
(1945) 08 CAL CK 0007
In the Calcutta High Court
Case No : Appeals Nos. 782 and 783 of 1941

Province of Bengal

APPELLANT

Vs

Sm. Hingul Kumari Law

RESPONDENT

Date of Decision : 10-08-1945

Acts Referred:

Citation : (1945) 08 CAL CK 0007

Final Decision : Dismissed

Judgement

Biswas, J.—The plaintiff respondent as executrix to the estate of her deceased husband is owner of touzi No. 1991 of the Midnapore Collectorate, and has raised the two suits out of which these appeals arise to contest the validity of an assessment of cess made by the appellant, the Province of Bengal, under the Bengal Cess Act (Bengal Act, 9 [IX] of 1880) on two hats which are held on certain khas lands of the plaintiff lying within two mouzas appertaining to the said touzi. These hats had been previously assessed to cess by the appellant as "lands" on their "annual value" under chapter II of Part II of the Act, but that assessment was declared ultra vires and illegal by a judgment of this Court reported in 42 C. W. N. 169 : 67 C. L. J. 50 Secretary of State v. Hingul Kumari ("37) 42 C. W. N. 169 : 67 C. L. J. 50. Following that decision, the present assessment was made under Chap. V of Part II on the basis of "annual net profits," and the plaintiff now questions the legality of this assessment also. Both the Courts below have held in her favour, and hence these two appeals by the Province of Bengal. Section 5, Cess Act, declares that 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 S. 2 provided, shall be liable to the payment of a road cess and a public works cess. Section 6 next provides as follows:

The road cess and the public works cess shall be assessed on the annual value of lands, and until provision to the contrary is made by the Central Legislature, on the annual net profits from mines, quarries, tramways, railways and other

immovable property, ascertained respectively as in this Act prescribed.

Chapter II and V of Part II respectively deal with the two modes of assessment under the two parts of the section. The assessment in the present case has been made under the second part of S. 6 : in other words, hats have been treated as "other immovable property", and the tolls and fees realised from the hats as "annual net profits." The Act contains no definition of "annual net profits", but "annual value" is defined in S. 4 as follows:

"Annual value of any land, estate or tenure" means the total rent which is payable, or if no rent is actually payable, would on a reasonable assessment, be payable, during the year by all the cultivating raiyats of such land, estate or tenure, or by other persons in the actual use and occupation thereof.

The definition clearly shows that "annual value" is made up of something which is "rent" or is payable for "use and occupation" of land. In the previous judgment of this Court it was held that the tolls and fees which the plaintiff realised from the hats did not constitute rent and had nothing to do with the use and occupation of the land on which the hats were held. The vendors who came to the hats to sell their goods made these payments only for the privilege of selling the goods. This is what the learned Judges said:

We hold that the sums of money paid or payable by them are not rents. Our reasons are: (i) that these persons are not tenants of the plaintiff, as they had or have no interest in the land of the hat or any portion thereof. They could be removed at the sweet will of the plaintiff: the plaintiff does not give them the right to sit on any particular or defined spot, which they choose for themselves according to convenience, and they or at least some of them, the hawkers, have to pay even without their sitting upon any spot; (ii) that the sums of money realised from them are not paid or payable for the use and occupation of any site. They solely depend upon the quantity and quality of the articles sold, and no money is payable, if there is no sale, although the unlucky vendor may have been sitting the whole of the hat day on a particular site within the hat compound. The mere fact that the vendors, hawkers, or stall holders could not sell any commodities without using or occupying the land does not, in our opinion, necessarily show that the fees which they paid to the plaintiff were paid partly at any rate for use and occupation of the land.

2. Relying on the Full Bench decision in 35 Cal. 82: 11 C. W. N. 1053 Secy. of State v. Karuna Kanta Choudhury ("07) 33 Cal. 82 : 11 C. W. N. 1053 : 6 C. L. J. 342 (F.B.), their Lordships accordingly came to the conclusion that the income derived from the hats did not come within the definition of "annual value," and the assessment on the basis of annual value was, therefore, set aside as illegal and ultra vires. The learned Judges expressly left open the question as to whether the hats could be assessed on the alternative basis of "annual net profits" under the second part of S. 6, following the provisions contained in Chapter V of Part II of the Act, and it is this in fact that led to the subsequent

proceedings which are challenged in these suits. The first contention of the plaintiff in the present proceedings is that the hats are lands, and under S. 6 of the Act, they are not, therefore, assessable to cess except on the basis of annual value, and as such assessment has been already held to be illegal, it necessarily follows that they are not liable to assessment at all. According to the plaintiff's construction of S. 6, immovable property which is assessable under the Act, as provided in S. 5, is divided into two categories: (1) lands, and (2) immovable property other than lands, including mines, quarries, tramways and railways; and for each category the section prescribes a distinct mode of assessment, that on annual value in one case, and on annual net profits in the other. If, for any reason, either category of immovable property is found not to admit of the specific mode of assessment prescribed for it, the result will be that it will escape assessment altogether.

3. Assuming that the hats are lands, Mr. Ramaprosad Mookherjee on behalf of the Province of Bengal, however, argues that it is not the effect of S. 6 that all lands are assessable to cess on the basis of annual value, or not at all. He admits that the section makes a two-fold division of immovable property, and that it is a division by dichotomy, so that the two categories mentioned therein are exhaustive of all kinds of immovable property which are liable to the payment of cess. He admits further that neither category is assessable except according to the particular mode of assessment specified in the section as applicable thereto. But he refuses to admit that the first category includes all lands. His contention is that it includes only such lands as are capable of assessment on the basis of annual value, so that where any lands cannot be assessed on that basis, they will necessarily come within the second category of "other immovable property" and will be assessable on the basis of annual net profits. He maintains that the hats have accordingly been rightly assessed under the second part of S. 6. The learned advocate refers in this connection to S. 72 in Chapter V, and contends that the words "other immovable property" in S. 6 have the same meaning as the more extended expression in S. 72 "other immovable property not included within the provisions of Chapter II.

4. One finds it difficult to accept the appellant's contention. In the first place, it involves the reading of some words after the word "lands" in S. 6 which are not there. Secondly, to read any such words, as Mr. Mookerjee would suggest, would amount to an absurdity. The object of S. 6 is to lay down the two modes of assessment admissible under the Act, but in doing so, it necessarily specifies the particular category of immovable property to which each mode of assessment is applicable. It would be absurd, however, to indicate any category of property assessable according to one particular mode by describing it as property which is capable of being assessed according to that mode. Mr. Mookerjee's reading of the section would in fact amount to saying, in the first part of it, that cess shall be assessed on the annual value of lands which are capable of being assessed on their annual value; and the second part should accordingly read that cess shall be assessed on the annual net profits of other immovable property, excluding

only such lands as are capable of assessment on their annual value. Unfortunately, the Act nowhere gives any specific indication of what lands are capable of assessment on the basis of annual value, unless this can be said to be implied in the definition of "annual value". On the other hand, Chapter II which deals with the valuation of lands in accordance with which cesses are to be levied, as well as Chapter III which deals with the rating and levy of the cesses, clearly appear to include all kinds of lands within its scope, and no reservation is made as regards any lands being liable to assessment on the basis of annual net profits. It is not necessary to hold that if land does not admit of assessment on the basis of annual value, it may not still be capable of yielding "annual net profits", but whether the income from land may be regarded as "annual net profits" or not, the scheme of the Act seems to be that it the subject-matter of assessment is land, the only mode in which it may be assessed in on the basis of "annual value", and not of "annual net profits". Thus, in the present case, the tolls and fees derived from the hats were undoubtedly "profits" of the property, though they could not be regarded as "rents". Relying on the previous judgment, Dr. Pal no doubt sought to argue before us that for the same reason for which these tolls and fees were not rents, they were not profits either, but the argument is manifestly fallacious. Rent is no doubt incidental to use and occupation of land, and implies a relationship of landlord and tenant between the parties, but "profits" is a term of much wider significance, having no necessary connection with the use and occupation of the land, and may include income other than that in the nature of rent. Such income will be derivable by the owner of the land because of his interest therein, though the persons from whom it is derived may not have any interest in the land at all.

5. If Mr. Mookerjee is right, and land could be assessed under the Cess Act on annual net profits, where the basis of annual value could not be applied on the ground that the income from the lands was not rent, it would have been much simpler for the Legislature to say that cess shall be assessed on immovable property either on the basis of annual value or on the basis of annual net profits, whichever of these modes of assessment may be applicable. That is not, however, what S. 6 says, nor does it appear that that is the effect intended by the section. The plain meaning of the section as worded is that in the case of lands the cess shall be assessed on their annual value, and in the case of all other immovable properties, including those specifically mentioned (mines, quarries, tramways and railways) on their annual net profits. The expression "other immovable property not included within the provisions of Chapter II", occurring in S. 72, can have no other meaning than what is conveyed by the words "other immovable property" used in S. 6, and in no way enlarges the scope of the latter so as to include lands therein. If, then, the hats are lands, there can hardly be any doubt that they are liable to assessment only on the basis of annual value under the first part of S. 6, and any assessment on annual net profits under the second part of the section must be held to be illegal and ultra vires.

6. That raises the question (i) whether the hats are lands, and (ii) if not, whether they are immovable property other than lands. "Land" and "immovable property" have both been defined in S. 4 of the Act. According to the definitions:

"Land" means land which is cultivated, uncultivated or covered with water, and does not include houses or buildings. "Immoveable property" includes lands and all benefits to arise out of land and things attached to the earth, or permanently fastened to anything which is attached to the earth, but does not include crops of any kind, or houses, shops or other buildings.

7. Mr. Ramaprosad Mookerjee cited a number of cases to show that a hat is a benefit arising out of land, and therefore, within the definition of immovable property as given in S. 2, cl. (5), General Clauses Act, (1 [I] of 1868), which corresponds to S. 3, cl. (25) of the present General Clauses Act (10 [X] of 1897): 22 Cal. 752 Surendra Narain Singh v. Bhai Lal Thakur ('95) 22 Cal. 752, and 36 Cal. 665 Golam Mohiuddin Hossein v. Mt. Parbati ('09) 36 Cal. 665 : 1 I. C. 520 : 13 C. W. N. 596. That definition is in material terms very much the same as that under the Cess Act, being as follows:

"Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

8. These cases are, however, of little assistance to Mr. Mookerjee, for the question which he has to face is not whether a hat is a benefit arising out of land, but whether it is excluded from the definition of land. None of the decisions cited is authority for holding that it is so excluded, and it is indeed difficult to see on what principle a hat may not be held to be land. It is significant that at the trial no attempt was made on behalf of the Province of Bengal to show that the hats which were the subject of assessment in the present proceedings were treated otherwise than as land. The relevant papers, such as the notices served on the plaintiff or the returns, if any, submitted by her, are not on the record, but it may be safely assumed that the notices referred to the hats simpliciter, though they might have specifically asked for submission of annual net profits instead of annual value as on the previous occasion. The fact that the returns called for were of annual net profits could not, however, alter the fact that such profits were intended to be the profits of the hats. It may be that the proceedings purported to be taken under the second part of S. 6, Cess Act, thereby attracting the provisions of Chap. V of part II, but it is quite clear that the annual net profits could not be regarded as constituting the "immovable property" which was being sought to be assessed. Section 72 which deals with assessment under the second part of S. 6, expressly provides that the notice to be served thereunder on the party shall require him to lodge a return of the net annual profits of immovable property which is to be assessed: in other words, a clear distinction is made between the net annual profits and the property of which the net annual profits are required to be returned. The immovable property here could not, therefore, but be the hats as distinguished from the annual net profits of the hats. There is thus no escape from the conclusion that the hats were

assessed as lands, and if so, they could not be brought within the term "other immovable property" as used in S. 6 or within the words "other immovable property not included within the provisions of Chap. II," occurring in S. 79. As already explained, if the hats are lands, they must necessarily be excluded from the category of immovable property other than lands. On these grounds, I hold that the present assessment was wholly invalid and must be set aside. The result is that the appeals must be dismissed with costs.

Das, J.

9. The facts leading up to the two suits out of which the present appeals have arisen lie within a narrow compass and are not in dispute. They may be shortly stated as follows: The plaintiff respondent Sm. Hingul Kumari Law as the executrix to the estate of her husband Kumar Surendra Nath Law deceased, is the owner, inter alia, of the whole estate of Narayangarh bearing Touzi No. 1991, Midnapore Collectorate. Mouzas Parulia and Nangamara lie within that touzi. On portions of khas non-agricultural lands appertaining to the two mouzas, hats are held once a week, the hat at Parulia being known as Bahurupa hat and that at Nangamara as Kushgeria hat.

10. The revenue authorities assessed cess on these hats some years back. Their contention then was that the amounts realised by the estate from the vendors and hawkers were rents and, therefore, they assessed cess under the first part of S. 6 Bengal Cess Act on the "annual value" as defined in S. 4, and ascertained under Chap. II of that Act. The plaintiff-respondent's objections having been overruled by the revenue authorities, she filed suits in the civil Court for a declaration that such assessment was illegal and ultra vires. The trial Court, and the lower appellate Court gave a declaration as prayed. There was an appeal to this Court by the Secretary of State for India. This Court held, on the facts proved in that case, that the tolls realised from vendors and hawkers were not rents and, therefore, no cess could be assessed on the basis of "annual value" as defined in the Act and dismissed the appeal. From the judgment of this Court reported in 42 C. W. N. 169 Secretary of State v. Hingul Kumari ('37) 42 C. W. N. 169 : 67 C. L. J. 50, it appears that a point was raised whether the income from the hats could be assessed under the second part of S. 6 read with Chap. V of the Act as "annual net profits from... other immovable property." The learned Judges observed:

Whether or not it was open to the revenue authorities to assess the income derived by the plaintiff from the hats in the manner and on the basis stated by him in his plaint under the second part of S. 6, following the provisions of Chap. V of the Act, is a question we are not called upon to decide in view of the scope of the suit and we accordingly express no opinion on it.

11. After the dismissal of that appeal, the revenue authorities assessed cess on the hats treating the income derived from the hats as "annual profit from... other immovable property" under the second part of S. 6 by following the provisions of

Chap. V of the Act. The objections of the plaintiff-respondent having been overruled by the revenue authorities, she filed two suits in respect of the two assessments on the two hats praying for a declaration in each case that such assessment was illegal and ultra vires. The trial Court upheld the contentions of the plaintiff-respondent and decreed both the suits. Appeals were preferred by the Province of Bengal before the District Judge.

12. The learned District Judge in agreement with the trial Court found, on the evidence adduced, that the tolls were realised from the vendors and hawkers, who came to the hats and sold merchandise there, on the basis of the quality and quantity of the goods sold; that they did not take any lease of any portion of the site of the hats, that they could be turned out at pleasure, that the amount of toll collected did not depend on the fact as to whether a particular vendor sat within or outside the few sheds that there were, that the hawkers who did not sit but moved about the place selling goods had to pay tolls and that if there was no sale no toll had to be paid at all. After considering the relevant sections and the judicial decisions bearing on the point the learned District Judge affirmed the decision of the trial Court and dismissed both the appeals. The present second appeals are from this decision of the learned District Judge. The only question canvassed before us is as to whether a hat, where tolls calculated on the basis of the quality and quantity of goods sold are collected from vendors and hawkers who come and sell their goods at the hat but have no lease of or interest in any portion of the site where the hat is held is assessable to cess on such collections as "annual net profits from... other immovable property" under the second part of S. 6 Bengal Cess Act and determined under Chapter V of the Act. Section 5 Cess Act imposes liability to cess on all immovable properties except those mentioned in S. 2 of the Act. Section 6 lays down the basis of assessment. The portion of S. 6 which is material for our present purpose is in the following terms:

The road cess and the public works cess shall be assessed on the annual value of lands and until provision to the contrary is made by the Central Legislature, on the annual net profits from mines, quarries, tramways, railways and other immovable property, ascertained respectively as in this Act prescribed; and the rate at which such cesses respectively shall be levied for each year shall be determined for such year in the manner in this Act prescribed:

13. Part II of the Act deals with the mode of assessment. Chapter II in that part provides for valuation of lands, ascertainment and fixation of annual value and publication of Valuation Rolls. Chapter III prescribes the rating and levy of cess. Chapter IV is concerned with the valuation and assessment of lands held rent free, and payment and recovery of cess in respect thereof. Then comes Chap. V which deals with the valuation, assessment and levy of cesses on mines, railways and other immovable property. Section 72 which is in Chapter V requires the Collector before the close of each year to cause a notice to be served upon the owner, chief agent, manager or occupier of every mine, quarry, tramway, railway and other immovable property not included within the provisions of Chapter II in

the prescribed form requiring such person to lodge a return of the net annual profits of such property calculated on the average of the annual net profits thereof for the last three years for which accounts have been made up. Sections 75 and 76 authorise the Collector to ascertain and determine the annual net profits of such property.

14. From the above sections it is clear that cess is assessed on the annual value of land and on the annual net profit from mines, quarries, tramway, railways and other immovable property ascertained respectively in the manner prescribed in the different chapters mentioned above. It will be noticed that annual value of land is ascertained once in every five years and the net annual profits are determined every year. "Annual value" is defined in S. 4. That definition clearly indicates that the annual value means in the case of rent paying lands, estate or tenure the total rent payable during the year by all the cultivating raiyats or other persons in the actual use and occupation thereof and in the case of rent free land, estate or tenure the total rent which would on a reasonable assessment be payable by such raiyats or other persons. In either case the existence of a relationship of landlord and tenant is clearly implied. Therefore, if there is no relationship of landlord and tenant in respect of any land there can be no demand or liability for payment of rent for such land and consequently no question can arise of annual value thereof. Such land has no "annual value" as defined by the Cess Act, "Annual profit" is nowhere defined in the Act and consequently that expression must be understood in its ordinary and natural meaning.

15. It has already been held by this Court in an appeal to which the parties now before us were the contending parties that there is no relationship of landlord and tenant between the plaintiff-respondent and the vendors and hawkers and the collections made by the plaintiff-respondent from the vendors and hawkers are not "rents" and, therefore, the aggregate amounts so collected cannot be regarded as "annual value" as defined in S. 4 and consequently the assessment of these hats to cess under the first part of S. 6 on the basis of "annual value" ascertained and fixed in the manner prescribed by Chap. II was illegal and ultra vires. The correctness of that decision reported in 42 C. W. N. 169 Secretary of State v. Hingul Kumari ('37) 42 C. W. N. 169 : 67 C. L. J. 50 has not been questioned and indeed cannot be questioned by the parties and that decision is binding on them. The only question now is whether these hats are "other immovable property" within the meaning of S. 6 of the Act. In 55 Cal. 1328 Secy. of State v. Sati Prasad ('29) 16 A. I. R. 1929 Cal. 197 : 55 Cal. 1328 : 115 I. C. 185, it was contended that the expression "other immovable property" should be construed ejusdem generis with mines, quarries, tramways and railways. This contention was rejected and it was held that the expression "other immovable property" meant immovable property other than those mentioned before, that is to say other than lands, mines, quarries, tramways and railways. On this construction S. 6 will read as follows:

The road cess and the public works cess shall be assessed on the annual value of lands and until provision to the contrary is made by the Central Legislature on the annual net profits from mines, quarries, tramways, railways and immovable properties other than lands, mines, quarries, tramways and railways ascertained respectively as in this Act prescribed.

16. Learned advocate for the appellant accepts the above principle of construction but contends that a slight qualification should be attached to the word "land" which on this principle of construction is to be excluded from "other immovable property." He contends that only those lands which have annual values and mines etc., should be excluded from "other immovable property." According to the modified construction suggested by learned advocate for the appellant S. 6 will run as follows:

The road cess and the public works cess shall be assessed on the annual value of lands which have annual value and until provision to the contrary is made by the Central Legislature on the annual net profits from mines, quarries, tramways, railways and immovable properties other than lands which have annual value, mines quarries, tramways and railways, ascertained respectively as in this Act prescribed.

17. This construction, he suggests, is clearly supported by the language of S. 72 where the word "land" is not used and only lands which are included within the provision of Chap. II are excluded from "other immovable property." His argument is that S. 5 imposes liability to cess on all immovable property and S. 6 should be so construed as would make all immovable property liable to assessment. Dr. Pal appearing for the plaintiff respondent contends on the other hand, that the language of S. 6 should be construed by giving to it its ordinary and natural meaning and the Cess Act being a taxing statute, if two constructions of a particular section are possible, the one in favour of the subject should be adopted. He suggests that on a plain reading of S. 6 lands can be assessed only on "annual value" and mines, quarries, tramways, railways and immovable properties other than lands, mines, tramways and railways are assessable on "annual net profits" derived therefrom, and the construction suggested by the learned Judges in 55 Cal. 1328 Secy. of State v. Sati Prasad ("29) 16 A. I. R. 1929 Cal. 197 : 55 Cal. 1328 : 115 I. C. 185 should be adopted without any further qualification as suggested by the learned advocate for the appellant.

18. After carefully considering the rival arguments I am unable to accept the construction suggested by the learned advocate for the the appellant and for the following reasons:

(i) Section 6 contains within itself two elements (a) an enumeration of different categories of properties, namely, lands, mines quarries, tramways and railways followed by a residuary category comprising "other immovable property" and (b) an enumeration of two different bases on which assessment is to be made. One of these two bases namely "annual value" is applied to one particular category

namely, "lands" and the other basis namely "annual net profit" to all other categories of properties so enumerated. This scheme indicates that the two bases are mutually exclusive, that is to say one basis which is expressly made applicable to one category of property is not applicable to the other category of property. Thus "annual value" is applicable to lands only and not to "mines, quarries, tramways, railways and other immovable property" and "annual net profits" is applicable to "mines, quarries, tramways, railways and other immovable property" but not to "lands." (ii) This mutually exclusive characteristic of the two bases is emphasised by the word "respectively" appearing in the section. (iii) The construction suggested by the learned advocate for the appellant involves adding the words underlined Printed in italics. - Ed. by me to the section. (iv) If the intention of the Legislature were that cess should be assessed on all immovable properties on whichever of the two bases were found applicable there would have been no necessity for enumerating the different categories of properties and for specifically making one basis applicable to lands only and the other basis applicable to the other categories. It would have been simpler to state that cess should be assessed on annual value, if any or on annual net profits of all immovable properties without enumerating them. (v) Chapter V which prescribes merely the procedure cannot control Chap. I which imposes the substantive liability. (vi) Section 72 is a mere rule of procedure prescribing notice of a particular kind and it cannot be regarded as modifying S. 6 which regulates the general basis of assessment. (vii) Section 72 requires the Collector to cause a notice to be served upon the owner, chief agent, manager or occupier of every mine, quarry, tramway, railway and other immovable property not included within the provisions of Chap. II. Valuation and assessment of lands held rent free and payment and recovery of cess in respect thereof are regulated by the provisions of Chap. IV. It cannot for a moment be suggested that notice under S. 72 which is in Chap. V dealing with ascertainment of annual net profits is to be given to the owners of lands held rent free which do not come under Chap. II but fall under Chap. IV which deals with ascertainment of annual value of rent free lands, yet that will be the result if we were to accede to the construction suggested by the learned advocate for the appellant. For reasons stated above, and in the light of the general principles of construction of statutes, I have come to the conclusion that on a correct construction of S. 6 "land" can be assessed only on its "annual value" and all immovable properties other than land are assessable on their "annual net profit." "Annual net profit" can never be the basis of assessment of land under the Act as it stands at present and, therefore, if a particular property is "land" but it has no "annual value" as defined by the Act, then under S. 6 it cannot be assessed to cess at all.

19. The above conclusion, however, does not dispose of these appeals, for the question still remains to be answered, namely, whether these hats with which we are dealing are "land" or "other immovable property." If these hats are "land" then they can be assessed only on their "annual value" as defined in the Act. It has already been held (42 C. W. N. 169 Secretary of State v. Hingul Kumari ("37)

42 C. W. N. 169 : 67 C. L. J. 50) that the collections made at these hats are not rent and, therefore, cannot come within the definition of "annual value." In this view of the matter, even if these hats are "land" they are not assessable to cess because the only basis of assessment of "land" to cess is the "annual value" thereof. If, on the other hand, these hats are "other immovable property" then they may be assessed on the basis of the "annual net profit" thereof. It is, therefore, necessary to determine whether these hats are "land" or "other immovable property." "Immovable property" is defined in S. 4 of the Act as including lands and all benefits to arise out of land and things attached to the earth, or permanently fastened to anything which is attached to the earth, but does not include crops of any kind, or houses, shops or other buildings. "Land" is defined in the same section as meaning land which is cultivated, uncultivated or covered with water and does not include houses or buildings. It will be noticed that in the definition of "immovable property" the Legislature has used the word "includes" and in that of "land" the word "means." It is well known that the Legislature uses the word "means" where it wants to exhaust the significance of the term defined and the word "includes" where it intends that while the term defined should retain its ordinary meaning its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise, so as to make the definition enumerative but not exhaustive. In this sense the definition of "immovable property" is enumerative and wider than that of "land" while the definition of "land" is not only exhaustive but expressly excludes houses and buildings. The several categories enumerated in the definition of "immovable property" are (a) land, (b) all benefits to arise out of land, (c) things attached to the earth and (d) things permanently fastened to anything attached to the earth. This enumeration of categories is followed by the exclusion of "crops of any kind, houses, shops or other buildings." The important question we have to answer is whether a hat of the description or kind we are concerned with comes within any and if so which of the four several categories enumerated above.

20. At common law, a market or fair is a franchise conferring a right to hold a concourse of buyers and sellers. Strictly speaking, the term market or fair means the franchise and is applicable to the right itself, though in common parlance it may be applied to the concourse of buyers and sellers as also to the market place. This franchise may be acquired by grant from the Crown or by prescription or under Act of Parliament. At common law this right to hold a market or fair is not an incident of ownership of the soil on which it is held but it is a franchise or privilege in the nature of an incorporeal right acquired in one of the three ways mentioned above. (See Halsbury, and Edition, Vol. 22, Arts. 58-60, p. 44-45).

21. In India there appears to be no such thing as a market franchise. In 17 Cal. 458 *Rakhal Das Addy v. Durga Sundari Dasi* ('90) 17 Cal. 458 an attempt was made to establish that the right of opening a hat in Bengal is in the nature of a franchise as in England. The learned District Judge rejected this contention and held that "the right of opening a hat in Bengal was not of the nature of a

privilege or a monopoly, but a simple right which every landholders possesses." This was upheld by this Court on appeal. In 47 Cal. 1079 Hem Chandra Roy v. Kristo Chandra Saha ("20) 7 A. I. R. 1920 Cal. 255 : 47 Cal. 1079 : 58 I. C. 879 : 24 C. W. N. 800 it was again held by this Court that the right to hold a hat was an incident of ownership of the land. The owner of the land may use and enjoy his land in any way he pleases provided he does not create a nuisance or infringe his neighbours' rights. He may let, sell, mortgage or otherwise deal with his land. He may similarly hold a hat on his land. The right to hold a hat is, therefore, in its origin, an ordinary incident of the ownership of the land and initially the owner of the land has the right to hold a hat on his land. But this right may be transferred to another person. This right to hold a hat may be transferred along with the land or without the land. In other words, the owner of the land may transfer the land or some interest in the land carrying with it the right to hold a hat or he may only transfer the right to hold a hat without transferring any interest in the land on which the hat is to be held. Thus, the owner may grant a lease of his land and authorise the lessee to hold a hat thereon, as was the case in 55 Cal. 1328 Secy. of State v. Sati Prasad ("29) 16 A. I. R. 1929 Cal. 197 : 55 Cal. 1328 : 115 I. C. 185 and the other cases to which I shall refer in detail hereafter or he may give only a bare license to hold a hat without giving the licensee any interest in the land on which the hat is to be held as was done in the Full Bench case in 35 Cal. 82 Secy. of State v. Karuna Kanta Choudhury ("07) 33 Cal. 82 : 11 C. W. N. 1053 : 6 C. L. J. 342 (F.B.). Such a bare licensee when he holds the hat is the owner of the hat just as much as the owner or the lessee of the land who holds a hat on his land is the owner of such hat. Although originally the right to hold a hat is an incident of ownership of the land, yet the right may be severed from the ownership of the land, and transferred to another person without transferring to him any interest in the land. The owner of the hat is, therefore, not necessarily the owner of the land or owner of any interest in the land, for he may have only a bare licence to hold a hat without any interest in the hat site. It follows, therefore, that the term hat, in its strict legal sense, like the term market or fair in English common law, means the right to hold a concourse of buyers and sellers and the owner of the hat is he who has this right. Although in the minds of lay people the conception of a hat may be associated with the particular plot of land where it is held and although in common parlance the term hat may be applied to the site of the hat, yet in contemplation of law and strictly speaking it means the right to hold a concourse of buyers or sellers which the owner of the hat, be he the owner of the land or his lessee or his licensee, possesses. The only difference between a hat in India and a market in England is that in England this right is a franchise acquired under a grant from the Crown or by prescription or under an Act of Parliament whereas in India it is originally an incident of ownership of land and may be acquired under a grant from the owner.

22. The legal conception of hat being such as I have just mentioned it is obvious that it cannot in its strict meaning fall within the definition of "land" as given in

S. 4, Cess Act. That definition clearly regards land as a physical "object. A hat in its strict legal meaning connotes an incorporeal right and, in my opinion, cannot come within the definition of "land". The question then arises can a hat of this kind be said to be a "benefit to arise out of land" so as to come within the meaning of "immovable property" appearing in Ss. 4 and 6, Cess Act. This leads me on to consider the nature of the profits of a hat, I shall not venture to lay down any general proposition as to the meaning of "benefit arising out of land" but shall confine myself to the question whether the profits of a hat is a "benefit arising out of land." At common law market toll is a subordinate franchise and means a sum payable upon sales of tollable articles in a market or fair. By custom or statute there may be dues in the nature of tolls, payable upon goods brought into a market for sale, whether sold or not, and these are in some cases payable in kind. This right or franchise may be acquired by grant from the Crown by statute or by prescription and unless the right can be established in one of these ways no toll is payable (see Halsbury, 2nd Edn., vol. 22, Art. 135, 136, p. 79).

23. Apart from tolls in the strict sense there may be other dues leviable in a market or fair. No person is entitled as of right to occupy, to the exclusion of others, any portion of the soil for the purpose of exposing goods for sale in a market or fair without the consent of the person in possession of the soil. Payments made for the enjoyment of such exclusive occupation are usually known as stallage, piccage, pennage or rent Piccage and pennage are but names for particular varieties of stallage. They are payable *ratione tenure*, and not by reason of any franchise and no grant, prescription, nor statutory authority need be shown for taking them: (1745) 2 Str. 1238 (1745) 2 Str. 1238: 1 Wils 107, *Northampton Corporation v. Ward*. In (1816) Secy. of State v. Sati Prasad ("29) 16 A. I. R. 1929 Cal. 197 : 55 Cal. 1328 : 115 I. C. 185 M. & S. 221 Reg. v. Bell (1816) 5 M. & S. 221: 17 R. R. 315 the Earl of Egremont, the Lord of Manor of Cockermouth, was the owner of the soil of the streets of the town of Cookermouth. He from time immemorial used to collect as tolls a handful out of every sack of corn brought to the market, set down on the street and exposed for sale. He also used to collect stallage from persons using stalls. Bell was the lessee of the tolls of corn but not of the stallage. Bell was rated in the assessment for the relief of the poor in respect of these tolls. It was held that the lessee of a market toll in gross not incident to the soil is not rateable to the poor in respect of his occupancy thereof. Lord Ellenborough C. J. after referring to the statement of the case for the opinion of the Court observed:

I cannot say, upon this statement, that the appellant is an occupier of land. Would he not be equally entitled to the toll, although the sacks were not set down in the market, but were upheld on the shoulders of those who exposed his corn to sale? There is nothing to give this toll a corporeal quality.

24. Bailey J. said:

Bell is assessed in the rate for corn tolls which, it is plain from the statement of

the case, were mere market tolls and not incident to the soil.

25. (1853) 1 El. & Bl. 423 William Roberts v. Overseers of Aylesbury (1853) 1 El. & Bl. 423 : 22 L. J. M. C. 34 : 17 Jur. 236 also clearly brings out the difference between market tolls and stallage. There the appellant was rated for the Market house, the tolls on merchandise sold in the market and for stallage. It was held that the tolls on the goods sold were not the subject of a rate but that the other payments were in the nature of compensation for the use of the soil and they and the Market house were properly rated. Lord Campbell C. J., pointed out the distinction in the words following:

The person using a stall has for the time being the use and occupation of that part of the soil on which it stands. The compensation which is paid to the owner of the soil or his lessee for the use of the soil in this way, is quite different in its nature from tolls payable to the lord of the market for goods sold, that toll is quite irrespective of the ownership or occupation of the soil.

26. Wightman J. expressed the following opinion:

Stallage may be considered as a compensation, in the nature of ground rent, paid by the person, who for the time uses a portion of the soil, to the owner who permits him so to do.

27. In (1872) 7 Q. B. 328 Reg. v. Casswell (1872) 7 Q. B. 328 : 26 L. T. 574 : 20 W. R. 624 it was held that tolls authorised to be taken by an Act of Parliament, in respect of cattle brought into a market for sale, which became due as soon the cattle were brought into the market place and before the cattle were put into a pen or tied up, were market tolls and not in the nature of stallage or tolls taken in respect of the use of the soil and that in assessing the lessee of the market and tolls to the poor rate in respect of his occupation of the market place, such tolls cannot be taken into account as enhancing the value of the occupation. Cockburn C. J., at p. 331, said:

The distinction between market tolls and stallage has been long taken and established, though it is, in my opinion, to be regretted, for a man, who occupies the soil of a market with the occupation enhanced in value by reason of this toll, ought to be assessed to the rates and contribute to the public local burthens, in proportion to the value of his occupation. But we must abide by the distinction founded on this principle of ancient law and take it as established that tolls payable merely as market tolls for the use of the market are not rateable, whereas the toll paid for the use of a stall which occupies the soil is rateable. The present toll is payable, not for the use of any shed or other thing erected or maintained upon the soil but independently of anything in the shape of stalls or sheds simply for admission to the market place, and it is, therefore, a market toll and comes within the distinction and is not rateable.

Blackburn J. after referring to his own observations in (1871) 7 Q. B. 333n London Corporation v. Overseers of St. Sepulchre (1871) 7 Q. B. 333n : 41 L. G.

M. C. 109n : 26 L. T. 575n, proceeded as follows:

.... I cannot see any distinction between the two cases. On the contrary, I agree with what Martin B. said in (1863) 1 H. & C. 102 *Mayor of Yarmouth v. Groom* (1863) 1 H. & C. 102: 32 L. G. Ex. 74: 8 Jur. (N. S.) 677 : 7 L. T. 161 at p. 111, that live animals simply driven into a market and not stalled, cannot be said to occupy the soil any more than a living person who walks into the market carrying provisions.... I am clearly of opinion, therefore, that these tolls are "market tolls" precisely the same as the tolls in (1871) 7 Q. B. 333n and therefore cannot be taken into account in rating the market place.

Lush J. simply said:

The question is whether these "cattle market tolls" are a payment for the use of the market only or for the use of the soil. I think, for reasons already given, they are the former.

28. It is needless to multiply cases on the same point. The distinction between market tolls and stallage is well and firmly established in English law. Market tolls are profits not of the soil but of the market payable in respect of the use of the market and not in respect of any use or occupation of the market place. Stallage, on the other hand, is payable only when there is any exclusive occupation of a particular portion of the soil and unless there is such exclusive occupation no stallage is payable. In other words, market tolls are not profits of the soil but are profits of the incorporeal market and, therefore, not a benefit arising out of the land, whereas stallage is payment made to the occupier of the soil for the use of the soil and is in the nature of rent of the soil and consequently a benefit arising out of the land.

29. The nature of the profits of a hat was considered by a Full Bench of this Court in 35 Cal. 82 *Secy. of State v. Karuna Kanta Choudhury* ("07) 33 Cal. 82 : 11 C. W. N. 1053 : 6 C. L. J. 342 (F.B.). In that case the plaintiff-respondent was the owner of Taluk Kalian Khata. Some lands within the taluk had been let out in jote to certain tenants who paid rent for them for the whole year. Certain persons called Fakirs executed a Kaimi Chandina Jama Mokarari Kabuliyat by which they agreed to pay to the plaintiff a Sayari Chandina Jama of Rs. 16 for the right or privilege of holding a mela or fair on those lands every year for 20 days in the month of Falgoon, when there were no crops standing on the lands. The Fakirs in their turn gave to certain persons who were called ijaradars what was called an ijara of the right to hold the mela at an annual rental of Rs. 3000. The Collector of Rangpore, holding that the zemindars and Fakirs holding under him were liable to pay cess on account of the profits of the mela, obtained from the ijaradars a return of the profits of the mela and he fixed the profits in respect of the plaintiffs' estate at Rs. 2215 and assessed on it cess amounting to Rs. 138-8-0. This sum was realised by the Collector from the plaintiff. The plaintiff then sued the Fakirs for recovery of the cess. A Division Bench of this Court (Rampini and Gupta JJ.) held as reported in 28 Cal. 637 *Umed Rasul Shaha Fakir v. Anath*

Bandhu Choudhary ("01) 28 Cal. 637 : 6 C. W. N. 128 that as the profits of the mela were liable to be assessed to income tax, they should not be assessed to cess at the same time and dismissed the suit. The plaintiff then filed a suit against the Secretary of State for India submitting that the assessment to cess was illegal and ultra vires and praying for a declaration that he was not liable to pay the cesses, for injunction and for refund of the amount paid by him. The Subordinate Judge decreed the plaintiff's claim and his decision was affirmed by the District Judge. The Secretary of State for India appealed to this Court. This second appeal came up for hearing before a Division Bench (Mitra and Caspersz JJ.). That Division Bench, the senior member of which had been one of the Vakils for the successful appellant in 28 Cal. 637 Umed Rasul Shaha Fakir v. Anath Bandhu Choudhary ("01) 28 Cal. 637 : 6 C. W. N. 128, being of opinion that the last mentioned case had been wrongly decided referred the case to a Full Bench for the determination of the following questions:

(i) Whether the profits of a mela can be lawfully assessed with Road and Public Works Cesses when the land on which such mela is held is not being used for agricultural purposes but is so used during the rest of the year? (ii) Whether the case of Umed Rasul Fakir v. Anath Bandhu Choudhary Umed Rasul Shaha Fakir v. Anath Bandhu Choudhary ("01) 28 Cal. 637 : 6 C. W. N. 128 has been correctly decided?

The reference came up for hearing before a Full Bench consisting of Rampini A. C. J. who decided 28 Cal. 637 Umed Rasul Shaha Fakir v. Anath Bandhu Choudhary ("01) 28 Cal. 637 : 6 C. W. N. 128 and Brett, Mitra, Woodroffe and Mookerjee JJ. It was held that the profits were not paid by tenant to landlord, nor for the use and occupation of land and consequently were not rent and did not fall within the definition of "annual value of land" as given in S. 4, Cess Act; and that an assessment of cess made by the Collector on the basis of such profits was illegal and ultra vires It was also held by Brett, Woodroffe and Mookerjee JJ. that the Fakirs, the ijaradars, the cattle sellers and stall keepers were mere licensees and had no interest in the land. Rampini A. C. J. answered the first question, which was formulated in very general language in the affirmative because the profits of a mela might, according to him, conceivably come within the definition of "rent" paid for the actual use and occupation of land by persons, other than cultivators or of "immovable property" as defined in S. 4 of the Act. But his Lordship pointed out that the question whether in any particular instance the profits of a mela were derived from land or were immovable property and whether the persons in enjoyment of them were tenure-holders or not depended on the terms of each particular lease. Then discussing the facts of the case the Acting Chief Justice held that although the sums payable by the stall keepers might come within the definition of rent, the fees paid to the ijaradars could not be regarded as rent. His Lordship concluded as follows:

They are fees paid at the rate of so much per animal. They are not paid by a tenant to the landlord. They are not paid for the use and occupation of land or

with reference to any land.

In the result his Lordship agreed that the assessment of road cess had been made by Government on a wrong basis and that the appeal should be dismissed. Brett J. first considered whether a mela was an "immoveable property." After setting out the definition of that expression as given in the Cess Act the learned Judge proceeded as follows:

The words in the definition "but does not include shops" seem to me to exclude fairs from the definition of immovable property. A fair is partly a collection of shops for the sale of goods, partly a mart for the sale of live stock. Moreover, the benefits accruing from a fair case hardly be described as benefits arising out of the land. They arise out of the sales made at the fair and depend not on the area or character of the land but on the number of purchasers who come to the fair."

Then Brett J. held that the profits derived from the fair could not be regarded as rent but were realised for the right merely to sell the goods in the fair. He further held that Fakirs or ijaradars were not tenure-holders for no interest in the land had been given to them. The only right that had been given to them was to hold the fair. It was a mere license. Then at page 93 the learned Judge is reported to have observed as follows:

I am also of opinion that the profits of the fair are not liable to assessment under Chap. V of the Act as other immovable properties not included in Chap. II, as I hold that the fair and the profits realised at it do not fall within the definition of immovable property at all.

Mitra J. did not consider it necessary to answer the abstract question of law referred to the Full Bench in view of the facts as they appeared then. Woodroffe J. agreed with Brett J. Mookerjee J. held that there was no relationship of landlord and tenant, that the vendors or stall-keepers were not tenants but were licensees and the sums they paid were not rents but were tolls. At p. 97 Mookerjee J. expressed himself as follows:

To my mind, it is reasonably plain that the provisions of Chap. V of the Cess Act which comprises Ss. 72 to 84, have not the remotest application to the matter now in controversy.

30. It will be noticed that in this case no interest in the hat site was transferred to the Fakirs or ijaradars but a bare licence to hold the hat was given to them. No interest in land could be or were passed by them to the vendors and hawkers. The consideration paid by them was not paid for the use or occupation of any land but was paid for the privilege of holding a hat or attending the hat. No interest in the land having been transferred it was held that the money realised from the licensees or the vendors and hawkers was not rent and, therefore, not annual value of the land. Two of the learned Judges (Brett and Woodroffe JJ.) held that the mela was neither land nor benefit arising out of the land. Three of the learned Judges (Brett, Woodroffe and Mookerjee JJ.) held that these profits

could not possibly be assessed as "annual net profits from..... other immovable property." Rampini A. C. J. expressed the view that the profits of a mela might be rent of land or of immovable property if any interest in the land was transferred and the transferee paid consideration for such transfer. This case appears to me to establish that when a bare licence is granted to a person to hold a mela without giving him any interest in the land, and he holds a mela the money paid by the licensee or the vendors and hawkers in consideration of such licence can only be regarded as a fee paid for the privilege of holding or attending the mela and not as rent for the use and occupation of the soil and such as mela is neither "land" nor "benefit arising out of land" and is not assessable under either part of S. 6, Bengal Cess Act.

31. The next case that was concerned with assessment of a hat is that in 55 Cal. 1328 Secy. of State v. Sati Prasad ("29) 16 A. I. R. 1929 Cal. 197 : 55 Cal. 1328 : 115 I. C. 185. In that case hats were periodically held on lands which were given possession of to ijaradars who executed kabuliyats in favour of the landlords promising annual jamas payable to the latter for the same. B. B. Ghose J. held that the expression "other immovable property" in S. 6 could not be construed ejusdem generis and it was used for the purpose of bringing into the net anything that might have been left out by the previous portion of the section, that is to say by the words lands, mines, quarries, tramways and railways. It was not, however, necessary for his Lordship to express any definite opinion on the question whether a hat was immovable property or not under the Cess Act for the learned Government Pleader did not base his arguments on the second part of S. 6 of the Act. His Lordship only considered whether the ijaradars in that case had interest in the land and whether the amounts payable by them under the kabuliyats were rent. On a construction of the terms of the kabuliyats, B. B. Ghose J. came to the conclusion that the kabuliyats created an interest in land and that the ijaradars had been put in possession and that the jama payable by them was on account of their use and occupation of the land on which the hats were to be held and came within the meaning of "annual value." In this view of the matter this case was distinguishable from the Full Bench case. Cammiade J. who generally agreed with B. B. Ghose J., however, threw out a suggestion that the preferable view was that hats were covered by the second part of S. 6. Of course this expression of opinion was wholly unnecessary for the purposes of that case. In this case an interest in land was held to have been transferred and the profit derived by such transfer was held to be rent. It follows, therefore, that the assessment, which was upheld was really on the annual value of the land itself an interest in which had been transferred. This assessment would have been proper whether a hat was held on the land or not. I do not regard this decision as establishing that a hat is "land" or "immovable property."

32. In 57 Cal. 655 Secretary of State v. Bhupal Chandra Roy ("30) 17 A. I. R. 1930 Cal. 739 : 57 Cal. 655 : 129 I. C. 177 the land of the hat was leased for a term and the lessees had control of the hat and the jama was held to be rent and to come within "annual value". The question whether the profits from the hat

were profits from immovable property within the meaning of the second part of S. 6 was left open. Here also what was assessed was the land itself and not the hat as understood in its strict sense. In 12 Pat. 701 Secretary of State v. Ramasray Singh ("33) 20 A. I. R. 1933 Pat. 430 : 12 Pat. 701 : 145 I. C. 808: 14 P. L. T. 231 it was held, following the Calcutta Full Bench case, that persons holding a hat upon the land of the cultivating raiyat are not lessees under them but are mere licensees.

33. In 39 C.W.N. 101 Hem Chandra Das v. Secretary of State ("35) 22 A. I. R. 1935 Cal. 296 : 155 I. C. 1055: 39 C. W. N. 101 it was held, on a construction of the kabuliyat in that case, that the ijaradar was in use and occupation of the land and the amount payable by him was rent and cesses had been properly assessed. The case in 14 Pat. 283 Sourendra Mohon Sinha v. Secretary of State ("34) 21 A. I. R. 1934 Pat. 701 : 14 Pat. 283 : 155 I. C. 1099 : 16 P. L. T. 129 followed the Full Bench case of this Court and held that the collections made at the hat from persons who came to carry on business on the zemindars' land were neither rent nor money paid for use and occupation of the land and that consequently the money received from such persons did not come within the definition of "annual value" in Cess Act. Finally we have the case in 67 Cal. 50 Secretary of State v. Hingul Kumari ("37) 42 C. W. N. 169 : 67 C. L. J. 50 which was between the same parties as are now before us and which related to the same hats with which we are concerned. The Division Bench, of which my learned brother was a member, held that having regard to the nature of the hats and the collections made therein as concurrently found by the Courts below the correct inference was that the money gained by the proprietor of the hats from such tolls or fees was not rent but was fee levied for the right or privilege of selling goods in the hats. The reasons given for this conclusion were that the vendors and hawkers were not tenants and had no interest in the land and that the amounts paid were not for the use and occupation of any site. The question whether the income from the hats can be assessed under the second part of S. 6 was, as I have said, left open.

34. These cases, to my mind, establish that the profits of a hat may be of two kinds, namely, rent for the use and occupation of the land when an interest in the land is transferred or mere fee for the privilege of holding the hat or of selling goods at the hat when no interest in the land is transferred to the person or persons who make the payments. A clear distinction is recognised between rent and fee as there is between stallage and mere market tolls in England. In the first case it is profit of the land itself and in the second case it is profit not of the land but of the hat in its strict sense.

35. From the authorities discussed above the following propositions may be deduced: (i) A hat in its legal meaning and conception is the right to hold a concourse of buyers and sellers and the owner of the hat is the person who has this right. (ii) The right to hold a hat is, in this country, initially an incident of the ownership of the land. The ownership entitles the owner of the land to hold a hat

on his land. (iii) The owner of the land may transfer the right to hold a hat with or without an interest in the land itself; (iv) As between the owner of the land and his lessee or licensee: (a) If any interest in the land on which the hat is held is transferred to ijaradars or tenants carrying with it the right to hold the hat in consideration of the payment of a sum of money, such payment is rent and comes within the definition of "annual value of land" in S. 4, and is as such assessable under part 1 of S. 6, Cess Act. (b) If no interest in the land on which the hat is held is transferred to the person who is permitted to hold the hat, then such person is not a lessee or tenant of the land but a mere licensee of the right to hold the hat and this bare right to hold the hat, independently of any interest in the site on which it is held, is not "land" and the sums paid by such bare licensee are fees paid for the right to hold the hat and are not rent and do not come within "annual value of land" and are not assessable under part 1 of S. 6. (c). The fees received from such a licensee cannot be regarded as "benefit arising out of land" for they are not paid for the use and occupation of the land on which the hat is held and as such are not assessable under part 2 of S. 6. (v) As between the owner of the hat and the vendors and hawkers: (a) If the vendors and hawkers occupy specific portions of the land even if for the day and make any payment to the owner of the hat for such exclusive use and occupation of that particular site, then such persons may be regarded as tenants at will and the payments made by them may be regarded as in the nature of rent and akin to stallage under the English law which is paid *ratione tenure* and are assessable under part 1 of S. 6. (b) If the vendors and hawkers have no right to occupy any specific portion of the land on which the hat is held then the payments made by them are not made for the use and occupation of any land but are fees paid for the privilege of attending the hat and selling merchandise and such payments are in the nature of market tolls in the strict sense in which they are understood in the English law and they cannot be assessed under either part of S. 6. (c) If payment is to be made by such vendors and hawkers only on sales and on the quality or quantity of goods sold but no payment is to be made if there be no sale, then it is further clear that such payments are not rent of land or benefit arising out of land and are not assessable under either part of S. 6 of the Act.

36. Applying the above principles to the hats, we are concerned with in these appeals and in view of the concurrent findings of the Courts below as to the nature of the rights of the owner of the hats and the vendors and hawkers attending these hats and the basis on which collections are made from them I have come to the conclusion that the hats in question are neither "land" nor "other immovable property" and the collections made from the vendors and hawkers of these hats are neither rent nor compensation for the use or occupation of the land and cannot be regarded as benefits arising out of land. This view is consonant with the decision of the majority of the learned Judges in the Full Bench case to which I have referred. It is true that in that case assessment was made on annual value under the first part of S. 6 but the first question formulated for the decision of the Full Bench was quite general in terms

so as to raise the question of assessability under both parts of S. 6. Indeed the majority of Judges (Brett, Woodroffe and Mookerjee JJ.) adverted to the second part of S. 6 and expressly held that the second part did not apply to hats of this description and we are bound by their decision. In any case I find myself in agreement with the views expressed by those learned Judges for reasons stated above. It is true that the right to market tolls in England arises out of a franchise independently of the ownership of the market place whereas the right to hold a hat and to levy collections are, in this country, incidents of ownership of land although they may be severed from it. This circumstance, in my opinion, however, makes no difference in the nature of the collections made. The important thing to consider is not the right under which payments are claimed by the owner of the hat, for, as I have said, the owner of the hat may or may not be the owner of the land or of any interest in the land on which the hat is held, but the reason for which and the circumstances in which the payments are made to the owner of the hat. Tolls of these hats with which we are dealing are not paid for the use or occupation of any land but are paid on sales only and that on the basis of the quality or quantity of goods sold. No toll is payable if there be no sales by a particular vendor or hawker although he may expose his goods for sale the whole day long at the hat. These tolls do not, therefore, arise out of land but out of the sales and have nothing to do with land at all. The circumstance that the sales are made at the hats does not, as was held in (1853), *El. & Bl. 423 William Roberts v. Overseers of Aylesbury* (1853) 1 *El. & Bl. 423* : 22 *L. J. M. C. 34* : 17 *Jur. 236*, make any difference and does not alter the legal character or incident of such payments. Speaking for myself, I am not prepared to hold that whenever land has anything to do with it, the profit must be regarded to arise out of the land.

37. There remain to be considered the cases relied on by the learned advocate for the appellants in which hats have been held to be immovable property on the assumption that they are benefits arising out of land and, therefore, a transfer of them has been held to require registration. Reference may be made to 21 *W.R. 383 Sourendra Mohon Sinha v. Secretary of State* ("34) 21 *A. I. R. 1934 Pat. 701* : 14 *Pat. 283* : 155 *I. C. 1099* : 16 *P. L. T. 129*, 22 *Cal. 752 Surendra Narain Singh v. Bhai Lal Thakur* ("95) 22 *Cal. 752* and 36 *Cal. 665 Golam Mohiuddin Hossein v. Mt. Parbati* ("09) 36 *Cal. 665* : 1 *I. C. 520* : 13 *C. W. N. 596*, The nature of the hats involved in these cases does not appear from the 19. ("74) 21 *W. R. 383, Bungsi Dhur Biswas v. Mudhoo Mohuldar*. reports. Those cases proceeded on the basis or assumption that the collections were rent. If such was the nature of the collections of those hats then those cases do not at all militate against the views expressed above. Further those cases were not concerned with the Cess Act and the definition of "land" and "immovable property" appearing in the last mentioned Act and the nature of the collections made at those hats did not fall to be considered at all. Those cases were concerned with the Transfer of Property Act and the Registration Act. The definition of "immovable property" in those Acts is not quite the same as that in the Cess Act. In any case, the

collections of those hats were assumed as rent and on that assumption the hats were regarded as immovable property. The collections of these hats with which we are concerned cannot by any stretch of language be regarded as rent of land or profits arising out of land. In my judgment, for reasons stated above, the decisions of the Courts below are well founded in reason, principle and authority and should be upheld. I accordingly concur in the order proposed by my learned brother that these appeals should be dismissed with costs.