facts nor proceed under section 66(3) on account of the legal difficulty that the assessment being made under section 23(4) no appeal lay from that assessment. It is clear that the petitioners have considerably weakened their case by not producing their books of account and by setting up the plea, which has been rejected everywhere, that their books which were in existence in the years 1923 and 1924 have since been destroyed by white ants. In my opinion the application ought to be dismissed, but under the circumstances of the case there will be no order as to costs.

FAZL ALI J.

CHATTERJI, J.—I agree.

Application rejected.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

SPECIAL BENCH.

1929.

Nov. 14, 25.

Before Terrell, C.J., Das and Kulwant Sahay, JJ.

J. M. CASEY

v.

COMMISSIONER OF INCOME-TAX.*

Income-tax Act, 1922 (Act XI of 1922), section 2(1)(b) and 4(3)(viii)—Aloe plants cultivated by assessee and decorticated by machinery.

Where an assessee grew aloe plants and, by means of machinery, decorticated the leaves for the purpose of making rope from the fibre, and it appeared that there was no cultivation of the aloe plants save in connection with the economic process involving the use of machinery such as was employed by the assessee, *held*, that this was the " process ordinarily employed by the cultivator for rendering his produce fit to be taken to the market ", and, therefore, that the entire profits were exempted from taxation by section 4(3)(*viii*) of the Income-tax Act, 1922.

Killing Valley Tea Company, Ltd. v. *Secretary of State for India*(1), distinguished.

*Miscellaneous Judicial Case no. 82 of 1929.

(1) (1921) I. L. R. 48 Cal. 161.

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The facts are set out in the following statement of case.

Mr. J. M. Casey, the applicant in this case, derives his income from the sale of oranges grown on an orange plantation in Sambalpur district, the income of which has not been taxed as being purely of an agricultural nature, and from the growing of Sisal hemp plant on a plantation of several hundred acres the leaves of which are carried to his factory by lorry and there passed through a machine called a decorticator which strips the pulp from the leaves and leaves the fibre.

2. Mr. Casey was assessed for the first time in the year 1927-28 on an income of Rs. 2,975 derived from what the Department held to be the non-agricultural part of this business in the year 1926-27, and under section 34 on an income of Rs. 8,425 on the escaped income of the year 1925-26. No assessment was made in previous years as the existence of this business was not known to the Department until that year (1927-28). The assessee raises no serious objection to the method adopted by the Department for separating the industrial profits of the concern from the agricultural profits on the assumption that some part of the profits is non-agricultural, but he does raise the contention that no part of the profits is industrial.

3. The sisal hemp plant from which the hemp fibre is manufactured in this case is very similar to the ordinary aloe plant, though it belongs, I believe, botanically to a different class. The leaves are cut and then transported by lorry to the factory where they are passed through a decorticator. The fibre is then washed in troughs to remove the pulp which may still be adhering. It is then dried on racks in the sun, baled in a baling press and despatched to the rope factories in Calcutta or elsewhere. The prime mover in the factor is a steam boiler which cost the assessee Rs. 2,000 second hand. The decorticator which was made by Khupps, the well-known German firm, cost a little more than £1,000 new and was purchased second hand by the applicant for Rs. 5,000. The leaves when brought into the factory are placed on an endless tray along which they move until they come in contact with knives fixed on a drum the axis of which is at right angles to the endless tray. These knives beat or strip off the pulp from one side of the leaves and then as the result of an automatic reverse motion the leaves again come into contact with these knives and the other side is stripped clean. The pulp drops down while the fibre is delivered at the far end of the machine.

4. The question which arises for the decision of their Lordships, in this case, is whether any part of the profits resulting from the growing of sisal hemp and manufacture from the hemp plant of fibre is taxable, or, whether, on the other hand, the whole of the profits are exempt as being purely agricultural income.

5. Under section 2, clause (*1*), sub-clause (*b*) of the Act, agricultural income includes income derived from agricultural land by the performance by a cultivator of any process ordinarily employed by a cultivator to render the produce raised by him fit to be taken to market, and under section 4, clause (*3*), sub-section (*viii*), agricultural income is exempt from tax.

6. As I am required by section 66 of the Act to state my own opinion on the point raised, I do so below.

7. The question at issue really appears to be whether the process employed by the applicant in this case is a process ordinarily employed by a cultivator to render the produce raised fit to be taken to market and this would appear to be in reality a question of fact as stated by Atkinson, J., in the case of the *Bicanpur Sugar Concern(1)*.

8. Assessee contends that there is no market for the raw leaf itself, but this is hardly correct. It appears from an affidavit of the jailor of the Ranchi Jail, that aloe leaves are purchased by the jail authorities at Re. 1 per cart load apart from cartmen's wages, and from an affidavit of the Jailor of the Motihari Jail, that aloe leaves are purchased by the Motihari Jail at a cost of 4 annas to 8 annas per hundred leaves. It is not correct therefore to state that the leaves themselves before manufacture have no value.

9. Again, the process of manufacture adopted by the assessee in this case is different from the process adopted in these jails or by the ordinary villagers who sometimes beat out the fibre for the purpose of making ropes. The assessee uses comparatively expensive machinery, while, in the jails and villages the leaves are stripped by hand and the pulp removed by a process of beating by wooden mallets.

10. In my view therefore the raw leaf has a market value, but if assessee's contention, that it has not, is correct, this does not help his case: In fact, it does exactly the opposite, for it proves that the whole of his profits are industrial and not part industrial and part agricultural.

11. Section 59 of the Act, read with Statutory Rule 23, makes it clear that the law has provided for cases in which income is derived partly from agriculture and partly from business. Again, the discussion in the Council of State and the Legislative Assembly at the time this bill was before the Legislature on the correct interpretation of the expression 'agricultural income' as defined in section 2 clearly indicates that taxation of the non-agriculture profits in such cases was intended. I quote below from the speech of the Hon'ble Mr. Moncrieff Smith as reproduced at page 21 of Iyenger's law of Income-tax:

"The clause as it will be amended now, will enable a land-holder or a cultivator to sell his produce provided he has not employed in regard to that produce any process other than the process referred to in the preceding sub-clause, that is to say, he will be able to employ a process which will enable him to take it to market for sale but will not be allowed to perform any further process otherwise the income which he derives from the sale will be liable to pay tax under this Bill."

Again Mr. G. G. Sim is quoted at page 24 of this Volume as saying:

"It was desired to make it perfectly clear that where a person sold the raw produce of his land after it had been worked up by a process other than the process described in sub-clause (2), it should still be the case that the profits of the working up are profits liable to income-tax otherwise it would not be possible, for example, to tax the profits from running a sugarcane factory where the owner of the factory gets the cane from his own land. Similarly, in the case where a man has a rice milling factory we must still tax the profits of the milling .....The rule that has always been in force is this that where a man works the factory which is entirely supplied with the produce of his own land, we deduct as a business expense the whole of the value of the raw material, that is to say, the value that it would fetch in the open market."

(1) (1919) 1 I. T. C. 29 (33).

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12. In my opinion then the profits of the applicant's business in this case are partly agricultural and partly industrial and he is legally liable to tax on the industrial portion of his profits, for the process of manufacture employed by the applicant in this case is not the performance by a cultivator of any process ordinarily employed by a cultivator to make the produce fit to be taken to market. The only process ordinarily employed by a cultivator to render the produce fit for the market is the mere cutting of the plant while, in the case of the assessee, the plant after being cut is decorticated and the fibre extracted (and not the plant itself) is sold.

Yunus, for the assessee: The income derived from the sale of fibre extracted from aloe plants is agricultural and hence not taxable. It cannot be disputed that if the leaves or timber had been sold, the income would have been agricultural.

[CHIEF JUSTICE.—If a man manufactures wine out of grapes and sells it, would the income be agricultural?]

No, but income does not cease to be agricultural and become industrial simply because machinery is employed. What is an ordinary process within the meaning of section 2, Income-tax Act, is a question of time. What was not an "ordinary process" ten years back may be an ordinary process to-day.

[DAS, J.—There must be a distinction between agricultural process and industrial process.]

Even peas and gram which are sold in the market may be separated from the plants by means of machinery. That would not make the process industrial.

[DAS, J.—In order that you may claim exemption, you will have to show that you employed a process "ordinarily employed by a cultivator..... to render the process raised..... by him fit to be taken to market."]

I submit that the process was "ordinarily employed" for winnowing the fibre. The use of machinery will not necessarily make it industrial process. The Commissioner is of the opinion that the only process ordinarily employed by a cultivator to

render the produce fit for the market is the cutting of the plant. This argument is wholly wrong. The mere fact that paddy can be sold in bundles with the plant will not make the grain, if separated from the plant by any process, an industrial product. The process employed for winnowing fibre and that employed for winnowing corn stand on the same footing.

C. M. Agarwala, for the Income-tax Commissioner: If the cultivator employs a process by which the produce becomes transportable to the market and without which the produce could not have been fit to be taken to market, then only does the exemptive clause apply. *Bhikhanpur Sugar Concern*, In the matter of(1) and *Killing Valley Tea Company, Limited.* v. *Secretary of State for India*(2).

Rule 23 framed under section 59 of the Act makes the differentiation between agricultural and industrial processes plain.

[DAS, J.—There is no finding that the leaves have a market value before the process of manufacturing is applied. Why should the agriculturist grow trees if before the process the product has no market value?]

The findings are that the leaves have a value before the process is applied and that the process adopted by the assessee is not the process ordinarily applied by a cultivator. These are findings of fact and not open to challenge.

[CHIEF JUSTICE: No other process for the economic decortication of this fibre is known, so the assessee's process is the ordinary process.]

The exemption was obviously intended as a protection for the average small cultivator using the ordinary process employed by the Indian villager, and not for the protection of capitalistic concerns. When

(1) (1919) 1 I. T. C. 29 (33); 53 Ind. Cas. 301.

(2) (1921) I. L. R. 48 Cal. 161 (169).

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a raiyat turns from the economic process of decorticating the fibre by hand to the economic process of doing by expansive machinery, he becomes an industrialist.

Yunus replied.

S. A. K.

Cur. adv. vult.

COURTNEY TERRELL, C.J.—This is a case stated by the Commissioner of Income-tax under section 66(*2*) of the Indian Income-tax Act, XI of 1922.

The assessee, among other activities of an agricultural nature, cultivates aloe plants, and from them by means of machinery prepares sisal fibre which he sells in the market. The Department do not claim to recover tax on such portion of his profits as is attributable to the production of the aloe leaves but it is contended that the manufacture of the fibre from these leaves constitutes a manufacturing process as opposed to an agricultural process the profits from which are not exempt as agricultural income under section 4, sub-section 3(*viii*).

The aloe plant from which the assessee produces the fibre is one variety of a class of plants indigenous to India and growing freely in the wild state. The principal use of these aloe plants is to provide hedges but hitherto they have not been the subject of regular cultivation. It has long been known that the leaves of some varieties could be so treated as to yield a fibre suitable for the manufacture of rope and matting and villagers have occasionally been found to take the leaves of the wild plant and by the use of a very rough and laborious process to extract fibre therefrom but until suitable machinery could be devised for the purpose it has not been an economic proposition to cultivate the plant for the purpose of producing the fibre. In short the cultivation of the plant had to await the introduction of a process for producing the

fibre therefrom on an economic scale. When this had been accomplished the deliberate cultivation of the plant and the selection of good varieties became profitable and in British East Africa and some other parts of the world it has become a regular industry. In India, however, it has until now assumed very small proportions and the assessee is one of the pioneers of the enterprise.

The contention urged by the Department is that the agricultural part of the industry terminates at the production of the leaf and its cutting and carting. Now under section 2(*1*)(*b*) of the Act agricultural income means :—

"Any income derived from such land by—

(*i*) agriculture, or

(*ii*) the performance by a cultivator or receiver of rent-in-kind of any process ordinarily employed by a cultivator or receiver of rent-in-kind to render the produce raised or received by him fit to be taken to market, or

(*iii*) the sale by a cultivator or receiver of rent-in-kind of the produce raised or received by him, in respect of which no process has been performed other than a process of nature described in sub-clause (*ii*).

The question for our decision is whether any part of the profits resulting from the growing of sisal and the manufacture from it of the fibre is taxable or whether, on the other hand, the whole of the profits are exempt as being purely agricultural income. Now it is perfectly clear from the wording of the section that an agricultural process does not necessarily stop short at the removal of the plant from the soil. In the case of, for example, cereals plants they must be threshed and winnowed in order to produce the grain and the process of threshing and winnowing is one ordinarily employed by the cultivator to render the produce fit to be taken to market. It is further to be noted that in order to test whether the process employed by the assessee is an agricultural process it should be possible to compare it with that which is "ordinarily

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employed by a cultivator " that is to say it must be found that the plant with which we are concerned is in fact cultivated and that the cultivator in order to render the produce fit to be taken to market ordinarily employs a process to treat the produce of actual cultivation. Now in this case there is in the first place no cultivation of the aloe plant save in connection with the economic process involving the use of machinery such as is employed by the assessee and therefore the process " ordinarily employed " is in fact that used by the assessee. In spite of the enquiries which the Department has been able to make nothing in connection with the cultivation of aloe fibre has been discovered save that aloe leaves are bought by certain jail authorities from persons who cultivate it and supply the leaves to the jail, the jail being apparently the only market which such cultivators have for the disposal of their leaves. The leaves so bought by the jail authorities are treated by the prisoners by means of the same laborious and uneconomic process which is employed by some villagers in treating the leaves of the wild and uncultivated plant. The object of the manufacture in jails is not the conducting of an economic process which shall render profitable the cultivation of the aloe plant but merely to keep the prisoners employed on sufficiently laborious and punitive work. In other words this instance relied on by the Department does not provide a standard of comparison for the process employed by the assessee. The word " market " in the section implies a real centre of economic exchange and the purchase by jails is merely an artificial condition having no relation to a market for agricultural produce. The Department rely upon the decision of the Calcutta High Court in the case of *Killing Valley Tea Company, Limited*, v. *Secretary of State for India*(1). That case was concerned with the state of affairs in connection with the manufacture of tea.

(1) (1921) I. L. R. 48 Cal. 161.

The assessees employed a process of manufacture applied to the leaf which involved the use of costly machinery and was of a complicated nature but the Court was able to compare this process with a process which had ordinarily been employed by the cultivators of the tea bush before modern manufacture had been introduced that is to say the dry leaf had long been known as a marketable commodity and the preparation of the dried leaf in its market form had been carried on by known processes of a simple nature. Here the standard of comparison was available and the modern manufacturing process could be clearly differentiated from it. But in the case of sisal fibre no such standard of comparison is available firstly because other than the so-called jail manufacture no cultivation of the sisal aloe plant appears to have been practised save in connection with the modern process of manufacture of the fibre and such manufacture of the fibre as had in earlier days been practised had not been associated with the cultivated plant but with the wild plant as casually found. Further there is no market in the proper sense of the word for aloe leaves. A fact may be noted in connection with the affidavit sworn by the jailor of the Motihari jail which is indicative of the small extent to which the cultivation of the aloe plant is understood. The jailor uses the words ' aloe fibre " as synonymous with the word " sunn ". Now it is well known that sunn fibre is produced from a plant which has no affinity whatever with the aloe plant. The manufacture of sunn fibre is a well understood and entirely distinct industry. The conclusion at which I arrive is that if a generalisation may be made from the single instance available, then the process ordinarily employed by the cultivator of the aloe plant in order to render his produce fit to be taken to market is that in fact employed by the assessee and the whole of the profits derived by him from the manufacture of sisal fibre is agricultural income and as such is exempt from taxation. It may be that in the future the

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economic conditions may change. If the growth of the aloe leaf should become established as an agricultural industry by itself, and if the manufacturers of sisal fibre should cease to cultivate the plant themselves and should purchase the leaves in an open market then such circumstances may possibly require reconsideration in the light of the income-tax law; but the circumstances which at present prevail in my opinion require that the question put to us should be decided in favour of assessee. The assessee is entitled to his costs of this reference.

DAS, J.—I agree.

KULWANT SAHAY, J.—I agree.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

SPECIAL BENCH.

Before Terrell, C.J., Das and Kulwant Sahay, JJ.

1929.

Nov. 12, 13, 14, 25.

RAJNITI PRASAD SINGH

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

Income-tax Act, 1922 (*Act XI of* 1928), *sections* 2(*1*), 4(*3*)(*viii*), 8 *and* 18—*Mortgage and lease back to mortgagor—rent payable under the lease not agricultural income—interest on securities—purchaser of securities paying for interest up to date of purchase—no deduction for amount so paid or for collection charges.*

Where a borrower, to secure a loan of a large sum of money, executed what purported to be a usufructuary mortgage in favour of the lender, who, by a contemporaneous document leased the properties back to the mortgagor, *held*, on a construction of the documents, that the transaction amounted in effect to a simple mortgage, and that the rent received by the

*Miscellaneous Judicial Case no. 73 of 1928.