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a moiety of the residuary estate was vested in the deceased son of Flora Williams and at his death it devolved upon George Williams, and the appellants are entitled to it as representing Harris, the purchaser. And ordering that an account of the estate since the death of the testator be taken, and that any money found due from the respondent Brown on adjustment of the account shall be paid to the appellants. Also declaring that Flora Williams sold her monthly allowance of Rs. 50 and that the appellants are entitled to it, and ordering all the money that is due for it from the 12th August 1892 with interest at Rs. 6 per cent. per annum, to be paid to them.

Their Lordships think that the appellants and the executor Edward Brown are entitled to take their costs of all the proceedings in India out of the portion of the estate of Thomas Paul D'Silva in the hands of the executor, but that all other parties should bear their own costs of those proceedings, and they will humbly advise His Majesty accordingly. The appellants will likewise have their costs of this appeal from the same source.

Their Lordships have already directed that the appellants' costs of opposing the petition of the respondent Cecilia Proby to be heard after the hearing had concluded, shall be paid by her.

Appeal allowed.

Solicitor for appellants : Messrs *Edwardes* and *Heron*.

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APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Gupta.

UMED RASUL SHAHA FAKIR AND OTHERS (*Appellants*) *v.* ANATH BANDHU CHOWDHURI (A MINOR) AND ANOTHER (*Respondents*).* [30th July, 1901.]

Cess Act (Bengal Act IX of 1880)—Mela, profits of— Liability to pay Road cess tax —Board of Revenue, authority of, to frame rules under s. 106.

[638] The profits of a *mela* cannot be regarded as income derived from agriculture and are not exempt from income-tax under s. 5 of the Income-Tax Act (II of 1886). Land, the profits of which are subject to income-tax, should not be assessed with road cess tax, except when such land is also used for agricultural purposes.

S. III. B. rule 33 (p. 74, Cess Manual 1900) is not such a rule as the Board of Revenue is authorized to make under the provisions of s. 106 of the Cess Act (Bengal Act IX of 1880).

THE defendants, appellants (Nos. 1 to 7) held, and possessed a certain *mokurari jote* by holding a *mela* on the land annually in the month of *Falgoon*, and paid Rs. 6-4 to the plaintiff and Rs. 6-4 to the *pro forma* defendant No. 8 in respect thereof; and after the *mela* was over they used to cultivate the land and paid rent and cesses in respect thereof separately. They also paid income-tax on the profits of the *mela*. The Collector of Rangpur called upon these defendants to furnish a valuation roll under the Cess Act (IX of 1880) with regard to the profits of this *mela*, which was submitted by them. The Collector fixed the

* Appeal from Appellate Decree No. 721 of 1899 against the decree of Babu Gopal Chunder Banerji, Subordinate Judge of Rungpur, dated the 23rd of January 1899, modifying the decree of Babu Rajendra Lal Ghose, Munsiff of Nelphamari, dated the 30th of June 1898.

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cesses on the annual valuation at Rs. 108-3-9, and realized the amount from the plaintiff. The plaintiff, a minor, by his grandmother Ballhavi Sundari Chowdhurani, used to recover these cesses from the defendants as well as the rent due under the lease. The Munsif disallowed the plaintiff's claim for cesses. The Subordinate Judge allowed it, holding that the defendants are tenure-holders within the definition of that term in the Cess Act.

The Advocate-General (Mr. *J. T. Woodroffe*) and Babu *Saroda Charan Mitter* and Babu *Sorashi Churn Mitter*, on behalf of the appellants.

Babu *Mohini Mohun Chakravarti*, on behalf of the respondents.

AUGUST 7. The judgment of the High Court (RAMPINI and GUPTA, JJ.) is as follows:—

The question at issue in this appeal is as to the liability of the appellants to pay road-cess. The appellants hold a *mokurari jama* under the plaintiff and the *proforma* defendant of Rs. 12-8, which they agreed to pay for the right to hold a *mela* on certain land, in the month of *Falgoon* every year, when there are no crops on the land. According to their *pottah*, **[639]** dated the 12th *Magh* 1267, they are to pay this sum to their landlords from the profits of the *mela*. They were called on by the Collector to submit a valuation roll under the Cess Act with regard to the profits of this *mela* and submitted it. The Collector then fixed a certain amount of road-cess on the profits of the *mela*, which he has realized from the plaintiff, and the plaintiff now sues to recover this road-cess from the defendants, as well as the rent due under the lease.

The First Court disallowed the plaintiff's claim for road-cess. The Subordinate Judge has allowed it, holding that the defendants are tenure-holders within the definition of tenure-holder contained in the Cess Act.

The defendants appeal. It is found by the Munsif to be the case, and it has been admitted before us, that the defendants have to pay income-tax on the profits of the *mela*, and that they ought not to be held liable for both income-tax and road-cess. The question then is what tax are they, properly speaking, liable to pay—road-cess or income-tax? Now, the Income Tax Act declares that it is an Act intended to impose a tax on income derived from sources other than agriculture, and s. 5 exempts from the liability to the tax incomes derived from agriculture or operations connected with agriculture. It would seem to us that the profits of a *mela* cannot be regarded as incomes derived from agriculture. The land on which the *mela* is held, is no doubt land used for purposes of agriculture, when it is not being used for the purposes of the *mela*, but when it is being used for the purposes of the *mela*, it is not being used for agircultural purposes and therefore the profits of the *mela* are not incomes which would be exempt from income-tax under s. 5 of Act II of 1886. Hence the defendants would seem to be liable to pay income-tax and consequently not road cess.

It is argued that the defendants came within the definition of tenure-holder, as defined in the Cess Act. Tenure-holder under the Cess Act means the holder of a tenure, which is an interest in land other than an estate or the interest of a cultivating raiyat. Now the defendants are, no doubt, not the holders of an estate, and they are not cultivating raiyats, and they hold immoveable property, which is defined in the Act as **[640]** "land, etc., but not crops, houses, shops, or other buildings." The definition of tenure-holder would, therefore, seem to be wide enough to

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include the defendants. But notwithstanding this fact we do not think that it can have been intended by the legislature to assess with road cess tax, land from which profits subject to income-tax are derived, except when such land is used for agricultural purposes. It is to be noted that the land, on which the *mela* annually takes place, is assessed with road-cess in its agricultural character, and the defendants do not object to pay road-cess on it in this respect. They only object to pay road-cess on profits derived from it, when it is not used for agricultural purposes.

The Munsif says the profits of the *mela* are not derived from the soil of the lands, but from shop-keepers for their shops in the *mela*, and he argues that shops are not included within "immoveable property" as defined in the Act. It is doubtful, if this view of the Munsif is strictly accurate. The shops put up at a *mela* are more properly described as booths or stalls. They are certainly not permanent structures. Many people, who attend a *mela*, do not erect even booths or stalls, but sit and sell their goods on the bare ground. But other than agricultural produce is sold at these *melas* and the people, who attend them, are not all agriculturists.

The respondent's pleader calls our attention to (S. III B.) rule 33 printed at pp. 74 and 75 of the Cess Manual, 1900 framed by the Board of Revenue under s. 106 of the Act. This rule is as follows:—

"The benefit, which a zemindar receives from a fair or *hât* in the shape of payments for the occupation of land by dealers or traders, is assessable to cess. When a fair or *hât* is held on land appertaining to an estate, it is to be valued under Chapter II of Bengal Act, IX of 1880, as part of the estate, to which it belongs. But when, as in some cases in the Darjeeling district, a fair or *hât* is held on land reserved solely for such purposes, and which does not form part of an estate, it should be valued under Chapter V of the Act under s. 79; the annual valuation of such lands is not necessary.

[641] NOTE—Profits derived from the rent of shops and other miscellaneous revenue derived by zemindars from *hâts* and fairs should not be excluded from the cess valuation of the land on which they are situated; valuation should not, however, be made on trade profits or on benefits derived by traders (Boards' cess proceedings of the 12th November 1898, No. 2, collection 10, file 96 of 1897.

The Board of Revenue has, therefore, clearly come to the conclusion that the profits derived from land used for the purpose of a *mela* are assessable with road-cess, and no doubt it may be argued that the land is agricultural land and the profits of the *mela* are derived from the use of this land. But for the reasons already given we do not think this is a correct view to take, and the rule in question would seem to us to be *ultra vires*. It does not appear to be such a rule as the Board of Revenue is authorised to make under the provisions of s. 106 of Act IX of 1880.

For these reasons we decree this appeal with costs.

The plaintiffs have no doubt been compelled to pay road-cess by the Collector, and it may seem hard that they should not be allowed to recoup themselves from their lessees or licensees. But the plaintiff's assessment with road-cess by the Collector would not seem to us to be legal, and it is to be hoped that the Collector will now withdraw his demand or cease to enforce it.

Appeal decreed.