Privy Council Appeal No. 21 of 1942
Patna Appeal No. 42 of 1940

Raja Bahadur Kamakshya Narain Singh, of Ramgarh - *Appellant*

v.

The Commissioner of Income-tax, Bihar and Orissa - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH MAY, 1943

Present at the Hearing:

LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD WRIGHT]

This is an appeal from a judgment of the High Court at Patna, dated 6th September, 1940, in a reference under section 66 of the Indian Income-tax Act (Act XI of 1922) (as amended by Acts 21 and 22 of 1930 and Act 18 of 1933), by which the High Court answered a question of law submitted by the Commissioner of Income-tax of Bihar and Orissa, in the negative, in respect of an assessment to income-tax of the appellant assessee for the year 1937-1938. Two questions had been submitted to the Commissioner by the assessee to be referred to the High Court which were:—

(1) Whether royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax?

(2) What should be the principle on which cost of management in collection of royalties is to be determined when there is a combined management covering both the Zamindari collection of agricultural income and royalties of mines?

The Commissioner of Income-tax was of the opinion that the second question raised no question of law and should not be answered by the High Court. In fact no argument was addressed by the assessee to the High Court thereon, and the High Court concurred in the opinion of the Commissioner of Income-tax. No further reference to that question need therefore be made.

The assessee, Kumar Kamakshya Narain Singh Bahadur, is and was at all material times the Proprietor of a Revenue paying estate known as the Ramgarh Raj, bearing Tauzi No. 28, in the Collectorate of Hazaribagh, being impartible and governed by the rule of primogeniture. At the time of the assessment which is the subject matter of this appeal, the estate was under the management of the Court of Wards the assessee being a minor. On the 10th August, 1937, the assessee attained his majority and the estate was released from the management of the Court of Wards.

For the income-tax year 1937-1938 the manager of the estate on behalf of the assessee made a return of the income of the assessee to the Income-tax Officer, District Hazaribagh, including a sum of Rs.5,32,368-2-10 being royalties realised from lessees of coal mines under seven leases, each of them for a term of nine hundred and ninety-nine years, in the form of and on similar conditions and covenants as those contained in three leases, that is to say:—(1) A lease dated 5th April, 1919, between Alexander McNeil Walter the Manager of the Ramgarh Estate under the Court of Wards Act (Act IX Bengal Code 1879) of the one part and Bokaro and Ramgur Limited of the other part; (2) a lease dated 25th March, 1925, between the said Alexander McNeil Walter and Bokaro and Ramgur Limited of the other part; (3) a lease dated 12th April, 1927, between the said Alexander McNeil Walter of the one part and the Karanpura Development Company Limited of the other part. Under the terms of the leases the lessees covenanted to pay to the lessors royalties on all steam coal, rubble coal, dust, hard and soft coke gotten manufactured and despatched, the lessee also covenanting that after certain dates as provided by the said leases minimum royalty should be paid on the terms and at the rates provided therein, in the event of the royalties reserved and payable under the said leases not amounting to the figure of the minimum royalty.

The Income-tax Officer of Hazaribagh assessed the assessee to income-tax on the income of the assessee including the coal mine royalties in the sum of Rs.76,286-9-0 and to super-tax in a sum of Rs.1,95,610-4-0.

By a petition of appeal dated 15th September, 1937, the assessee appealed to the Assistant Commissioner of Income-tax on the following amongst other grounds:—

> That according to law, rent and royalty on mines being capital revenue, that is value of the corpus, should be exempted in assessing income-tax;
>
> That rent and royalty are in the nature of the price of coal and instalments of purchase money and hence not assessable to income-tax.

By his order of 14th February, 1938, the Assistant Commissioner expressed the opinion that royalties should be included in assessing the income of the assessee and stated that " in order to constitute a sale a fixed price is always essential. But while the lessees are to pay royalties at a certain fixed rate per ton of coal extracted, the aggregate of such payments must not be less than a minimum sum in any year. This minimum has to be paid even if no coal is extracted. From this it follows that royalty is not the price of coal taken as the assessee contends." The assessment was confirmed.

By a petition under section 33 of the Act to the Commissioner of Income-tax the assessee prayed that the Commissioner should send for the record and that the order of the Assistant Commissioner be set aside and a fresh assessment be made, which petition was rejected.

By an application under section 66 (2) of the Act the assessee required the Commissioner of Income-tax to refer the two questions set out above for decision of the High Court.

On the 23rd December, 1938, the Commissioner of Income-tax drew up a statement of the case exhibiting a specimen of the mining leases concerned, referring these questions to the High Court, and expressed his own opinion upon them, which was, as regards the first question—

> (*a*) Receipts under leases in the terms of the exhibit were rightly held by the Appellate Officer to be annual income and not capital instalments of a purchase price.

The High Court referred the case to a Full Bench (the Hon. Sir Trevor Harries, Chief Justice, the Hon. Mr. Justice Fazl Ali and the Hon. Mr. Justice Manohar Lall) who were of the opinion that royalties received by the assessee were " income from other sources " within the meaning of sections 6 (vi) and 12 (1) of the Act, and were rightly assessed to income-tax by the taxing authorities.

It is here only necessary to refer in detail to the material terms and covenants of one of the leases, namely that dated the 3rd April, 1919. The most material clause was as follows:—

> " This indenture witnesseth that in pursuance of the said Agreement and in consideration of the salami or premium rupees thirty-seven thousand and forty (being at the rate of rupees forty) per standard bighas on nine hundred and twenty-six bighas in respect of the premises at or before the execution of these presents by the lessees paid to the lessor (the receipt whereof the lessor doth hereby admit and acknowledge) the lessor doth hereby grant and demise unto the lessees all and singular the underground coal mining rights of and in all those the lands and premises specified in schedule hereto and which are hereinafter referred to as the premises and all the estate right title interest claim and demand of the lessor into and upon the same and every part thereof with full liberty and power to the lessees to search for work make merchantable and carry away the coal there found and also liberty and power for the purposes aforesaid and all other purposes connected therewith to dig sink drive make repair and use all such pit shafts drifts levels water gates planes adits water-ways and air-ways and to form and erect engines machinery dressing floors buildings workshops store houses cottages godowns coke ovens furnaces brick-kilns lime-kilns erections and things and to form all such railways and tramways and other roads and communications spoil heaps and other conveniences in over and under the said lands as may be necessary in the premises. To hold the said premises hereby demised unto the lessees from the first day of November one thousand nine hundred and fifteen for the term of nine hundred and ninety-nine years subject to the right of determination hereinafter contained yielding and paying therefor unto the lessor by monthly payments in each year (the first such payments to be made on the twenty-first day of December one thousand nine hundred and fifteen the royalty on all coal and coke raised gotten manufactured and despatched from the said lands hereby demised at the rates following that is to say:—Four annas per ton on all steam coal three annas per ton on all rubble coal and two annas per ton on all dust coal raised and despatched and eight annas per ton on all hard coke and six annas per ton on all soft coke manufactured and despatched."

The lease provided for payment of a minimum royalty at the end of any year in which royalties on coal raised and despatched should be less than a certain amount. It also contained usual covenants and in particular that the lessees undertook to deliver up the mines in good order and condition at the end or sooner determination of the term. It included a covenant by the lessor for quiet enjoyment and the lessees were granted liberty to determine the lease on certain terms. The lessors were further entitled to enter upon the demised premises and to determine the lease on specified conditions if the royalties were not duly paid.

The other leases were in terms similar for all purposes material to this appeal to the lease just referred to.

The appellant's main contention has been that on the true construction of the Income-tax Act, 1922, mineral royalties depending on the tonnage of minerals raised and despatched are not properly chargeable to tax because they are in their nature and quality capital, and are not " income " or income derived from " other sources " within the meaning of sections 6 and 12 of the Act.

The Indian Income-tax Act of 1922, which was a consolidating Act, is both in its general framework and its particular provisions different from the English income tax Acts, so that decisions upon the English Acts are in general of no assistance in construing the Indian Act. But on some fundamental concepts reference may be to some extent usefully made to English decisions, in particular as to the meaning of the word " income." Under section 4 of the Indian Act it is provided that the Act shall apply to all " income, profits or gains " described or comprised in section 6, and arising in British India. Section 6 specifies six heads of income, profits and gains which are to be chargeable. Of these it is not disputed that the monies upon which the disputed charge has been assessed (if taxable as income under section 6), fall under the head " other sources." As to this head, section 12 enacts (1) that the tax payable by an assessee under that

head is to be " in respect of income, profits and gains of every kind and from every source to which the Act applies (if not included under any of the preceding heads). (2) Sub-section 2 provides that such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made of any personal expenses of the assessee."

Under the English Acts income which consists of mining royalties, was taxed under Schedule A but according to the relevant rules of Schedule D. Under the Indian Act the provisions of section 9 with reference to " property " (which is head III in section 6) are regarded as excluding royalties from being held to come under that head. Royalties cannot be regarded as " profits or gains " of a business. The sources of the royalties may properly be deemed to be the lessees' covenants to pay them, and hence royalties fall under " other sources."

The appellant's substantial argument is that the coal on his land is capital, and that the sums which he receives from time to time for each ton raised and despatched is a capital receipt, being the price given in exchange for the capital asset, as and when the property in each ton vests in the lessee. He supports this contention also on what he terms are the realities and equities of the position. These, as he urges, arise from the circumstance that the coal is a wasting property and is being gradually exhausted as each ton is raised and disposed of. He has also submitted, though not perhaps very strenuously, that whereas under the English Acts mines and income from them are expressly dealt with and are clearly therefore subjected to the tax, the position under the Indian Act is different in the respect that mining royalties are not expressly specified as taxable. He has also contended that their peculiar characteristics make the general words " income, profits and gains " inapplicable to them, at least in the absence of their being expressly mentioned.

The issue depends on the true interpretation of the word " income " as used in the Act. Income is not only the most general word in section 6 of the Act but is obviously a more appropriate term to be applied to mining royalties than " profit or gains." In order to ascertain whether the word " income " applies to mining royalties, it is necessary to advert to the nature of a mining lease and the meaning of rent or royalties as used in a mining lease. A question has been raised whether the mining leases are leases within sections 105 to 108 of the Transfer of Property Act, 1882, or within the ordinary legal acceptance of that word in Indian law. In their Lordships' opinion the leases are properly described as leases according to ordinary parlance and are within the terms of the sections referred to of the Act of 1882. At the same time, their Lordships do not regard this question as relevant to determine in the present case.

The payments which under the leases are exigible by the lessor may be classed under three categories (1) the salami or premium; (2) the minimum royalty; (3) the royalties per ton. The salami has been, rightly in their Lordships' opinion, treated as a capital receipt. It is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted to them by the lease. That general right may properly be regarded as a capital asset, and the money paid to purchase it may properly be held to be a payment on capital account. But the royalties are on a different footing. The minimum royalty is only payable if in any year the royalties on coal raised and despatched are less than the sum fixed as the minimum royalty. This amounts to a species of annual guarantee: it does not correspond to any coal in fact extracted and taken away: it is simply " income " flowing from the covenants in the lease, contingently on the lessees' failure to take the minimum quantity of coal. It would be payable if in any year the lessees took no coal at all, or if the coal in the mine was completely exhausted before the termination of the lease. The minimum royalty is therefore in their Lordships' judgment ' income " and in no sense a payment on capital account. But the minimum royalty throws at least by analogy or contrast some light on the

character of the royalties payable on each ton of coal. These in their Lordships' judgment, for reasons which will now be explained, constitute income, as the High Court at Patna has held in upholding the assessment.

The appellant's case was primarily based on certain observations made by Lord Cairns in *Gowan* v. *Christie*, L.R. 2 Scotch Appeals 273, at p. 283. Lord Cairns said:

> " for although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual for a specific length of time, to go into and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil."

Lord Cairns was there not considering the question whether royalties under such a lease were capital or income for purposes of taxation. The question was whether the lessee was entitled to be relieved from his contract because he could not work the minerals at a profit. The House of Lords held against the lessee.

Before discussing that dictum of Lord Cairns, certain other authorities may be cited. In *Coltness Iron Co.* v. *Black*, 6 A.C. 315, there was a further discussion of the nature of a mining lease. The main question was whether the lessees could deduct from their gross annual receipts, which included profits from their coal mines, the cost incurred in sinking new pits. The House held that they could not, because these costs were not part of the working expenses but were capital expenditure. They further rejected the contention that some allowance should be made against the profits because the coal was being gradually exhausted in the course of earning these profits. This, so far as it goes, is a decision against the appellant's argument. It is based on the English taxing Acts under which mines are specifically assessed. Lord Blackburn, after quoting what Lord Cairns had said in *Gowan* v. *Christie* (*supra*) went on to say:—

> " But the argument that no income tax should be imposed on what is, perhaps not quite accurately, called rent reserved on a mineral lease, because it is a payment by instalments of the price of minerals forming part of the land, any more than on the price paid down in one sum for the out and out purchase of the minerals forming part of the land, is, I think, untenable."

He further added in reference to the fact that the coal was being exhausted the following observations:—

> " It has also been sometimes argued that it is very unjust to tax at the same rate a terminable interest, such as that in a mine, which must at some time be worked out, and a fee simple interest, which will endure so long as this world continues in its present state. I will not inquire whether this is just or not. There is much force in the argument on the other side, that if the interest is terminable, so is the tax, and will cease when the interest ceases. But whether just or not, there can be no doubt that the same annual charge is imposed upon a terminable annuity and on one in perpetuity; and, what seems harder, that the same annual charge is imposed upon a professional income, earned by hard labour, often extending over many years before any return is got, and, when earned, precarious, as depending on the health of the earner."

Now it is true that Lord Blackburn was dealing with the English statutes, which were clearly different from the Indian Act. Under that latter Act, the tax is on " income." Mines are not specially mentioned as they are in the English Act. But if income is in fact derived from mines, it is to be taxed as much as " income " from any other source. The general term covers the specific instances. The grounds on which the appellant contends that the royalties are not " income " are that they are capital receipts from a wasting property. In principle, in their Lordships' opinion, both these points are disposed of by Lord Blackburn's words, which depend on general principles, not on rules peculiar to the English Acts.

Income, it is true, is a word difficult and perhaps impossible to define in any precise general formula. It is a word of the broadest connotation. Its definition has however been approached in recent decisions of this Board. The first to which their Lordships think it is desirable to refer is *Commissioner of Income-tax* v. *Shaw Wallace & Co.* (59 I.A. 206). Sir George Lowndes in delivering the judgment of the Board once more wisely emphasised the danger of using decisions on English income tax Acts in order to construe the Indian Act. He went on to give a definition of " income " as it is used in the Indian Income-tax Act. His definition was:—

> " Income, their Lordships think, in this Act connotes a periodical monetary return " coming in " with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as " capital." But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

That definition was followed and in substance repeated in a decision of the Board delivered by Lord Russell of Killowen in *Captain Maharaj Kumar Gopal Saran Narayan Singh* (62 I.A. 207). In that case the appellant, the assessee, had transferred an estate in consideration of a lump sum and of the discharge of certain debts and of the payment to himself for life of an annuity of Rs.2,40,000. It was held that the annuity constituted " income " to the assessee during each year in which it was paid. Lord Russell, adopting generally the definition already quoted, added the following important amplification:—

> " The word ' income ' is not limited by the words ' profits ' and ' gains.' Anything which can properly be described as income, is taxable under the Act unless expressly exempted."

It is not in their Lordships' opinion correct to regard as an essential element in any of these or like definitions a reference to the analogy of fruit, or increase or sowing or reaping or periodical harvests. Lord Cairns (*loc. cit*) used these expressions because he was distinguishing mineral leases from agricultural leases. Sir George Lowndes (*loc. cit*) speaks of " income " being likened pictorially to the fruit of a tree or the crop of a field. But it is clear that such picturesque similes cannot be used to limit the true character of income in general, and particularly when it is constituted by mining rent or royalties. These are periodical payments, to be made by the lessee under his covenants in consideration of the benefits which he is granted by the lessor. What these benefits may be is shown by the extract from the lease quoted above, which illustrates how inadequate and fallacious it is to envisage the royalites as merely the price of the actual tons of coal. The tonnage royalty is indeed only payable when the coal or coke is gotten and despatched: but that is merely the last stage. As preliminary and ancillary to that culminating act, liberties are granted to enter on the land and search, to dig and sink pits, to erect engines and machinery, coke ovens, furnaces and form railways and roads. All these and the like liberties show how fallacious it is to treat the lease as merely one for the acquisition of a certain number of tons of coal, or the agreed item of royalty as merely the price of each ton of coal. The contract is in truth much more complex. The royalty is " in substance a rent; it is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows " to quote the words of Lord Dennan in *R.* v. *Westbrook* (10 Q.B. 178). He was referring to leases of coal mines, clay pits and slate quarries. He added that in all these the occupation was only valuable by the removal of portions of the soil. It is true that he was dealing with occupation from the point of view of rating, but occupation has the same meaning in its application to matters of taxation such as are involved in this case.

There is therefore, in their Lordships' judgment, no real justification for treating the royalties as capital payments. They think that they are

" income " within the meaning of the Act, whatever may be the exact definition of that word in the Act. Its applicability may in particular cases differ because the circumstances, though similar in some respects, may be different in others. Thus the profit realised on a sale of shares may be capital if the seller is an ordinary investor changing his securities, but in some instances at any rate it may be income if the seller of the shares is an investment or an insurance company. Income is not necessarily the recurrent return from a definite source, though it is generally of that character. Income again may consist of a series of separate receipts, as it generally does in the case of professional earnings. The multiplicity of forms which " income " may assume is beyond enumeration. Generally, however, the mere fact that the income flows from some capital assets, of which the simplest illustration is the purchase of an annuity for a lump sum, does not prevent it from being income, though in some analogous cases the true view may be that the payments, though spread over a period, are not income, but instalments payable at specified future dates of a purchase price. Such a case is illustrated by *Scoble* v. *Secretary of State for India* [1903], A.C. 299.

But in their Lordships' judgment, the royalties here are clearly income and not capital. They are periodical payments for the continuous enjoyment of the various benefits under the leases. The actual acquisition of the property in a particular ton of coal at the moment when the lessees have cut and taken away the coal is only the final stage.

The authorities already cited and many others to the same effect show that the fact that the mines, which form an element in the consideration for the royalties, are wasting assets is irrelevant. The English cases are sufficiently collected and explained by the Court of Appeal in *Alianza Co.* v. *Bell* [1905], 1 K.B. 184, affirmed in the House of Lords [1906], A.C. 18. That case states principles which are generally applicable in India as well as in England. If the receipts are income, it is not material for tax purposes that that for which they are paid comes from a wasting property. If the payment ceases because the source ceases so does the tax. Once it is established that the royalties are income within the meaning of the Act it is not material that the mines are in course of being exhausted unless there is provided in the Act that there should be a deduction from the income on that particular ground. But there is under the Indian Act no provision for allowance for amortisation in respect of the minerals being exhausted. Indeed, where as here the lease is for 999 years, an attempt to quantify the appropriate allowance would be scarcely practicable. However section 12 (2) already quoted in this judgment expressly excludes allowances in respect of capital expenditure. Any ordinary expenditure incurred by the appellant in connection with the leases, such as the cost of collection of the royalties, has been duly allowed.

For these reasons which are substantially those given by the learned Judges of the High Court, their Lordships agree with them in their conclusions. Accordingly the appeal fails and should be dismissed.

Their Lordships in doing so are in agreement with the current of judicial opinion in the Indian Courts. They may start by citing the decision of the Calcutta High Court in 1907 in *Manindra Chandra Nandi* v. *Secretary of State for India*, I.L.R. 34, Cal. 257, and the elaborate judgment of Mookerjee J. at p. 283 which has never been dissented from in India. Similar views were expressed in the comparatively recent cases in the Patna High Court to which full reference has been made in the judgments under appeal. Their Lordships do not think it necessary to repeat here what has been so fully explained in these judgments. It is enough here to say that their Lordships substantially agree with them. They refer particularly to the judgment of Dawson Miller C.J. in *Sri Raja Shiva Prasad Singh* v. *The Crown* (I.L.R. 4, Patna 73). It may be added that on the question at issue, there is no difference in principle between the effect of the Act of 1922 and its predecessor, the Act of 1886, in this matter.

Their Lordships are of opinion that the judgment of the High Court should be affirmed and the appeal dismissed with costs.

They will humbly so advise His Majesty.

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In the Privy Council

RAJA BAHADUR KAMAKSHYA
NARAIN SINGH, OF RAMGARH

v.

THE COMMISSIONER OF INCOME-TAX,
BIHAR AND ORISSA

DELIVERED BY
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