapers v. City of London Corporation* (1916) 2 A.C. 429. There the actual decision was that a statute which vested in the owners "free from all taxes and assessment whatsoever" certain land reclaimed from the river Thames, partly at the owners' expense imported an exemption from local taxes and assessments only, but from all these, whether existing or thereafter to be imposed. That it was confined to local taxes only was collected from the context and purpose with which the phrase was introduced. That it embraced future as well as existing taxes was held upon the natural meaning of the words.

10. The Permanent Settlement Regulation of 1793 was intended as an enactment of certain articles of a proclamation made earlier in that year. It must be construed as an enactment and given full effect, but it is another question whether there is any principle of unrestricted application which determines its construction. From the decision of the House of Lords one may well collect that there is not. The basis of the Permanent Settlement is best disclosed by the opening words of Regulation XIX of 1793:

By the ancient law of the country the Ruling Power is entitled to a certain proportion of the produce of every bigha of land, unless it transfers its right thereto for a term or in perpetuity, or limits the public demand upon the whole of the lands belonging to an individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public....

11. Next, the sixth article of Regulation I of 1793:

From the earliest times until the present period the public assessment upon the land 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.

12. Again:

The property in the soil was never before formally declared to be vested in the landholders, nor were they allowed to transfer such rights as they did possess, or raise money upon the credit of these tenures, without the previous sanction of Government. (Regulation II of 1793, Section 1).

"As being the two fundamental measures essential to the attainment of it." (So Improvement of Agriculture.) " The property in the soil has been declared to be vested in the landholders, and the revenue payable to Government from each estate has been fixed for ever." (Regulation II of 1793, S.D.)

13. The Regulations themselves thus show the historical setting of the language they employ. They show that the usual amount which went to Government in the past had been some 10-11ths of the net produce or rents. They show the status of zamindar solidifying from that of officer of State to that of proprietor of lands, and the notion of rent emerging from the notion of land revenue.

14. The phrases used by the Permanent Settlement Regulation are:

The limitation of the public demand upon the lands": "to declare the jama which has been or may be assessed upon these lands fixed for ever" : "they and their heirs will be allowed to hold these estates at such assessment for ever." "Zamindars, etc., are to consider these orders fixing the amount of the assessment as irrevocable and not liable to any alteration by any persons whom the Court of Directors may hereafter appoint to the administration of their affairs in this country" : " they will enjoy exclusively the fruits of their own good management and industry" : "no demand will ever be made upon them by the present or any future Government for augmentation of the public assessment in consequence of the improvement of their respective estates."

15. The width and depth of these phrases may be further gauged from the savings in the seventh article which leaves it open to the Governor-General in Council to enact regulations for the welfare of the cultivators and others; to re-establish sair collections or other internal duties; and to resume police grants or allowances.

16. Upon these materials it will suffice for my present purpose to notice two things. If we put aside sair or internal duties, and suppose that the Government had - say in 1798 - imposed upon zamindars a new tax in respect of their estates with a new name and upon a new excuse, this would plainly have contradicted the true intent and meaning of the promises of 1793. The practice of inventing new excuses for new imposts was not an unknown feature of Oriental history in 1793, and the zamindars both as agents and as patients may be taken with great certainty to have had it well in mind. But, secondly, the true intendment of the Permanent Settlement is trenched upon by the imposition of further taxes in respect of any part of a settled estate upon any tenure-holder tenant or other

person under the zamindar just as much as by taxes levied directly on the zamindar. I hold it plain on the face of the regulations that if in 1796 Government had further assessed the lands it could not have claimed to be keeping its bargain merely because the cultivator or dependent tenure-holder, contrary to all usage, was to be assessed directly. The patnidar who had taken his estate on the footing of Regulation I would have had as great a grievance as the zamindar.

17. We have, therefore, to see whether the stipulations of 1793, so understood are intended to stand side by side with the provisions of the income tax Acts on the footing that the more modern statutes are to be read as silently excluding from their operation all cases which come within the terms of the old legislation. If so, it must be conceded that for the purpose of a yield of income tax, and whether extensively or intensively considered, a wide area has been completely sterilized : also that if the Court has by interpretation to cut down the words of the income tax Act so as to make them square with the language and ideas of 1793, many large and important questions at once emerge.

18. The question being one of construction, there is risk of error in putting Regulation I of 1793 side by side with the Indian income tax Act of 1866 without attention to events which separate them. It is at least desirable to see how the Legislature has interpreted or observed the "fixity of public demand" promised in 1793. That it has freely legislated so as to prevent zamindars from exacting excessive rents, imposing illegal cesses, imposing undesirable conditions of tenancy, evicting tenants for inadequate reason, and so forth is no more than an exercise of the power expressly reserved by the Regulation. The Bengal Act X of 1859 and the Bengal Tenancy Act of 1885 represent this exercise of power. But the income tax Act of 1860 and the Cess Acts are of a different character, and more instructive for the present purpose.

19. That Act XXXII of 1860 imposed upon owners of permanently settled estates as well as of other estates a tax of 3 per cent, upon the annual value admits of no doubt whatsoever. It further imposed a tax of 1 percent, for roads, canals and other reproductive public works. This was done without purporting to revoke or repeal any part of Regulation I of 1793. The language is:

Schedule 1:

For and in respect of the property in, and profits arising from, all lands and houses in India.

20. The rules under Schedule I are given in. Part VII of the Act. They provide that holders of lands paying revenue to Government not under any permanent settlement may treat as their annual profits a sum equal to one-third of the revenue-payable, but that all persons in receipt of any rents or profits of any other lands whether paying revenue to Government or not shall be chargeable on the actual amount of such profits. Thus the policy of the statute was to be comparatively lenient to proprietors of estates paying a revenue that was subject to revision, but to treat proprietors of permanently settled estates as people who

ought to be made to pay in full. The exemption for the actual cultivator of lands was limited to those whose land was worth less than Rs. 600 per annum (Section 130). This Act was for five years only, and may be regarded as an emergency measure. There is no presumption, nor indeed is it true, that the same policy was continued when twenty years later the income tax as we now have it, was introduced as a permanency. If, however, conclusions are to be drawn from the bare fact that in later legislation there is no express repeal of these provisions of Regulation I of 1793 which are relied on as an exemption from all future¹ taxation, the frame and manner of the statute are conducive to caution.

21. Again in the income tax Act, of 1872 (VIII of 1872):

An act for imposing duties on income arising from offices, property, professions and trades.

to be in force for one year only - we find the duties charged on offices (Part II), profits of companies (Part III), interest on Government securities (Part IV) and then " upon all incomes of Rs. 1,000 per annum or upwards not chargeable under Part II, Part III, or Part IV of this Act." By Section 21:

Owners of lands or houses occupying the same shall be chargeable in respect of the annual value thereof at nine-tenths of the full rent at which such lands or houses are worth to be let for the year.

The Local Government may with the sanction of the Governor-General in Council prescribe for the whole or any part of the territories subject to such Local Government special rules for the assessment of income derived from land at an amount bearing a fixed proportion to the revenue assessed thereon.

All such rules shall be published in the local official gazette and shall thereupon have the force of law.

22. We may trace somewhat further in this permanently settled Province the duty levied for roads and public works. Bengal Acts imposing Road Cess (Act X of 1871) and Public Works Cess (Act II of 1877) are represented now by the Cess Act of 1880 (Bengal Act IX of 1880). The frame of this enactment is to impose these cesses on "all immovable property." They may not be levied at a rate exceeding in each case 3 per cent., and they are to be assessed on the annual value of lands and on the annual net profits from mines, quarries, and other immovable property. No one supposes that there is any exemption for lands because they are permanently settled. As a matter of construction, why not? There are no express words cancelling any part of Regulation I of 1793, but the provisions requiring the holder of an estate or tenure to lodge a return refer one to the definition of "estate" which word is to mean inter alia "land included under one entry in the general registers of revenue paying lands." So far as I have observed it is only incidentally that the distinction between permanent and temporary settlement is referred to. In Section 27 when the revenue or rent of a small estate is under Rs. 100 the Collector may summarily determine the annual

value to be a sum not exceeding three times the revenue in a permanently settled estate, and not exceeding twice the revenue in a temporarily settled estate. But it is clear enough that general language "all immovable property" "estate" land" "revenue paying lands" were thought to be clear and convincing for purposes of imposing the charge.

23. Although the present case falls to be determined under Act XI of 1922 the provisions upon which the question depends appear first in Act II of 1886. At the time of the passing of the latter Act direct taxation in India was imposed by various Provincial License Acts and Act II of 1878. The license tax was substantially a tax on trades and it had been introduced at the same time as the Public Works Cess. The Act of 1886 had for its main object to bring within the scope of direct taxation not trades only, but all businesses and professions. Its was there that the main extension of revenue lay. But in re-introducing an income tax to the Indian Statute-book, the Act defined its scope generally as "An Act for imposing a tax on income derived from sources other than agriculture." Accordingly the second schedule charged the tax upon (i) Salaries and Pensions, (ii) Profits of Companies, (iii) Interest on Securities, and (iv) Other sources of income. As it was not now intended to repeat the policy of 1860 the Act of 1886 dealt with the question of land by way of exemption in Section 5. For the present purpose this language was repeated unaltered in the Act of 1918", and with a slight alteration in the Act of 1922.

24. As the exemption first stood it applied to income derived from agriculture and its subsidiary operations regardless of whether the land was assessed to land revenue or to any local rate. The Act of 1922 has made this a condition. But when we come to consider, not the cultivator himself or the receiver of rent in kind, but the landlord's rent from land and income from buildings, the exemption stands to-day as it did in 1886. As regards rent it is dependent (1st) upon the use of the land for agricultural purposes, (2nd) upon assessment to land revenue or local rate. As regards buildings, it is dependent upon four conditions - (i) being owned by the receiver of rent from land used for agricultural purposes and assessed to revenue or local rate, (ii) occupation by the owner himself, (iii) such occupation being necessitated by reason of his connection with the land, (iv) proximity to the land.

25. There is no mention in the Act of mining royalties or of fisheries. There is express mention of land revenue, but no hint of a distinction between temporary and permanent settlement.

26. The question then must be whether, in providing detailed and precise regulations for the assessment of a tax upon all incomes with a carefully defined protection for agricultural income, the Legislature, while basing this protection upon a consideration of the payment of land revenue, has omitted to notice or has chosen not to mention so plain and important an issue as the exemption of all income derived from permanently settled estates. Or whether on the other hand this is part of the very matter to which the Legislature has addressed itself

in formulating, and, in 1922, slightly changing the elaborate definition of agricultural income which is contained in Section 2 of the Act of 1922.

27. The fundamental fact for the purposes of construction is that the hypothesis, that the statute may have been enacted without attention to the broadest fact in Indian revenue history, is quite incredible. Again, the purport of the charging sections - if the express exemptions be disregarded, as the reasoning requires - is radically altered if an exemption of all permanently settled estates is implied. Wide areas escape the purview of the charge. Further, an express exemption which is large enough to cover all permanently settled estates, and which covers them to the full extent of "agricultural purposes," - if not somewhat further, cannot readily be taken as applying only to estates not permanently settled, or as an addition to an implied exemption of all permanently settled estates for all purposes whatsoever. General language is not infrequently intended sub modo, and even in statutes cannot be taken at the foot of the letter. But in the first place an income tax Act may be taken to have been framed so as to express intentions of the Legislature on a matter of cardinal importance for its purpose. Secondly, the words employed in Section 4 - the charging section-are calculated to an end which in the absence of any saving clause they are apt and sufficient to secure, that is, they place on the subject claiming exemption to burden of making out his case under the strict provisions of the Statute. Thirdly, the modification sought to be implied overlaps a modification made expressly and with much care to limit and define its scope. Fourthly, the basis of the express modification is the payment of land revenue, and the Legislature, so far from moving in diversa, materia, may very easily be supposed to regard its own provision as a precise formula, probably of compromise, adequately meeting the obligations imposed on it for modern purposes by the Permanent Settlement as well as the demands of others (e.g., the more highly assessed holders of estates temporarily settled) for some degree of uniformity in the incidence of direct taxation. It is difficult, indeed, to believe that the effect of the tax upon such important subjects as mining profits in permanently settled Provinces was left to be thrashed out as against all interests upon the terms of the Regulation. Nor can it reasonably be taken as axiomatic that it is any more fair or just to tax forthwith an estate subject to periodical revision as regards land revenue than to tax an estate permanently settled.

28. The decision of the Madras High Court does not convince me that the contention of the Assessee is correct : Chief Commissioner of income tax v. Zamindar of Singampatti AIR 1922 Mad. 325. The Court proceeded partly on the basis of the sanad of the Rajah, and partly on the terms of Madras Regulation XXV of 1802. It held that-

there is nothing in the income tax Act to indicate that the attention of its framers was ever drawn to Regulation XXV of 1802.

29. This there certainly is not; but it is a bold supposition that the Legislature dealing with exemptions on the basis of land revenue was unmindful of the

Permanent Settlement. Again, it was stated in the judgment of the Full Bench:

No other reason is suggested (sc. for the exemption of agricultural income from income tax) than the equity of exempting from further burden income which had already paid toll to the State in the shape of land revenue. This applies equally whether the land is liable to ryotwari assessment, or whether Government demands have been permanently commuted as in the case of a permanently settled estate. Logically the exemption from further burden should apply to both; and it would seem that it ought to cover all sources of income which had been commuted under a permanent settlement.

30. These observations were made by way of construction of the express exception of "agricultural income". The Chief Commissioner of Income Tax Vs. Zamindar of Singampatti, gives a construction somewhat wider than I can see my way to give. But if they are in any degree Well-founded, the necessity for implying a general exception in favour of the holders of permanently settled estates would seem to be small, and the difficulty great.

31. A plain exemption of a particular, property for reasons special to itself from all parliamentary taxes, once this is held not to be confined to specific existing taxes, raises no question save this, whether the income tax Act intended to determine it. There is no great difficulty in the supposition that the Legislature had not in mind individual exemptions given in times past by local acts. On the whole there is less difficulty in that view than in the view that the Legislature, having them in mind and being minded to end them, failed to refer to them in express terms.

32. The reasons already given appear to me sufficient to show that the present case is at least not of this type. I think it nearer in character to Attorney General v. Exeter Corporation (1911) 80 L.J. K.B. 636. The maxim appealed to is "generalalia specialibus non derogant" and the fallacy to be avoided is that of arguing.

a dicto simpliciter ad dictum seundum quid.

"Can Section 38," said Hamilton, J., as he then was, "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?"

33. That seems to me to be the proper form of the question here. 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. The maxim appealed to states a logical consideration to be kept in view as an aid to the ascertainment of their meaning. It rests, as Hamilton, J., pointed out:

upon the theory and, as I think, the fact, of the continuity and justice of English legislation,

and in particular upon the presumption against enactments interfering with any person's rights without compensation. The force of the maxim varies in different circumstances as an instrument to cut down language which is clear. In the present case it does not require one to view as gravely improbable, the theory that, when the Legislature said "all income...as described or comprised in Section 6 from whatever source derived...received in British India...save as hereinafter provided," it meant the full value of what it said, notwithstanding that it had before it the question of the Permanent Settlement. One would not expect it to tax and compensate nor would it seem that financial policy in 1793 and in 1886 would altogether square. The first and last thing to find is whether or not the conditions of the Permanent Settlement need or need not be taken, as in the mind of the Legislature at the time. If yea, the Legislature has expressed itself.

34. Can it be said here; that if the Legislature intended the exemption of agricultural income as its provision to meet the case of all persons assessed to land revenue, and without distinction between temporary and permanent settlements, it was altering the previous law beyond the immediate scope and object of the Statute? - that the income tax Act contains no indication of a particular intention to define the liability of so large a class of the payers of land revenue? - that no question of uniformity enters into the object of the Statute? that there is nothing in the nature of the Income Tax Act, making it unlikely, that the language of 1793 was to be a criterion of exemption from the new tax?

35. It may assist in clearness if I put my construction of the Statute positively. The permanent introduction of an income tax in 1886 was in part a consequence of the abolition of much indirect taxation in preceding years. The Legislature had since 1860 made several temporary and limited experiments in direct taxation, and it all of these the Permanent Settlement had been a source of difficulty and difference of opinion. The estates temporarily settled were contributing to revenue much more than those permanently settled. The Legislature, as I think, dealt with the matter as a broad and obvious question in general public policy - not as though the Permanent Settlement was a local act, or a privilege granted to a particular corporation by its charter. It dealt with it on lines which would produce the least inequality as between estates permanently settled and those subject to periodical revision. To do this it was content to forego a very large area of income which had at first been made liable - apart altogether from the incomes of actual cultivators as such. By reason of the Cess Acts doubtless it was the more able to adopt this policy. It settled, therefore, upon the exemption of agricultural income as we find it in the Statute, an exemption which is the same for the landholder, whether permanently or temporarily settled, and the same for the zamindar and the dependent tenure-holder. This done, the references to land and to land revenue being repeated, positive, and plain, and the area of exemption wide, it used general language because it means to catch all else.

Both in what is exempted and in what is not exempted the two classes of estates are on the same footing; thus, as to buildings, land and mining rights, incomes thence derived are on the same footing as other people's incomes.

36. If this in effect be the actual tenour of the language, for what and why is it to be deserted? For an interpretation which throws upon the income tax authorities the duty of applying the language of Regulation I of 1793 as independent Statute of exemption? On the hypothesis that the attention of the Legislature was not called to the Permanent Settlement? Surely not. On the theory that the Legislature felt so confident in the continuity of its policy that it could, without the expenditure of a few words of saving, use the widest language without leading any one to suppose that mining royalties in Bihar would be touched? The plain fact is that there had been no continuity of policy since 1860 save as to cesses which were now established. On the view that the Legislature cannot be supposed to have repealed the Permanent Settlement without formal confession of so fell a purpose? But when the promises of 1793 were altogether over-ridden, the Legislature had never done it in this manner; and the Act of 1886 was a victory for the Permanent Settlement in particular by reason of the express exemptions.

37. In *Barker v. Edger* (1898) A.C. 748, Lord Hobhousa put the matter thus:

When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.

38. Having regard to the subject matter and terms (of the Regulation and of the Act), I think it sufficiently clear that the provision made by Section 2 of the income tax Act, 1922, is not made in such complete abstraction from the facts of the Permanent Settlement as to explain, despite the language of Sections 4 and 6, the absence of an express mention of income derived from hereditaments permanently settled among the classes of income to which the Act shall not apply; or as to leave open the inference that the language of Regulation I of 1793 is to be on independent test of liability.

39. It remains to consider the Assessee's claim to exemption as a claim to come within the provisions of Section 2 of the Act. In my opinion, income derived from a fishery is not "rent or revenue derived from land which is used for agricultural purposes." Learned Counsel for the Assessee has suggested that land used for agricultural purposes becomes at certain seasons flooded, and that in bhils and dobas thus formed over such land there may be rights of fishing of some value. Any such case will require careful consideration on its own facts. If the argument is that the income in such a case is "derived from land which is used for agricultural purposes" although it is not derived from any such use, it may be observed that the decision in the mela case *Umed Rasul Saha Fakir v. Anath*

Bandhu Chaudhuri (1901) 28 Cal. 637 is some authority the other way. From the papers in the present case I do not collect that this is the special case made by the Assessee, who claims to own extensive fisheries called jalkar mehals, which are leased out in consideration of the payment of rent called jalkar rent. In my opinion, "fishery" is not "agriculture" nor an "agricultural purpose," and income derived from fisheries is not exempt as such even when the fisheries are comprised in a permanently settled estate.

40. The last question for decision relates to what is called sthaljat, or rent received for the use of land for stacking timber. In the application of the Assessee it is thus described:

For the purpose of collecting the rent of the forests periodic leases are granted to parties (permitting them to fell timber. Rent-in-kind is realised by a share of the timber felled or by a share of the sale-proceeds thereof. The timber so felled is not subjected to any process of manufacture. The lessees stack the felled timber at places for the purpose of sale and payment of rent and for such stacking they pay rent of the site Under the name of sthaljat.

41. Here, again, the question is whether this rent is derived from land which is used for agricultural purposes u/s 2(1)(a) of the Act. The contention of the Assessee is that this rent is part of his income from the forest, that the land is used for purposes of forestry, and that forestry is within the meaning of the term "agriculture" as used in the Act. The learned Senior Government Pleader declines to concede that there is anything in the income tax Act which exempts income derived from forestry, and contends that in any case this income is not a part of forestry income. The Commissioner of income tax, Assam, in the letter of reference to this Court says:

The land is used, not by the applicant for the sale of his agricultural produce, but by persons to whom this applicant gives the right to cut, convert, transport and sail timber. While the profits arising to the landlord from forestry are exempt from income tax, I am of opinion that the profits of the persons who work the timber arise from "business" and are therefore assessable to income tax. Consequently, rent received by the applicant is rent received from business premises and therefore does not come under the head of "agriculture" and is taxable.

42. These divergent views are the consequence of arguing from widely different premises so far as the law is concerned; but the question is partly one of fact. The Senior Government Pleader has disclaimed any duty to argue on this Reference the wide and important question whether income from forestry can for any purpose be brought within the definition of "agricultural income." This Court, on the other hand, has no concern with the executive instructions of income tax authorities, and will not consent to interpret anything except the law. I observe that in the Madras case already cited the Court upon reference to certain dictionaries came to the opinion that-

The word "agriculture," while sometimes used in the narrow sense of the art or science of "cultivating the ground" is also used in a much wider sense so as to include even "forestry" according to Webster.

43. I am not convinced that the Legislature, if it intended to include "even "forestry"" would have been content to say "agriculture", but in the circumstances I desire to prejudice this question no further than by an expression of this doubt. The contention of the Assessee, however, must reach so far as to establish that land rented to purchasers of timber whereon they conduct operations of and incidental to the business of selling timber is land used for agricultural purposes by reason that the timber is bought from him, that the site is within or adjacent to his forest, and, that the amount due to him is paid there, or is in some manner calculated there. I think that this is to stretch ordinary language beyond its reasonable limits, and that the income in question is liable to assessment.

Page, J.

44. This is a Reference by the Commissioner of income tax, Assam, u/s 66(2) of the income tax Act (Act XI of 1922). The Reference is made on the application of the Assessee. The Commissioner has held that income derived from pasturage is not assessable to income tax on the ground that it is "agricultural income" within Sections 2 and 4 of the income tax Act. The Crown does not now dispute the correctness of the Commissioner's decision on this point with which I agree.

45. The issue in controversy which fell for determination on this Reference is whether income derived from the rental (i) of fisheries or jalkar mehals, (ii) of land let to contractors for the purpose of stacking timber, and accruing from the estates of the applicant which were permanently settled under Regulation I of 1793 and subsequent Regulations, is assessable to income tax. The Commissioner has determined that the income which is derived from each of these sources is liable to assessment. The applicant, however, contends that neither of these sources of income is assessable to income tax, and he founds his contention upon two grounds : (i) that such income is "agricultural income" as defined in Section 2, and is exempted from assessability u/s 4(3)(viii) of the income tax Act of 1922, (ii) that the imposition of income tax upon income derived from the sources in question would be an additional "public demand" upon permanently settled land, the jama in respect of which was fixed for ever under Regulation I of 1793, and that such income, therefore, is not within the ambit of the charging sections of the income tax Act.

46. In my opinion, the first contention upon which the applicant relies is without foundation. In Section 2 of the income tax Act the meaning of " agricultural income" so far as is material for the purposes of this Reference, is stated to be-

(a) 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 Government as such; (b) any in-

come derived from such land by - (i) agriculture, or (ii) the performance by a cultivator or receiver of rent-in-kind or 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).

47. I agree with the view expressed by the Commissioner that income derived from fisheries cannot reasonably be regarded as income derived from agriculture, however wide the meaning may be, which is attributed to the word, agriculture. It is, I think, unnecessary to dilate upon the subject and, in my opinion income derived from fisheries is not within any of the exemptions set out in Section 4 of the income tax Act.

48. With respect to income which is derived from the rent of land let to contractors for sthaljat or the stacking of timber, it is to be observed that the applicant does not himself carry out on the land any of the operations specified in Section 2(b)(ii) and (iii). The contractors use the land for the purpose of felling, converting, stacking, transporting and selling timber thereon. Having regard to the purpose for which the land is let, and the use to which it is put by the contractors, it is unnecessary for the Court to determine whether income derived from forestry, in all or any of its branches, is "agricultural¹ income" as defined in Section 2 of the income tax Act. I refrain from expressing any view which I may entertain upon that vexed question because, in my opinion, income derived from sthaljat is not "rent or revenue derived from land which is used for agricultural purposes," but is rent derived from land which is used for the purpose of enabling the timber contractors to carry on their trade or business see *Killing Valley Tea Company Limited Vs. Secretary of State for India in Council*, . In respect of such income the applicant is not entitled, in my opinion, to pray in aid the provisions of Section 2 for the purpose of claiming exemption from liability to pay income-

49. The second ground upon which the applicant bases his contention that provisions of the income tax Act do not apply to the sources of income in question raises an issue of grave and far-reaching importance. The applicant urges, that, if it were to be held that provisions of the income tax Act are applicable to such income, the result would be that the rights and privileges which were granted and secured to him for ever as the proprietor of permanently settled estates under Regulation I of 1793, and subsequent Regulations, would pro tanto be abrogated. Now, the Regulations which comprise Permanent Settlement were made pursuant to powers granted under 13 George III, C. 63, 21 George III, C. 70, 37 George III, C. 142 and 53 George III, C. 155. By Clause II of Reg. I of 1793, it is provided:

Article I. In the original Regulations for the decennial settlement of the public revenue of Bengal, Bihar and Orissa, passed for those Provinces respectively on

the 18th September 1789, the 25th November 1789, and the 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 the ten 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.

50. Clause III, Article II:

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.

51. By Clause 31 of Regulation II of 1819, it is provided.

First, Nothing in the present Regulation shall be considered to affect the right of the proprietors of estates, for which a Permanent Settlement has been concluded to the full benefit of all waste lands included within the ascertained boundaries of such estates respectively at the period of the Decennial Settlement, and which have since been or may hereafter be reduced to cultivation.... The zamindars and other proprietors of land will, be enabled by an application to the Courts to obtain immediate redress in any case in which the Revenue Authorities shall violate or encroach on the rights secured to them by the Permanent Settlement. Second. It is further hereby declared and enacted that all claims by the Revenue Authorities on behalf of Government to additional revenue from lands, which were at the period of the Decennial Settlement included within the limits of estates for which a Permanent Settlement has been concluded, whether on the plea of error or fraud or on any pretext whatever - saving of course the case of lands expressly excluded from the operation of the settlement, such as lakhiraj and thanadari lands - shall be and considered wholly illegal and invalid.

52. Lord Cave, in the case of Secretary of State for India in Council v. Maharaja of Burdwan AIR 1922 P.C. 6, observed:

On an analysis of the terms of these Regulations, so far as they are material to the question now under consideration, it appears that, while lands included in a permanent settlement were carefully excluded from further assessment, this protection was extended only to lands actually in existence at the time of the settlement and specifically included in the estate as settled. The produce of "every bigha" of these lands was to be assessed to revenue once for all (Regulation XIX of 1793); and even waste land producing little or no revenue to the proprietor, if included within the limits of any pergunnah, mouzah or other division of estates for which a settlement was concluded, was to be free from

further assessments, on being brought into cultivation (Regulation II of 1819, Section 31).

53. Now, no new or additional "public demand" or assessment to taxation, except such as is made pursuant to authority granted by the Legislature can lawfully be charged upon lands which form part of a permanently settled estate. Any such assessment or demand is wholly illegal and invalid. See *Secretary of State v. Fahamidannessa Begum* (1889) 17 Cal. 590, *Maharaja Jagadindra Nath Roy v. Secretary of State* (1902) 30 Cal. 291, *Secretary of State v. Maharaja of Burdwan* AIR 1922 P.C. 6. Whether any particular property is included in a Permanent Settlement is a question of fact see *Maharaja Jagadindra's case* (1902) 30 Cal. 291. In the present case it appears from the letter of Reference and the documents attached thereto - Indeed, it is not disputed-that both the jalkar rights of fishery and the lands, the income from which the Crown contends is assessable to income tax, form part of permanently settled estates of which the applicant is the present zamindar. On behalf of the Crown, however, it is conceded that the Legislature is entitled to abrogate, modify or destroy any right or privilege, even if it be of its own creation and that the provisions of the income tax Act override and repeal the Regulations made in 1793 and in subsequent years, in so far as the terms thereof are inconsistent with the provisions of the income tax Act. The applicant, on the other hand, conceded that the Legislature possesses an unfettered discretion by a subsequent enactment to cancel existing rights, whether such rights had been created under the common law, or by Statute, or otherwise. *Gujus dare est ejus est disponere*. He urged, nevertheless, that when an enactment is passed inconsistent with the existence or the validity of rights subsisting at the time when the Act came into operation, and wide enough in its terms to effect the repeal of them, such rights would only thereby be abrogated or destroyed if the Legislature by express words, or by necessary implication from the terms of the later Statute, had manifested its intention to abrogate or repeal such existing rights, and he contended that the Legislature by enacting the income tax Act had neither specifically, nor as an irresistible implication from the language used, expressed its intention to cancel or destroy the rights and privileges which had been solemnly granted and secured to the applicant under the Permanent Settlement. Now, the charging sections of the income tax Act, 1922, are Sections 3 and 4. Section 3 provides:

Where any Act of the Indian Legislature enacts that income tax shall be charged for any year at any rate or rates applicable to the total income of an assessee tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, company, firm, and Hindu undivided family.

54. Section 4, Sub-section (1) says:

Save as hereinafter provided, this Act shall apply to all income, profits or gains as described or comprised in Section 6, from whatever source derived, accruing,

or arising, or received in British India, or deemed under the provisions of this Act to accrue or arise, or to be received in British India.

55. Section 4, Sub-section (3)(viii) excludes from the ambit of Sections 3 and 4 "Agricultural income." The heads of taxable income are set out in Sections 6 to 12.

56. Section 6 provides:

Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income tax in the manner hereinafter appearing namely : -(i) Salaries, (ii) Interest on securities, (iii) Property, (iv) Business, (v) Professional earnings, (vi) Other sources.

57. It will be observed that the provisions of the charging sections though wide enough to catch the items of income in question on this Reference, are quite general in character, and that in Chapter III no reference is made to the chargeability of lands other than lands appurtenant to buildings of which the assessee is the owner; the income from such property as that in question being included, if at all, under the heading "other sources of income" in Sections 6 and 12. The Full Court; of the Madras High Court, in the case of Chief Commissioner of income tax v. Zamindar of Singampatti AIR 1922 Mad. 325 having regard both to a Sanad and to Madras Regulation XXV of 1802, under the terms of which the zamindari in question in that case was settled, has recently decided that the terms of these documents exempted the zamindar of such permanently settled estates from taxes which might be imposed thereafter as well as to taxes in force at the time of the Sanad; and that "although it is competent to the Legislature to withdraw or modify such an exemption by a subsequent enactment, this can only be done expressly and not in general terms or by implication." See also Associated Newspapers, Limited v. Corporation of the City of London (1916) 2 A.C. 429, Pole Garew v. Craddock (1920) 3 K.B. 109. Although the document of title, under which the estate affected by these proceedings was originally settled, is not before the Court, the exemption from further taxation granted under the Madras Regulation XXV of 1802 and that granted by the Bengal Regulation I of 1793 are in substance the same and the applicant, in my opinion, was justified in claiming that this case is a decision in favour of the contention which he has urged before us. With great respect for the learned Judges who decided that case, however, I am not myself prepared to go the length of holding that rights, such as those conferred under the Permanent Settlement can only be abrogated if express provisions cancelling such a rights are inserted in a subsequent legislative enactment. No doubt the maxim *generalia specialibus non derogant* may be regarded as embodying a good working rule of construction, but where the intention of the Legislature to abrogate or modify existing rights is manifest as a necessary implication from the language used in the repealing statute, it matters not, in my opinion, that the existing rights are not therein expressly and specifically modified or cancelled. Lord Selborne, Lord Chancellor, refers to this canon of construction in *Mary Seward v. The owner of the Vera Cruz* (1884) 10 A.

C 59, where he observes:

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 a particular intention to do so.

58. Lord Justice Bowen re-stated the canon in *Re Cuno Mansfield v. Mansfield* (1889) 43 C.D. 12 in these words:

In the construction of Statutes you must not construe the words so as to take away the rights which already existed before the Statute was passed, unless you have plain words which indicate that such was the intention of the Legislature.

59. See also *Irrawaddy Flotilla Co. Limited v. Bhagwandas* (1891) 18 Cal. 620, *Sundermull Vs. Ladhuram Kaluram*, and *Duke of Argyll v. Commissioners of Inland Revenue* (1913) 109 L T 893. In *Garnett v. Bradley* (1878) 3 A. C. 944, Lord Blackburn laid down what I conceive to be the true rule of construction applicable in the circumstances of this case. His Lordship observes:

There is another rule which has been laid down, which, I think, is a good rule if it is properly applied, namely, that where there has been a particular rule established either by custom or by statute, where there is some particular law standing, and a subsequent enactment has general words which would repeal that particular law or particular custom, if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together; the first, the particular law, standing as an exceptional proviso upon the general law.

60. After referring to certain cases, His Lordship continues:

In all these cases, however, the particular statute relied upon was a statute in favour of a particular class of persons or the property of a particular class of persons. I do not take upon myself to say that all cases in which that rule has been applied have been such, although I am not aware of any case in which it has been applied to which that remark would not be applicable. But where that is the case, where the particular enactment is particular in the sense that it protects the rights, the property, the privileges of particular persons or a class of persons, the reason for the rule which has been acted upon is exceedingly plain and strong. It would be very unjust, or I would rather say unfair (I do not go further than that), to pass an enactment taking away from a particular person or class of persons his or their rights without hearing what he or they have got to say about it; and if general words were to have the effect of taking away the rights of a particular person or class which had been given to them beforehand, it would be done without their having any knowledge or opportunity of resisting it,

and it is not to be imputed to the Legislature or to be supposed that the Legislature would do what was unfair. Therefore, I think that where only general words are used there is a strong presumption that the Legislature did not intend to take away a particular privilege, right, or property, of particular class, unless they have done something to show that. If they have done something in such a way as would shew that that was their intention, if they have said in negative words that those rights or privileges shall all be taken away any enactment to the contrary notwithstanding, that would prevent the presumption arising at all. But in the absence of that, I think it is an intelligible principle to say that the Legislature shall not be presumed to have done anything unfair, and to have taken away this particular privilege, not having stated openly that they meant to take it away, or in such open or clear language that the persons affected might come and resist and use arguments to shew why it should not be taken away, but having simply used general words quite consistent with, their never having thought of this privilege at all. I think, my Lords, that that principle will reconcile almost all the cases; certainly it will reconcile all I have cited, and it is a good and intelligible principle.

61. See also *Hawkins v. Gathercole* (1854) 6 D G. M. & G. 1. Now, applying this rule of construction to the provisions of the Income Tax Act of 1922, am I entitled to hold that it is manifest from the language used that the Legislature intended that income tax should be imposed upon the zamindars of permanently settled estates, notwithstanding the terms of the Regulations under which the permanent settlement was created? No express provision to that effect is to be found in the Act. Is it not equally probable that the Legislature intended to impose income tax upon income, profits and gains derived from every source whatever (including, estates which had been temporarily settled or unsettled estates), except income derived from sources which under the Statute or otherwise were exempted from assessability to such taxation? If it had been the intention of the Legislature to impose income tax in respect of permanently settled estates, why did it not express its determination to do so in clear and un-mistakeable language?

62. It is, I think, permissible, and not uninformative to refer briefly to the history of the legislation in India relating to income tax as a possible mode of elucidating the true meaning of the language used in the consolidating Act of 1922. The first Indian income tax Act was Act 32 of 1860, which was passed in order to meet the heavy expenditure incurred during the Mutiny. It provided inter alia by Section 1:

From and after the 31st day of July, 1860, there shall be collected and paid for the service of the Government of India during the term herein limited, for and in respect of the property and profits mentioned in the several¹ Schedules contained in this Act, and marked 1, 2, 3 and 4 respectively, the yearly duty of three rupees for every hundred rupees of the-annual value thereof, that is to say, Schedule I, for and in respect of the property in, and profits arising from, all

lands and houses in India.

63. During the succeeding five years and again in 1869, in spite of protests from the zamindars upon whom the burden of the impost fell, income tax appears to have been levied in respect alike of permanently settled, temporarily settled and unsettled lands. In 1860, therefore, when the Government determined to make income accruing from all lands assessable to income tax, it did not hesitate to express its intention to do so in plain and unambiguous language. In 1886, however when a general income tax was again imposed by Act II of that year, and in the subsequent Income Tax Acts passed in 1918 and 1922, no specific reference is made to the intention of the Government to charge all lands, and no mention whatever is made that it was the intention of the Government to assess income tax in respect of lands comprised in permanently settled estates. Why not, if the intention of the Legislature in passing the income tax Acts had been to abrogate pro tanto the exemption of such estates; from further taxation which had been granted under the Permanent Settlement; in 1793?

64. The reason for the strange omission of the Legislature to express its alleged intention to do so in plain and express language may be that after 1865 the Legislature regarded a tax upon profits and gains derived from professional and industrial sources as more likely to create a productive source of revenue to the State than a tax upon income derived from land. Or again, assuming for the moment that the Legislature did in fact intend, by enacting the Income Tax Acts, 1886-1922, to modify the terms of the Permanent Settlement, it may be that the Legislature, construing the exemption from further taxation granted under the Regulations to be an exemption confined to

an increase of the public demand levied upon the zamindars," in consequence of the improvement of their estates", "and seeking to allay the anxiety which it felt lest rates upon property should appear to the people to be a breach of faith."

felt itself justified in refraining from expressly imposing a tax upon income derived from land as it had done in 1860 and 1869, and in endeavouring to attain the same result by means of charging sections couched in general terms, but wide enough to catch income derived from land in the meshes of the tax.

65. It had been admitted by the Secretary of State for India in 1870 that the misunderstanding upon which

such claims to exemption are founded is a misunderstanding which has been long prevalent, and has imparted a character of doubt and hesitation to the language and to the acts of the Government both in India and at Home.... It is injurious alike to the Government and to the people that this condition of things should continue.

66. (See the Despatch of the Duke of Argyll to the Governor-General-in-Council in connection with a proposed cess for educational purposes dated 5th May, 1870). If the Government, as appears to be the fact, was aware of the

expediency of using clear and unambiguous language in legislative enactments affecting permanently settled lands, and was minded to cancel or modify the terms of the Permanent Settlement, I should expect to find that the Legislature had expressed its determination to do so in plain and direct language.

67. But in framing the provisions of the Income Tax Acts, 1886 to 1922, the Legislature has not elected to take the course which it had adopted in 1860 and 1869, and, whatever the reason may be which induced the Legislature to refrain from doing so, it happens that the only provisions of the Income Tax Act to which the learned Government Pleader is able to point as indicating the intention of the Legislature to abrogate pro tanto the rights and privileges solemnly granted and secured to the zamindars of permanently settled estates under the Regulations of 1793 and 1819 are the general words of the charging Sections 3 and 4.

68. Now, it may, or may not be, that subsequent events have proved that the Bengal Permanent Settlement was an improvident, or an impolitic transaction into which the Government of India ought not to have entered. Again, the Legislature may or may not be justified on moral or political grounds in cancelling or modifying the rights and privileges which were granted under the Permanent Settlement. Such problems are matters of policy with which the Court has no concern. The question which the Court is called upon to decide is not whether the Legislature intended to modify, or was justified in repealing, the Permanent Settlement in whole or in part, but whether by enacting the income tax Act it has succeeded in so doing. For the reasons which I have stated, and having regard to the provisions of the income tax Act, so far am I from being satisfied that the Legislature has thereby manifested its intention to cancel or encroach upon the exemption from further taxation which was secured to the applicant under Regulation I of 1793 and Regulation II of 1819, that I am left in doubt as to whether or not such was the intention of the Legislature in enacting: the Income Tax Act. But

no tax can be imposed except by words which are clear, and the benefit of the doubt is the right of the subject

per Lord Justice Fitz Gibbon in *Re Finance Act, 1894*, and *Studdert* (1900) 2 I.R. 400, and the Court is not entitled to substitute for express words or an irresistible-inference a process of guess-work, however subtle the reasoning, or ingenious the marshalling of facts by which such a process is supported.

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible, in a taxing statute, where you can simply adhere to the words of the statute.

69. Per Lord Cairns in *Partington v. The Attorney-General* (1869) 4 E. & I. A. 100. I am of opinion, therefore, notwithstanding the provisions, of Income Tax Act, that income derived from the estates of the applicant which are permanently settled under Regulation I of 1793 and Regulation II of 1819 is not assessable to income tax. In arriving at this conclusion, I am not unmindful that it has been held that royalties upon coal constitute income derived from "other sources" and as such, is assessable to income tax. *Manindra Chandra Nandi v. Secretary of State* (1907) 34 Cal. 257, *In the matter of Raja Jyoti Prasad Singh Deo* AIR 1921 Pat. 103, and that profits derived from a mela, or fair, have also been held to be assessable to income tax. *Umed Rasul Shah Fakir v. Anath Bandhu Chowdhuri* (1901) 28 Cal. 637, *Secretary of State v. Karuna Kanta Choudhury* (1907) 35 Cal. 82, see also *Maharaja Birendra Kishore Manikya Bahadur Vs. Secretary of State for India in Council*, . But it does not appear that, in these cases, the contention was or in the circumstances could have been raised that such income was derived from land which formed part of a permanently settled estate. It has also been held that assessments in respect of road cess and public works cess may lawfully be made upon "the annual value of lands" and "the nett annual profits of mines, etc." See *Manindra Chandra Nandi's case* AIR 1922 Mad. 325. But a further and vital distinction is to be observed between the language used in the Income Tax Act and that used in the Bengal Cess Act. By Sections 5 and 6 of Act IX of 1880, it is specifically provided:

5. From and after the commencement of this Act in any district or part of a district all immovable property situate therein, except as otherwise in Sections 2 and 8 provided, shall be liable to the payment of a road cess and a public works cess.

6. The road cess and the public works cess shall be assessed on the annual value of lands and on the annual nett profits from mines, quarries, tramways and other immovable property, ascertained respectively as in this Act prescribed.

70. I am, therefore, of opinion that (i) the income derived from fisheries and (ii) the income derived from land used for stacking timber which accrues from the permanently settled estates of which the applicant is the present zamindar cannot lawfully be charged with income tax.

Rankin, J.

71. My learned brother and I are agreed as to the course which should be taken in view of the difference of opinion between us upon the subject-matter of this Reference. In the case of *Tata Iron and Steel Co. Limited v. Chief Revenue Authority, Bombay* AIR 1923 P.C. decided on the 12th March, 1923 by the Judicial Committee of the Privy Council, it was held that a decision u/s 51 of the Income Tax Act of 1918 was merely advisory, and not in the proper or legal sense of the term final, and that, therefore, no appeal lay under the Bombay Letters Patent to His Majesty in Council, because the judgment was not a final judgment or final order within the meaning of that Letters Patent. The present Reference arises

under the corresponding Section 66 of Act XI of 1922. It is important to observe that a right to state a case to the High Court is given to the Commissioner in the course of any assessment under the Act, or any proceeding in connection therewith, not being of a criminal character. If in the course of such a proceeding a question of law arises, the Commissioner may, either on his own motion or on reference from any income tax authority, subordinate to him, draw up a statement of the case, and refer it with his own opinion thereon, to the High Court. Again, within a month of the passing of an order fixing an assessment the assessee may by application require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall within a month draw up a statement of the case, and refer that with his own opinion to the High Court. The result is therefore, that the provisions of Section 66 are not provisions whereby an order made by the Income Tax authority is appealed from in the sense that this Court is invited to affirm or discharge it. The proceedings are proceedings whereby the income tax authority may be instructed by an opinion to be given by this Court upon a case stated by the Commissioner. That is a special jurisdiction, and the only authority we have connecting that jurisdiction in any way with the Letters Patent of this Court, is an observation made in *Maharaja Birendra Kishore Manikya Bahadur Vs. Secretary of State for India in Council*, where a case stated in accordance with the Income Tax Act is dealt with as being, theoretically speaking, a form of appeal such as is contemplated by Clause 16 of the Letters Patent.

72. The jurisdiction to be exercised is in no way related to the Code of Civil Procedure. The Code of Civil Procedure, by Section 4 "provides" that,

In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force.

73. When we come to read Section 98, we find that there is a provision under the heading "Appeals from Original Decrees" according to which on a case of difference of opinion between two Judges, the decree appealed from shall be affirmed and, to that proviso, there is a proviso that the Bench may, when they differ in opinion on a point of law refer the matter for the opinion of another Judge or Judges. Even if we take the general provisions of Section 141 and the rather less general provisions of Section 108, it does not seem to be possible to apply the provisions of Section 98 to a case u/s 66 of the Income Tax Act. There is no decree or order which is being challenged in the sense that the Court is invited to affirm or discharge it. I find, therefore, the greatest difficulty in seeing how Section 98 can be applied in such a case unless we are to solve all difficulties by endeavouring to do so cypres, and entirely by analogy. Moreover, the decision of the Privy Council in the case of *Bhaidas Shivdas v. Bai Gulab* AIR 1921 P.C. 6 does not seem to leave it open to doubt that in such a case as this the provisions of Section 4 of the Code do save the provisions of the Charter

from being taken away by the provisions of Section 98 of the Code of Civil Procedure. There is, it is quite true, room for difference of opinion as to whether the language of their Lordships of the Judicial Committee ought not to be read for the present as confined to the kind of appeal which was then before them for consideration, namely, an appeal from the Original Side, that is, an appeal granted by the very terms of the Letters-Patent. Upon this matter, a decision has been only to-day pronounced by another Divisional Bench of this Court in Appeals-from Appellate Orders Nos. 19 and 20 of 1923. It is unnecessary, in my opinion, to go into that question. It may be true or not that there is a strong body of authority in the case of Second Appeals from the mofussil in favour of applying; the provisions of Section 98, Code of Civil Procedure. But undoubtedly the construction put by the Judicial Committee on S.4 of the Code makes it still more difficult for us to apply Section 98 when we are exercising such a very particular jurisdiction as is given us by Section 66 of the Income Tax Act a jurisdiction which seems to be far removed from any jurisdiction that is contemplated by Section 98. For these reasons, it seems to me that the only provision under which it is open to us to act is Clause 36 of the Letters Patent of 1865. I have examined the language of that Clause with care to see whether there is any phrase or expression in it which, renders it inapplicable to such a jurisdiction as we are now exercising. It seems to me that the language there is quite wide enough to comprise the class of cases now in question. It runs,

if such division Court is comprised of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there shall be a majority, but if the Judges should be equally divided then the opinion of the senior Judge shall prevail.

74. In these circumstances, it seems to me that the matter is governed by Clause 36 of the Letters Patent, and that the opinion which I have expressed must prevail.

75. The Registrar will now send under the seal of the Court and his own signature as provided by Section 66, Sub-section (5), a copy of the judgments of my learned brother and myself to the Commissioner of Income Tax, Assam, but it must be pointed out to him in clear terms that it is my judgment, as the judgment of the senior Judge, which is the substantive one to control his action subject of course to any appeal that there may be.

76. There will be no costs in the Reference.

Page, J.

77. I am of the same opinion, and I have nothing to add. Reference answered in the affirmative.