

*Privy Council Appeal No. 94 of 1934.*

*Patna Appeal No. 8 of 1934.*

The Commissioner of Income Tax, Bihar and Orissa - *Appellant*

*v.*

The Maharajadhiraj Sir Kameshwar Singh of Darbhanga - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 2ND JULY, 1935.

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*Present at the hearing:*

LORD MACMILLAN.

SIR JOHN WALLIS.

SIR SHADI LAL.

[*Delivered by* LORD MACMILLAN.]

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The present appeal arises from an assessment to income tax made upon the respondent for the year 1929-30 and the only question before their Lordships relates to an item of Rs.91,283 included in the assessment. The appellant maintains that this item, the receipt of which is admitted, forms part of the taxable profits or gains of the business of money-lending carried on by the respondent; the respondent maintains, and the High Court has held, that it is "agricultural income" within the meaning of the Indian Income-tax Act and consequently exempt from income tax.

In order to determine which of these contentions is right, it is necessary to describe briefly the transaction out of which this item of receipt arose. It appears that in 1929 the respondent's father, who carried on an extensive money-lending business, made a loan of 18½ lacs of rupees, with the sanction of the High Court at Patna, to Thakurain Kusum Kumari, widow and administratrix of the late proprietor of the estate of Lachmipur. The transaction was embodied in two indentures both dated 3rd February 1929. The respondent's father died on 3rd July 1929 and the respondent has succeeded him as his eldest son and heir and as his successor in business.

The first of the indentures is described as a "zarpeshgi lease with usufructuary mortgage" and is granted by Thakurain Kusum Kumari as "lessor mortgagor" in

favour of the respondent's father as "lessee mortgagee" in consideration of the loan of 18½ lacs. The lessor mortgagor thereby grants, demises and conveys in zar-peshgi lease and by way of usufructuary mortgage certain lands in the district of Bhagalpur, forming part of the Lachmipur zemindary, to the lessee mortgagee, to have and to hold the same for fifteen years. After stating that the lessor mortgagor has put the lessee mortgagee in possession, the indenture proceeds to state that the parties have agreed that the lessee mortgagee shall advance the sum of 18½ lacs and that, for repayment of the loan, the lessor mortgagor has given, and the lessee mortgagee has taken, the zar-peshgi lease and usufructuary mortgage. The rent reserved to the mortgagor lessor, and described as the "thika rent", is fixed at Rs.31,000 arrived at by taking the gross average rental of the properties at Rs.1,59,813 and then deducting management and other expenses amounting to Rs.37,530 and "thika profits" Rs.91,283, leaving Rs.31,000. This sum of Rs. 91,283, designated "thika profits", is the sum now sought to be assessed. The indenture further provided that the thika rent should form part of the yearly payments which the lessor mortgagor thereby undertook to make in reduction of the loan and should be increased as the amount of the loan diminished by 6 per cent. on the sums repaid with a corresponding reduction in the "thika profits". Other articles of the indenture provided that the lessee mortgagee should maintain the irrigation works, look after boundaries and collect all rents and income of every kind from the properties thereby leased and mortgaged and should peacefully hold and enjoy the same. The leased properties were mortgaged and hypothecated as security for payment of the zar-peshgi loan and the lessee mortgagee was given the right to hold over and retain possession of the properties until satisfaction of the entire debt.

The second indenture dealt with certain properties in the Sonthal Parganas also forming part of the Lachmipur estate, which could not legally be mortgaged. It is described as an indenture of lease and demised these properties to the respondent's father by way of lease for fifteen years at a thika rent of Rs.30,000, the lessee being bound also to pay the Government Revenue charges in respect of the properties comprised in both indentures. Part of the rent was appropriated to certain payments and the balance was to be credited by the lessee "toward the liquidation of the zar-peshgi loan and the usufructuary mortgage in respect of the properties in the district of Bhagalpur in possession of the lessee" under the other indenture. The lessee was entitled peacefully to hold and enjoy the leased properties and to collect all rents profits and income of every kind therefrom.

The legal position occupied by the respondent's father and now by the respondent in relation to the Lachmipur

properties, as the result of the transaction embodied in the two indentures, is thus stated by the learned Chief Justice (Courtney Terrell):—

“ The mortgagee lessee was to be in possession of both properties, and, in his relation to the cultivators of the soil he stood in the position of landlord, dealing directly with them and collecting the rents. He had moreover to pay the Government revenue, cesses and taxes and his name was registered in the Land Registration Department. He alone was able to sue for rent whether current or arrears, to sue for enhancement or for ejection and was able to settle lands with raiyats and tenants in all the properties, in fact he was in a position to take all proceedings which the mortgagor would have been able to take in the ordinary course if the lands leased and mortgaged had remained in her khas possession.”

It was not indeed disputed that the rents payable in respect of both properties were rents “ 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 ”. The rents thus come within the definition of “ agricultural income ” in section 2 (1) (a) of the Income-tax Act, and the “ thika profits ” or profit rental of Rs.91,283, forming part of the rents, are therefore “ agricultural income ” within the statutory meaning. That being so, the respondent relies on section 4 (3) of the Income-tax Act which in terms provides that “ This Act shall not apply to the following classes of income . . . (viii) agricultural income ”.

In answer to this *prima facie* conclusive ground for excluding the sum in question from the respondent's assessment the appellant concedes that if the respondent were not a moneylender and if the transaction in virtue of which he receives the rents had not been a transaction entered into in the course of his moneylending business, he would have been entitled to invoke the statutory exemption of agricultural income; but the appellant submits that the fact that the respondent carries on a moneylending business and receives the rents as the result of a transaction entered into in the course of that business makes all the difference. He refers to section 4 (1) which prescribes that “ this Act shall apply to all income, profits or gains as described or comprised in section 6 ”, which section in turn provides that “ the following heads of income, profits and gains shall be chargeable to income-tax . . . (iv) Business ”, and he contends that the item of income in question, while it may be “ agricultural income ”, nevertheless having been received by the respondent not as an ordinary proprietor or landlord but as part of the income, profits and gains of his moneylending business, it loses the benefit of the statutory exemption of “ agricultural income ” and becomes assessable as business profits. This is the view which was taken by the Income Tax Officer and by the Assistant Commissioner. It was also the opinion expressed by the Commissioner in referring to the High Court, at the respondent's request, the two

questions: “ (a) Is the Lachmipur bond a simple mortgage or a usufructuary mortgage? (b) Is the income from the Lachmipur property taxable? ”.

Their Lordships find themselves in agreement with the learned Judges of the High Court in rejecting the appellant's contention. Section 4 (1) in declaring that “ this Act shall apply to all income, profits or gains as described or comprised in section 6 ” is prefaced with the words “ save as hereinafter provided ”, and thereafter in the third sub-section it is expressly provided that “ this Act shall not apply to . . . agricultural income ”. Similarly section 6, which includes “ business ” among the “ heads of income, profits and gains . . . chargeable to income tax ”, opens with the words “ save as otherwise provided by this Act ”. The result, in their Lordships' opinion, is to exclude “ agricultural income ” altogether from the scope of the Act, howsoever or by whomsoever it may be received. As Ashworth J. puts it in *Makund Sarup v. Commissioner of Income Tax, United Provinces*, 1927, 2 Ind. Income Tax Cases 495 at p. 501:— “ The business of moneylending may bring in an income which is exempt from income tax on the ground that it is derived from agricultural land.” The exemption is conferred, and conferred indelibly, on a particular kind of income and does not depend on the character of the recipient, contrasting thus with the exemption conferred by the same subsection on the “ income of local authorities ”.

There are no doubt cases where the question whether a particular item of receipt is taxable or not depends upon the nature of the recipient's business. Thus the profit made on the realisation of an investment is a taxable income receipt in the hands of an investment company which engages in the business of buying and selling investments but is a non-taxable capital receipt in the hands of an ordinary investor who is not engaged in that business. But in the case just put the question is whether the item is income at all; if it is income it is plainly taxable. In the present case the item of receipt is admittedly income but it is income which the Act expressly excludes from taxation.

Their Lordships, being of opinion that the High Court has rightly answered question (b) in the negative, find it unnecessary, as did also the High Court, to deal with question (a). The sum originally assessed appears to have been Rs.97,283; this is an error and the figure which their Lordships find to be exempt from taxation is Rs.91,283.

Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed and the judgment of the High Court affirmed. The respondent will have his costs of the appeal.



In the Privy Council.

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THE COMMISSIONER OF INCOME TAX,  
BIHAR AND ORISSA

*v.*

THE MAHARAJADHIRAJ SIR  
KAMESHWAR SINGH OF DARBHANGA

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DELIVERED BY LORD MACMILLAN.

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