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court but seeks to evade it when disappointed with the decision. In my opinion the proper course is to allow this appeal and to send this case back to the court of the District Judge for argument upon the merits and the defendant should pay the costs of the plaintiffs incurred up to now throughout.

COURTNEY TERRELL, C.J.

KULWANT SAHAY, J.—I agree.

JAMES, J.—I agree.

Appeal allowed.

Case remanded.

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November, 29. December, 21.

SPECIAL BENCH.

Before Courtney Terrell, C.J., Kulwant Sahay and James, JJ.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA

v.

MAHARAJADHIRAJ SIR KAMESHWAR SINGH.*

Income-tax Act, 1922 (Act XI of 1922), section 2, sub-section (1) (a)—advance of loan by assessee—zerpeshgi lease with usufructuary mortgage executed by mortgagor—certain sum to be reserved for lessor mortgagor—balance to be appropriated by mortgagee as "thica profits"—income derived by assessee, whether is agricultural income—fiscal statute—rules of construction.

The proprietress of an estate executed a zerpeshgi lease with a usufructuary mortgage in favour of the assessee to secure a loan of about 18 lakhs. The yearly income of the mortgaged property was calculated as Rs. 1,59,813. A sum for expenses amounting to Rs. 37,530 was set off. A further sum of Rs. 31,000 called the "thica rent" was reserved for the lessor mortgagor but it was not to be paid direct to her but was to be appropriated by the assessee towards the principal of the loan and in addition there was a provision that the principal of the loan might be reduced by annual payments not

* Miscellaneous Judicial Case no. 99 of 1932.

to exceed Rs. 1,20,000 in any year. The balance of the yearly income, namely, Rs. 91,283 was called the "thica profits" and was to be appropriated by the assessee. The mortgagee was to be in possession of the mortgaged 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. Under the terms of the deed the mortgagee had to pay the Government revenue, cesses and taxes and his name was registered under the Land Registration Act.

Held, (*i*) that the source of the income must be considered in its proximate rather than in its ultimate significance;

(*ii*) that the income of Rs. 91,283 derived by the assessee was an agricultural income within the meaning of section 2, sub-section (*1*) (*a*), of the Income-tax Act and, therefore, was exempt from taxation;

(*iii*) that in dealing with a fiscal statute the court should not be concerned either with the intention of the legislature or with the spirit of the legislation; in such cases the court has merely to regard the letter of the law unless such considerations are clearly specified in the enactment for the guidance of tribunals.

Reference under section 66(*2*) of the Income-tax Act, 1922.

The facts of the case material to this report are set out in the judgment of Courtney Terrell, C.J.

The case was in the first instance heard by Courtney Terrell, C. J. and Kulwant Sahay, J. who referred it to a larger Bench.

On this Reference

Sir Sultan Ahmed (with him *P. R. Das*, *K. P. Jayaswal*, *Murari Prasad*, *S. M. Gupta*, *S. K. Basu*, *R. Misra*, *B. P. Sinha*, *C. S. Jayaswal* and *K. P. Upadhya*), for the assessee:—The income in question is agricultural as the assessee is getting it not from the mortgagor but from the tenants of the soil.

[SAHAY, J.—If the transaction be considered as a lease, would it make any difference?]

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No. My position may become still stronger.

[SAHAY, J.—Under the terms of the deed you can hold over in case the loan is not repaid. There cannot be holding over in a mortgage.]

Yes. I am also recorded in the Collector's Register D.

[SAHAY, J.—So nobody else can recover the rent.]

Exactly. For all practical purposes I am the landlord. The interest on simple mortgage is taxable for the simple reason that the mortgagee does not get the profit from the land, but direct from the mortgagor. If I cannot be brought within the letter of the law, the Department cannot touch me. No other consideration, moral or equitable, is relevant—*Partington* v. *The Attorney-General*(1). The same view is repeated in *Cox* v. *Rabbits*(2).

A fiscal statute must be construed strictly in favour of the subject—*Tennant* v. *Smith*(3)

[Sections 2, 4 and 6, Income-tax Act, referred to.]

"Agricultural income", therefore, means the income of the tenant, or income from tenants, in cash or in kind, or the income of the landlord who cultivates the land himself. The words used are "Receiver of rent" and not "landlord or proprietor as such".

The definition is comprehensive enough.

[CHIEF JUSTICE.—The test would depend upon the criterion whether the income is collected by the lender as rent for land or whether this rent is collected from the borrower.]

(1) (1869) 4 Eng. & Ir. App. 100, 122.
(2) (1878) 3 A. C. 373.
(3) (1892) A. C. 150.

Exactly.

[JAMES, J.—The original landlord has only the right of reversion. You are the landlord for the time being.]

Yes. I am in possession and I am entitled to collect rent. I am entitled to sue for rent and execute decrees in the same way as the mortgagor would have been entitled to.

Sir N. N. Sircar, Advocate-General, Bengal (with him *Manohar Lall*), for the Commissioner of Income-tax:—The point is—What is the source of income? Here the source is money-lending business whatever be the intermediate machinery to realise the income. It cannot be said that the way or form in which the money is realized is the source. "Source" does not mean immediate source but ultimate source. In other words, it means the source from which I make the profit.

[CHIEF JUSTICE.— Or does it mean the source from which you draw the income?]

[KULWANT SAHAY, J.—We are here concerned with *source of income*.]

The meaning of the word "source" has been explained in *Scott Chad* v. *Pares*(1).

[CHIEF JUSTICE.—"Source" means the source of income and not the source of capital.]

In the present case the assessee is both a lessee and a mortgagee. He realises money as lessee and retains it as mortgagee.

Sir Sultan Ahmed not called upon in reply.

S. A. K. *Cur. adv. vult.*

COURTNEY TERRELL, C.J.—The question for decision in this case is whether an item in the assessee's income for the year from October 1st, 1928, to the 30th September, 1929, is properly to be considered as "rent or revenue derived from land

(1) (1901) 1 Ch. Div. 708.

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used for agricultural purposes" under section 2, sub-section (1) (a), of the Act and so exempt from taxation.

The assessee has a large money lending business. On March 3rd, 1929, he entered into a business transaction with the proprietress of the Lachmipur estate. The Lachmipur estate comprises two properties, one in Bhagalpur and the other in the Santhal Parganas. By the law of the Santhal Parganas the latter property could not be mortgaged.

The proprietress wished to take a loan of 18½ lakhs from the assessee and the bargain is contained in two bonds, the one relating to the Bhagalpur property and the other in respect of the Santhal Parganas property. The first is a zurpeshgi lease with a usufructuary mortgage and the latter is a thica lease. They are interdependent and each makes reference to the other. In the case of the Bhagalpur bond the yearly income of the property mortgaged was calculated as Rs. 1,59,813. A sum for expenses was set off amounting to Rs. 37,530. A further sum of Rs. 31,000 called the "thica rent" was reserved for the lessor mortgagor but it was not to be paid direct to her but was to be appropriated by the assessee towards the principal of the loan and in addition there was a provision that the principal of the loan might be reduced by annual payments not to exceed Rs. 1,20,000 in any year. The balance of the yearly income from the property was called the "thica profits" and amounted to Rs. 91,283. If at the end of 15 years the whole of the principal had been paid off the estate was to be handed back to the lessor mortgagor otherwise it was to continue until the whole loan was satisfied.

In the case of the Santhal Parganas property, the lease provided for a rent of Rs 30,000 to be paid by the assessee out of which a certain sum was to be paid to the lessor for maintenance and certain other sums of subscriptions for schools, pujas and the like

and the balance was to go towards the payment of the loan provided for in the zurpeshgi bond. 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 ejectment 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.

The question which arises for our decision relates to the sum of Rs. 91,283, the balance of the income from the Bhagalpur property after paying the thica rent and the expenses of working the estate.

The contention on behalf of the Department is that this is not agricultural income. It is argued, first, that the possession by the assessee of the estate and the collection of the revenue was merely incidental to his business position as a money lender and that the "source" of the income as contemplated by section 4 was in truth the money lending business. Secondly, it is contended that the assessee's position in any case was of a dual character. In his capacity as a lessee in possession of the property he was merely an agent for the purpose of collecting such revenue and paying it to himself in his capacity as a mortgagee.

On the part of the assessee it is contended that the source of the income must be considered as the rent and other payments derived from the tenants of what is admittedly land used for agricultural purposes. In my opinion the latter argument must prevail. The source of the income must be considered

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in its proximate rather than in its ultimate significance. The estate was in every sense in the possession of a landlord of land used for agricultural purposes. We are not concerned with the intention of the assessee in making this investment. It is conceivable that he may have intended ultimately to purchase the mortgaged property in order to add it to the rest of his zamindari rather than to obtain the repayment of his loan in the ordinary way. To accede to the suggestion that we should look at the ultimate rather than the proximate source of the income would involve insuperable difficulties. It is perfectly clear that if the mortgage had been a simple mortgage and the mortgagor had remained in possession and paid this sum by way of interest to the mortgagee it would then have been taxable by way of income arising out of the transaction. The assessee would have derived the income not from the land but from the mortgagor. Similarly if the assessee under a contract of usufructuary mortgage had leased the land back to the mortgagor so that the latter remained in possession and in relation to the cultivators of the soil stood in the position of a landlord the rent payable by the mortgagor would merely have been by way of interest payable to the assessee and would have been taxable. We are dealing with a fiscal statute and accordingly are not concerned either with the intention of the legislature or with the spirit of the legislation. In such cases the Court has merely to regard the letter of the law unless such considerations are clearly specified in the enactment for the guidance of tribunals. In this case there are no such guiding principles stated and we have to follow the enactment strictly.

A great part of the Commissioner's statement of the case is taken up with a discussion on the question of whether or not the transaction in question is or is not a usufructuary mortgage and we have been invited to express an opinion on this question apparently with a view to the possible consequences which might be

argued from the conclusion. But the real question for decision is whether the profit of Rs. 91,283 is or is not assessable to income-tax, and I would answer this question in the negative.

The assessee is successful and is entitled to costs which we fix at Rs. 200 in addition to the amount deposited by him which must be returned.

KULWANT SAHAY, J.—I entirely agree.

Two questions have been referred to us under section 66(2) of the Income-tax Act. The first question is whether the assessee's profit arising from the transaction of the usufructuary mortgage and zarpeshgi lease evidenced by the deed relating to the Bhagalpur property amounting to Rs. 91,283 is assessable to income-tax; and the second question propounded is whether the indenture relating to the Bhagalpur property is or is not a pure usufructuary mortgage. As regards the second question, it appears that no answer is necessary. The Department seems to be under the impression that the income derived from usufructuary mortgage is not taxable but if the transaction be treated as being other than usufructuary mortgage the income derived would be taxable. In my opinion the question whether the income is or is not taxable does not depend upon the transaction being a usufructuary mortgage or otherwise. The question for consideration is whether the income derived by the assessee from the transaction in question is or is not an agricultural income under section 2, sub-section (1) (*a*), of the Income-tax Act. If it is such agricultural income there can be no doubt that it is not taxable. The principal question, therefore, is the first question which depends on a finding whether the income is or is not agricultural income.

It has been contended on behalf of the Department that the source of the income is the transaction of the loan of rupees 18½ lakhs and it does not matter whether the income is derived from lands used for

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agricultural purposes or otherwise. In my opinion this contention is not sound. If the income is derived from land used for agricultural purposes as rent or revenue then such income is exempt from assessment. The income cannot be made taxable unless and until it can be brought strictly within the letter of the law and a fiscal statute must be construed strictly in favour of the subject. After consideration of the document in question and the circumstances of the case I am clearly of opinion that the income in question is exempt from taxation as being rent or revenue derived from land used for agricultural purposes. The assessee is in the position of a landlord with respect to the actual cultivating tenants within the meaning of the term under the Bengal Tenancy Act and the income derived from the lands must be agricultural income within the meaning of the Act and is, therefore, exempt from taxation.

JAMES, J.—I agree.

Order accordingly.

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November, 30. December, 1, 4, 21.

SPECIAL BENCH.

Before Courtney Terrell, C. J., Kulwant Sahay and James, JJ.

MUSAMMAT UREHAN KUER

v.

MUSAMMAT KABUTRI.*

Suits Valuation Act, 1887 (*Act VII of* 1887), *sections* 8 *and* 11—*suit for accounts—pecuniary jurisdiction, whether governed by value of suit stated in the plaint—court, whether has power to award decree for a sum exceeding the limits of its pecuniary jurisdiction—Court-Fees Act*, 1870 (*Act VII of* 1870), *sections* 7 *and* 11—*Bengal, Agra and Assam Civil Courts Act*, 1887 (*Act XII of* 1887), *sections* 18 *and* 19—*Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 15 *and Order VII, rule* 2—*objection on the score of undervaluation or*

* Appeal from Original Order no. 255 of 1931, from a decision of Babu Narendra Nath Chakravarty, Subordinate Judge of Patna, dated the 13th August, 1931.