1930.

RAMDHARI RAI v. GORAKH RAI.

CHATTERJI, J.

Subordinate Judge was right and the contention of the learned Counsel on behalf of the appellant cannot succeed. These being all, the contentions raised are found against the appellants. The appeal accordingly is dismissed with costs.

FAZL ALI, J.—I agree.

Appeal dismissed.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Terrell, C. J. and Dhavle, J.

MAHARANI JANKI KUER

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.*

1930.

July, 28.

Income-tax Act, 1922 (Act XI of 1922)—royalties for preparing bricks, whether assessable to income-tax.

Sums received on account of royalties for preparing bricks are assessable to income-tax just as royalties on quarries or royalties on coal.

On the assessee's land there was a quantity of earth which was suitable for brick-making and licenses were granted to brick-makers to erect brick kilns upon the land in question and to take away brick earth and use it for the making of bricks. The assessee received remuneration in respect of the licenses which were granted at a rate of rent.

Held, that the income so derived was taxable.

Secretary of State in Council of India v. *Sir Andrew Sooble*(1) and *Roberts* v. *Lord Belhaven's Executors*(2), distinguished.

*Miscellaneous Judicial Case no. 119 of 1928. Reference under section 66(2) of the Income-tax Act of 1922, made by the Commissioner of Income-tax, Bihar and Orissa, dated the 1st November, 1928.

(1) (1903) Ap. Cas. 299 (303). (2) (1925) 9 T. C. 506.

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

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

K. P. Jayaswal and *Jadubans Sahay*, for the assessee.

C. M. Agarwala, for the Commissioner of Income-tax.

COURTNEY TERRELL, C.J.—The assessee in this case has been assessed upon the sum which has been received in the year under assessment in respect of royalties for preparing bricks.

It appears that on the assessee's land there is a quantity of earth which is suitable for brick-making and licenses are granted to brick-makers to erect brick kilns upon the land in question and to take away brick earth and use it for the making of bricks. The method by which the assessee receives remuneration in respect of the licenses which are granted is that a definite rent of Rs. 10 a katha is charged for the land upon which the brick kiln stands and furthermore for earth from one kind of land the licensee has to pay Rs. 10 per specified measure and he has to pay Rs. 5 per specified measure in respect of the brick earth which is removed from another kind of land. In consideration of making this payment, he is entitled to remove brick earth from either of the two kinds of land to erect his brick kilns, to burn his bricks, and to take them away. The licensor also grants licenses to persons who desire to remove what are termed concretes from the land, (these, we are told, are merely in the nature of kankar for road-making) and for the privilege of going upon the land and removing the concrete where it may be found. The licensee has to pay a royalty of Re. 1-8-0 for every 100 cubic feet of kankar which he may remove. It is contended by the licensor that bargains of this nature are in effect a capital sale of the brick earth

or kankar as the case may be and that being in the nature of a capital sale income-tax is not assessable upon it inasmuch as the payments are not in the nature of income. In my opinion that view is not well founded. An argument has been addressed to us of this character. It is said that minerals and in particular coal are in England under the English Income-tax Act the subject of special enactment and that royalties which are received by a coal owner are taxable by reason of that special enactment, and our attention was drawn to a statement by Lord Halsbury in the case of *Secretary of State in Council of India* v. *Sir Andrew Scoble*(1). His Lordship said—

"My Lords, as I have already said, I do not think it is a matter on which one can dogmatize very clearly. Where you are dealing with income-tax upon a rent derived from coal, you are in truth taxing that which is capital in this sense, that it is a purchase of the coal and not a mere rent. The income-tax is not and cannot be, I suppose from the nature of things, cast upon absolutely logical lines, and to justify the exaction of the tax the things taxed must have been specifically made the subject of taxation, and looking at the circumstances here and the word 'annuity' used in the Acts, I do not think that this case comes within the meaning which (using the Income-tax Acts themselves as the expositors of the meaning of the word) is intended by the word 'annuity', and that is the only word that can be relied upon here as justifying what would be to my mind a taxation of capital".

That part of the passage which relates to the taxation of rent derived from coal together with the contention that coal is as far as income is concerned the subject of special legislation in England is what is relied upon by the assessee. But an examination of the English Income-tax Act shows that the only justification for saying that coal is the subject of

(1) (1903) Ap. Cas. 299 (308).

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COURTNEY TERRELL, C.J.

special legislation is that coal is mentioned in that part of the Schedule to the Act which deals with the special method of dealing with certain classes of income derived from land and it is not a specific enactment that coal rents are to be specially taxable. And when Lord Halsbury dealt with income-tax upon the rent derived from coal he was not in that passage dealing with income derived from coal as a matter of special legislation.

Another case which was relied upon was the case of *Roberts* v. *Lord Belhaven's Executors*(1) which was decided in Scotland. That case dealt with the following circumstances. Lord Belhaven's estate had upon it large dumps of coal refuse and Lord Belhaven entered into an agreement with certain contractors to remove the whole of these dumps from his land; the removal was to be effected within a period of $3\frac{1}{2}$ months and the contractors were to have the right of dealing with the waste in any way they might think fit and were to pay to him the price of 7 shillings 6 pence a ton. It was held, dealing with the matter on the basis of the agreement, that a capital sale could not be considered as income and that the special circumstances constituted in fact a capital sale.

The circumstances relied upon were that the contractor had to purchase quite a definite heap of material and that he had to remove it within a certain definite time; it was in no sense a contract that the contractor should come upon the land and use it in any particular manner or to pay royalty in respect of his license to come on the land and dig it at a certain specified rent; it was the sale of a definite heap of material for a definite price at so much a ton. In the case that we have to decide, however, the facts are entirely different. The licensee, if the ordinary business of brick-making is followed, has the right to come upon the land to erect his brick kilns, to make bricks there, and to take all the materials that he

(1) (1925) 9 T. C. 506.

wants for the making of his bricks from his land and in respect of that license to pay rent which is to be calculated at a specific rate which bears relation to the extent of his user of the license. If the brick-maker carries on his business until all the earth is exhausted, the land will still remain in the ownership of the licensor, possibly diminished in value, possibly unaffected in value and possibly even increased in value according to the special circumstances which may prevail at the termination of the period and it is in no sense a capital sale of the land itself.

In the course of the argument I put to Mr. Jayaswal a question as to whether there would be any difference if the brick earth was found not lying upon the surface layer of the soil but found at a depth of 50 feet under the soil, and it appeared that he had some difficulty in answering that question because it is clear that if the earth had lain right underneath the soil he could not have used the argument that it was a sale of the soil itself.

This case, to my mind, is analogous to cases of royalties on quarries and royalties on coal in both of which cases tax has always been levied under the Income-tax Act in this country.

The question which has been put to us is—"Is the income of the assessee from the manufacture of bricks assessable to income-tax, or on the other hand, is it non-assessable as being of a casual and non-recurring nature, or, in the alternative as being income arising from the use and occupation of land and, therefore, agricultural income".

It is conceded that the question of it being agricultural income does not arise having regard to recent decisions of the Privy Council. It is certainly not of a casual and non-recurring nature because it is the ordinary practice for persons, who own brick-fields, to charge certain sums which, however, they may be measured, are paid quarterly or annually or

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monthly and this income cannot be called casual because it is part of the well recognised methods of exploiting brick-fields to let them out on leases of this character; and, as I have said, it cannot be considered as in the nature of a capital sale of the assets of the assessee.

For these reasons I would answer the question put to us by stating that the income of the assessee from the manufacture of bricks is assessable to income-tax.

COURTNEY TERRELL, C.J.

There are other questions which are raised by the Commissioner of Income-tax in his Letter of Reference but as to these they are governed by the recent decision of the Privy Council in *Probhat Chandra Barua* v. *King-Emperor*(1); and our answer to those questions in regard to this class of recoveries should be in the affirmative.

The opposite party is entitled to his costs which we assess at Rs. 50.

DHAVLE, J.—I agree.

APPELLATE CIVIL.

Before Ross and Scroope, JJ.

1930.

July, 18, 22, 29.

KESHO SAHU

v.

MUSAMMAT MUKTAKIMAN.*

Easement—privacy, right of—usage or grant.

A right to privacy is not an inherent right of a party and can arise only by express usage, by grant or by special permission.

*Appeal from Appellate Decree no. 63 of 1929, from a decision of R. B. Beevor, Esq., I.C.S., Subordinate Judge of Patna, dated the 10th July, 1926, confirming a decision of Maulvi Muhammad Khalil, Munsif of Patna, dated the 5th July, 1927.

(1) (1930) 57 Ind. App. 228.