

Court is entitled to disclaim onerous property, as it did or purported to do in *Krishna Pershad Singh v. Gosta Behari Kundu*(1). It is sufficient to say with reference to the property now in question that there was no disclaimer by the Court—quite the reverse. The case cited on which the learned Subordinate Judge mainly relied has therefore, in their Lordships' judgment, no application to the facts of the present case even if on principle it be not open to criticism—as to which they say nothing.

Their Lordships would add that they think that insufficient attention has, so far, been paid to section 51 of the Act and to the fact that in the appellants' suit no attempt was made to comply with its provisions. That omission must have a most important bearing on the question whether leave should ever be granted to execute against property of the disqualified proprietor any decree obtained in a suit so defective.

On the whole case their Lordships are of opinion that the decree of the High Court was quite right, and they will humbly advise His Majesty that this appeal therefrom be dismissed and with costs.

Solicitors for appellants : *Watkins and Hunter*.

Solicitor for respondent : *Solicitor, India Office*.

PRIVY COUNCIL.

MAHARAJADHIRAJ OF DARBHANGA

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND
ORISSA.

On Appeal from the High Court at Patna.

Income-tax—Business—Successor carrying on business—Liability of successor—“Assessment”—Income-tax Act (XI of 1922; amended by III of 1928), section 26, subsection 2.

* Present : Lord Tomlin, Lord Macmillan, and Sir John Wallis.

(1) (1907) 5 C. L. J. 434.

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If the person carrying on a business dies after receiving a notice under section 22, sub-section 2, of the Income-tax Act, 1922, requiring him to furnish a return of his income during the previous year, and it is found that upon his death another person succeeded to and is carrying on the business, the successor is liable, under section 26, sub-section 2 of the Act (as amended by Act III of 1928), to be assessed as if he had been carrying on the business throughout the previous year, even if his predecessor died before making a return and before the expiry of the time specified for his doing so. In the expression "at the time of making an assessment under section 23" the word "assessment" does not connote a definite act but the process of assessment which begins with the service of the notice under section 22, sub-section 2, and continues until some order of assessment is made.

Rajendranath Mukherji v. Commissioner of Income-tax(1), applied.

Judgment of the High Court [*Maharajadhiraj of Darbhanga v. Commissioner of Income-tax*(2)], affirmed.

Appeal (no. 77 of 1933) from a judgment of the High Court (April 22, 1932) upon a reference made under section 66, sub-section 2, of the Indian Income-tax Act, 1922.

The reference related to an assessment to income-tax made upon the appellant for the financial year 1929-1930 in respect of a business which had been carried on by his father who died on July 3, 1929. The appellant had been assessed under section 26, sub-section 2, of the above Act, as amended by Act III of 1928, the Commissioner finding that he had succeeded to and was carrying on the business.

The question referred was: "Does section 26, sub-section 2, apply to the petitioner in the circumstances of the case? And if it does was there a succession in law to justify an assessment on the petitioner?"

(1) (1933) I. L. R. 61 Cal. 285, 291; L. R. 61 I. A. 10, 15.

(2) (1932) I. L. R. 12 Pat. 5.

The facts, and the terms of section 26, sub-section 2, of the Act as amended in 1928 appear from the judgment of the Judicial Committee.

The High Court, by a judgment delivered by Terrell, C.J. and concurred in by Fazl Ali, J., held that the appellant was rightly assessed. The judgment refers to a further question as having been referred, but the question set out above was the only question referred (*see* Record p. 81).

Sir Dawson Miller, K.C., Latter, K. C., R. P. Hills and Jayaswal, for the appellant.

The Act of 1922, previously the Act XVIII of 1933 which added section 24B, contained no provisions making the estate, or the personal representative, of a deceased person liable to assessment if the person had died before making a return in compliance with a notice under section 22, sub-section 2, and before the time thereby specified has expired. The decision to that effect in *Commissioner of Income-tax v. Reid*⁽¹⁾, was not in dispute in the reference, and for the purposes of this appeal must be taken as correct. Section 26, sub-section 2, introduced into the Act in 1928 should not be construed as providing an exception to the general scheme of the Act unless it clearly does so. The sub-section provides for an assessment upon the successor "at the time when an assessment comes to be made under section 23". But in the present case that time never came, because the person served with the order had died without making a return and without being in default. The sub-section receives sufficient effect if it is confined to successions *inter vivos*, and its language is more applicable to that case. The respondent's contention might result under section 25, sub-section 1, in double taxation. Further, there were no facts before the Commissioner upon which he could find that the appellant was carrying on the money-lending business; the Commissioner wrongly placed the onus

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(1) (1930) I. L. R. 55 Bom. 312,

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upon the appellant to prove that he was not carrying it on.

Dunne, K.C., and Wallach, for the respondent were not called upon.

The judgment of their Lordships was delivered by—

LORD TOMLIN.—This is an appeal from a judgment of the High Court of Judicature at Patna delivered on a question of law referred under section 66(2) of the Indian Income-tax Act, 1922, by the Commissioner of Income-tax, Bihar and Orissa.

The question referred was answered by the Court adversely to the appellant, the subject, and the appeal to His Majesty in Council followed.

The point arises in this way. The late Maharajadhiraj died on the 3rd July, 1929. At the date of his death the Maharajadhiraj had been served with a notice under section 22(2) of the Income-tax Act to furnish a return of his income in the prescribed form. At the date of his death the time for furnishing that return had not expired and no return had been made. The return required was for the year, 1st April, 1929, to 31st March, 1930; but that return should have been based upon the income of the previous year, that is to say, in this particular case, the income for the year commencing the 1st October, 1927, and ending 30th September, 1928, that being the Fasli year which governed the making up of accounts of the Maharajadhiraj's estate.

Now it seems to be accepted, at any rate for the purpose of this case it must be accepted, that in the ordinary way a deceased person's estate cannot be fixed with tax in respect of a period for which no return has been made and in respect of which there has been no default in making a return, nor can a representative of such person be fixed with tax in respect of the profits of that period received by the deceased person. That position seems to have been accepted; but the Commissioner of Income-tax held

that inasmuch as the Maharajadhiraj was carrying on a number of businesses to which his son, the present appellant, succeeded, the present appellant was taxable under section 26(2) of the Act added by amendment by Act III of 1928. This decision of the Commissioner was affirmed by the High Court upon the question referred to them, and is now called in question here by the appellant.

The sub-section in question provides that :—

“ Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding, as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year.”

Now the appellant urges that the section is not applicable for two reasons: First of all, he says that although the Commissioner of Income-tax has found as a fact that the business to which the appellant succeeded was being carried on by the appellant, that finding of fact can be gone behind because the Commissioner of Income-tax mis-directed himself in point of law and, therefore, that there was not here a succession “ in such capacity ”—that is, a succession by a person carrying on the business. The moment you so find, the finding of the Commissioner of Income-tax that the business was being carried on ought, it is maintained, to be displaced.

The way in which it is put is this: The Maharajadhiraj carried on apparently a number of businesses, including that of a mill owner, but his main business appears to have been the business of money-lending. The onus, says the appellant, is on the Crown to show under the sub-section that not only did the appellant succeed to the business, but that he carried it on. It is true that the Commissioner of Income-tax found that he did carry it on, but he mis-directed himself, it is suggested, in point of law. The Commissioner said this:

“ The second question of fact upon which I have to find is whether, as contended by the assessee, the business in money-lending was

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discontinued at the death of the late Maharajadhiraj. At that date loans out at interest amounted to some two crores of rupees. No evidence has been put in to show that any attempt has since been made to call in or realise any parcel of this amount. It is simply represented that no fresh loans have been given out. But to give out no new loans would not amount to closing the business. Moreover, the contention that the business had been closed on the death of the late Maharajadhiraja was not made at the time during the assessment proceedings, which were not completed until the 27th March, 1930, while the decease of the late Maharajadhiraja occurred on the 3rd July, 1929, but the contention was first put forward in the appeal petition, dated the 28th April, 1930. From this fact it appears to me plain that the contention was an after-thought."

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It is suggested that in that language the Commissioner of Income-tax has mis-directed himself in regard to onus by treating the appellant as having to discharge the onus of proving that he discontinued the business, and by treating the non-calling in of outstanding loans as necessarily in law conclusive that the business was being continued. Their Lordships do not think that is a fair inference to be drawn from the language. The Commissioner of Income-tax is weighing the factors which in his opinion are relevant to be considered for the purpose of determining the question whether or not the business was being carried on, and he is not saying that the appellant must shew it was discontinued or that the fact of the loans not having been called in is conclusive that the business was being carried on. That being so, it seems to their Lordships that the point of mis-direction fails and that the matter must be considered on the footing that there was a business being carried on by the late Maharajadhiraj, that the appellant succeeded to it and that having succeeded to it he carried it on.

Now the second point that is made is this: Assuming those three things nevertheless, the subsection does not apply because the opening words:

"Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded,"

must apply only to those cases where it was possible

under section 23 to assess the predecessor. That seems to their Lordships to put upon the word "assessment" the narrow meaning which was deprecated by their Lordships in the case of *Rajendranath Mukherji v. Commissioner of Income-tax*(1). In that case, in the judgment of the Board delivered by Lord Macmillan, this was said: "That the word 'assessment' is not confined in the statute to the definite act of making an order of assessment appears from section 66, which refers to 'the course of any assessment.'" On that view of "assessment" it seems to their Lordships that where a notice has been given under section 22(2) to a person to furnish within the time specified a return in the prescribed form the process of assessment has begun and continues until some order of assessment is made. If that be so, the words "at the time of making the assessment" mean in the course of the process of assessment and inasmuch as in the present case a notice was duly served on the late Maharajadhiraj the process of assessment had begun and it would be impossible to say that the event had not occurred which enabled the tax officer to find, if the facts justified the finding, that the person on whom this notice had been served had carried on a business and had been succeeded in such capacity by another person.

It was also suggested that inasmuch as you could not tax a deceased person who had not made a return or was not in default in making a return, the sub-section ought to be confined to cases of a succession to somebody who was himself liable to tax and that that would lead to construing the section as applying only to cases of succession *inter vivos*.

Their Lordships are of opinion that approached in either of those ways it is not possible to read the sub-section as the appellant desires and that this case falls within the language of the sub-section. The assessment was thus properly made.

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Their Lordships will accordingly humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Hy. S. L. Polak and Company.*

Solicitors for respondents: *Solicitors, India Office.*

LETTERS PATENT.

Before Courtney Terrell, C.J. and Varma, J.

BHARATH MAHTON

v.

MOD NARAYAN SINGH.*

Reformation in situ—principle; whether applies to identifiable lands of landlord accreted to tenant's holding—Alluvion and Diluvion Regulation (XI of 1825), section 4—Regulation, whether applies to lands reformed in situ—defendant, whether entitled to rely on adverse possession of third party as extinguishing plaintiff's title.

The mere fact that a river has uncovered land belonging to the landlord and adjacent to the tenant's holding does not necessarily imply that it is to be treated as an accretion to his holding under Regulation XI of 1825, although in general the law of the Regulation is applicable to the alluvion of land belonging to the landlord as much as it is applicable to the law of alluvion of land belonging to the Crown.

Khubi Mahto v. Mahant Lachman Das(1), followed.

When land emerges from water and it can be identified as the property of one who had previously occupied it, the

* Letters Patent Appeal no. 72 of 1933, from a decision of the Hon'ble Mr. Justice Khaja Mohamad Noor, dated the 26th April, 1933, in second appeal no. 1242 of 1930.

(1) (1922) I. L. R. 2 Pat. 18,