Bombay High Court

Ralla Ram vs The Province Of East Punjab on 24 November, 1948

Equivalent citations: (1949) 51 BOMLR 333

Author: F Ali

Bench: H Kania, Kt., F Ali, P Sastri, Mukherjea

JUDGMENT Fazal Ali, J.

1. The question to be determined in this appeal is whether the provisions of the Punjab Urban Immovable Property Tax Act (Punj. Act No. XVII of 1940), which will hereinafter be referred to as the Punjab Act, are beyond the powers of the Provincial Legislature which enacted it. The question arose under the following circumstances.

2. The appellant is the owner of a shop in the town of Amritsar. Under the Act, to which reference has been made, he was called upon to pay, a sum of Rs. 67-8-0 as property tax for the year 1943-44 in respect of the shop. At first, he denied his liability to pay the amount, but, subsequently, he paid it under protest, and thereafter instituted a suit in the Court of the Judge of Small Causes at Amritsar, claiming its refund on the ground that the Act which levied the property tax was ultra vires the Punjab Legislature. This suit was dismissed, and thereupon, he made an application for revision to the Lahore High Court, but the application also was dismissed. While dismissing the application, however, the High Court granted a certificate under Section 205(1) of the Government of India Act, 1935, and he has accordingly preferred an appeal in this Court.

3. At the hearing of the appeal, the Government of East Punjab (the present respondent in the appeal) was represented by the Advocate-General of East Punjab, and the Advocate-General of Bombay was also heard, on the ground that the Government of Bombay was interested in the constitutional point involved in the appeal.

4. In order to appreciate the grounds on which the Punjab Act is called in question, a brief reference to some of the provisions of the Government of India Act, 1935, seems necessary.

5. Under Section 316 of the Government of India Act, 1935, the powers conferred on the Federal Legislature are exercisable by the Indian Legislature. Section 99(1) of the Government of India Act gives the power to the Federal Legislature to make laws for the whole or any part of British India or any federated State, and to the Provincial Legislature to make laws for the Province or for any part thereof. This section is followed by Section 100, which runs as follows:

(1) Notwithstanding anything in the two next succeeding sub-sections, the Federal Legislature has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule to this Act (hereinafter called the 'Federal Legislative List').

(2) Notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and subject to the preceding sub-section, Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the said Schedule (hereinafter called the 'Concurrent Legislative List').

(3) Subject to the two preceding sub-sections, the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the said Schedule (hereinafter called the 'Provincial Legislative List').

(4) The Federal Legislature has power to make laws with respect to matters enumerated in the Provincial Legislative List except for a Province or any part thereof.

6. Lastly Section 107(1) provides that:

If any provision of a Provincial law is repugnant to any provision of a Federal law which the Federal Legislature is competent, to enact or to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then, subject to the provisions of this section, the Federal law, whether passed before or after the Provincial law, or,

as the case may be, the existing Indian law, shall prevail, and the Provincial law shall, to the extent of the repugnancy, be void.

7. The relevant items of Lists I and II to which reference may now be made are: item 54 of List I which is "Taxes on income other than agricultural income" and item 42 of List II which comprises "Taxes on lands and buildings, hearths and windows." It is obvious that while a Provincial Legislature is quite competent to levy the tax referred to in item 42 of List II, it cannot encroach on the subjects allotted to the Central Legislature within the ambit of item 54 or any other item in List I. It must also be conceded that if the subject-matter of a tax falls within item 54 of the Federal List and also under item 42 of the Provincial List, the power of the Indian Legislature must prevail to the exclusion of the power of the Provincial Legislature. As the impugned tax purports to be a tax on buildings, it falls prima facie under item 42 of List II, and, if on a proper examination of the matter it is found that in fact and in law it does so fall and does not fall under item 54 of List I, there can be no doubt that it was within the legislative competence of the Punjab Legislature to levy such a tax. The appellant however contends that the tax does not properly fall within item 42 of List II, and he assails the Act imposing the tax on two grounds. First, it is contended that if the expression "taxes on buildings" is construed in the light of British legislative practice as also with reference to the context in which it occurs, it must be held to refer to some kind of occupation tax payable by the occupier of the building and not by the owner. On this line of reasoning, it is urged that the Punjab Legislature was not competent to levy the present tax which is a tax on the owner.

8. Secondly, it is urged that the impugned tax is in substance a tax on income and as such falls under item 54 of List I, and not under item 42 of List II. To levy such a tax, it is contended, was beyond the power of the Provincial Legislature.

9. In support of the first contention, the learned advocate for the appellant relied on the well-known observations of Lord Macmillan in Croft v. Dunphy [1933] A.C. 156 which run as follows (p. 165) :-

When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which had conferred the power. Thus in considering what might be appropriately and legitimately enacted by the Dominion Parliament under its power to legislate in relation to 'bankruptcy and insolvency', it was considered relevant to discuss the usual contents of bankruptcy statutes.

10. It was contended that in interpreting the words "tax on buildings", which occur in List II, regard should be had to the legislative practice prevailing in England; and further that since the taxes on buildings in England, or rates as they were called, were generally speaking in the nature of an occupation tax payable by the occupier, it could not have been contemplated by the British Parliament that the expression "tax on buildings" should be something other than an occupation tax and embraces tax payable by the owner. This line of argument has its own inherent weakness, but it is further weakened by three important concessions which the learned advocate for the appellant is obliged to make: (1) that even in England taxes on lands are generally payable by the owner, (2) that the Inhabited House Duty Act, on which reliance was placed, had been repealed many years before the enactment of the Government of India Act, and (3) that, on a reference to a large number of Provincial Acts which have been in force in different parts of the country for a long time prior to the enactment of the Government of India Act, it would appear that taxes on lands and buildings imposed properly upon the owners have been for very many years a well-recognized form of taxation within many municipal areas in India.

11. In In re The Central Provinces and Berar Act No. XIV of 1938 [1939] F.C.R. 18, where a question arose whether an Act of a Provincial Legislature levying a tax on retail sales of motor spirit and lubricants was ultra vires the Provincial Legislature, the tax being in the nature of a duty of excise within the meaning of entry 41 in List I of the Seventh Schedule to the Government of India Act, Sir Maurice Gwyer C.J. observed (p. 53):

Lastly, I am entitled to look at the manner in which Indian legislation preceding the Constitution Act had been accustomed to provide for the collection of excise duties;: for Parliament must surely be presumed to have had Indian legislative practice in mind and, unless the context

otherwise requires, not to have conferred a legislative power intended to be interpreted in a sense not understood by those to whom the Act was to apply.

12. If therefore the legislative practice in India is to be taken into consideration, the appellant's argument could be met, by saying that the British Parliament might well have intended to enable the Provincial Governments to continue to impose taxes of the nature imposed in different parts of the country for many years past. It seems however unnecessary to pursue the matter further, because the point can, in our opinion, be disposed of on a surer ground. It appears to us that when the words used in the Act are clear and unambiguous, and they are not unfamiliar or uncommon words or such words as may be aptly described as terms of art, it is unnecessary to travel beyond the Act for the purpose of construing them. Item 42 of List II deals with taxes on "lands and buildings, hearths and windows". There are no words in the Act to suggest that the tax is to be paid only by the occupier and not by the owner, and it seems to us to be wholly wrong to read in item 42 words which do not occur there and thereby to limit the scope and meaning of the expressions used. It is suggested that all the words used in item 42 should be read together, and that if they are so read, it must follow that the tax on buildings should be of the same nature as the tax on hearths and windows, which, it is said, must be in the nature of a "consumption tax" payable by the occupier. This argument also appears: to us to be based on unwarranted assumptions. The mere fact that the words "hearths and windows" occur along with the words "lands and buildings" in item 42, does not indicate that they must all be necessarily read together, and that the tax on lands and buildings must be of the same nature and incidence as the tax on hearths and windows. It is quite conceivable that the tax on buildings may be levied on the owner, whereas the-tax on hearths and windows may be levied on the occupier and vice versa. The correct position has, in our opinion, been summed up very lucidly by the learned Chief Justice of the Lahore High Court in the following passage in his judgment:-

It may well have been the policy of the British Parliament to tax occupiers of lands and buildings, etc., and not the owners. In each of the Acts referred to by Mr. Narotam Singh the tax was in terms imposed upon the occupier. The fact that it was the policy of the British Parliament to tax occupiers cannot be used to construe the words appearing in item 42. It appears to me that if Parliament when enacting the Government of India Act intended Provincial Legislatures to tax

occupiers only and not owners of lands and buildings, they would have said so. It would have been the obvious thing to say and the fact that they did not say so makes it clear to my mind that Parliament, intended Provincial Legislatures to have power to impose any taxes on lands and buildings, hearths and windows, which they could legitimately do.

When words in a statute are clear and unambiguous, effect must be given to the plain grammatical meaning of the words. By no stretch of imagination can it be said that item 42 is ambiguous. The words are clear and they entitle a Provincial Legislature to impose taxes on lands and buildings, hearths and windows without reference to who has to pay such taxes. If the tax can legitimately be paid by the owner, then it appears to me that item 42 would cover such tax, as it would cover a tax legitimately payable by the occupier. It seems to me, therefore, that no assistance can be obtained from what had been the policy of the English Legislature in construing this particular item.

13. The second contention put forward on behalf of the appellant is a more serious one, and needs very careful examination. Section 3 of the Punjab Act, which, is the charging section in the Act, is in these terms:

3. (1) There shall be charged, levied and paid an annual tax on buildings and lands situated in the rating areas shown in the schedule to this Act at such rate, not exceeding twenty per centum of the annual value of such buildings and lands, as the Provincial Government may by notification in the Official Gazette direct in respect of each such rating area.

(2) The Provincial Government may by similar notification direct that during the continuance of the present state of war and for a period not exceeding twelve months after the termination thereof there shall be charged, levied and paid, in addition to the tax leviable under Sub-section (1), a surcharge not exceeding fifty per centum of the rate notified under that sub-section.

(3) The Provincial Government may, by notification in the Official Gazette, from time to time add to, omit or vary any of the entries contained in the schedule to this Act.

(4) The tax shall be paid by the owner of the buildings and lands in respect of which it has been levied.

14. This section must be read with Section 5 of the Act which is to the following effect:

The annual value of any land or building shall be ascertained by estimating the gross annual rent at which such land or building together with its appurtenances and. any furniture that may be left for use or employment with such building might reasonably be expected to let from year to year, less

(a) any allowance not exceeding twenty per centum of the gross annual rent as the assessing authority in each particular case may consider reasonable rent for the furniture let with any such building;

(b) an allowance of ten per centum for the cost of repairs and for all other expenses necessary to maintain such building in a state to command such gross annual rent. Such deduction shall be calculated on the balance of the gross annual rent after the deduction, if any, under Clause (a) and

(c) any land revenue actually paid in respect of such building or land:

Provided that in calculating the annual value of any building or land under this section the value of any machinery in such building or on such land shall be excluded.

15. It was contended on behalf of the appellant that on a perusal of Section 3 and other provisions of the Act, it would appear that the basis of the tax is the annual value of the building and, since the same basis is used in the Indian Income-tax Act for determining income from property, and generally speaking the annual value is the fairest standard for measuring income and, in many cases, is indistinguishable from it, the tax levied by the impugned Act is in substance a tax on income. This conclusion does not seem to follow from a mere perusal of Section 3 of the Act, because all that it provides is that there shall be an annual tax on buildings

at such rate not exceeding twenty per cent, of the annual value of such buildings, as the Provincial Government may direct in respect of each rating area. It is possible as a matter of first impression, to read this provision as meaning that while 20 per cent, of the annual value is fixed merely as the ceiling, the rate of tax on a building may have no reference to and be quite independent of the annual value of the building. On this interpretation, the tax will not be open to attack on the grounds urged. But the Act is to be read as a whole, and, having regard to the elaborate provisions made in it for determining the annual value of buildings and to the fact that the rate actually fixed in the Official Gazette has a direct reference to the annual value, there can be no doubt that the basis of the tax is annual value. The appellant's contention therefore has to be examined on the footing that the basis of the tax under the Punjab Act is the annual value of the property to be taxed.

16. The proper approach to a question such as the one we have before us has been aptly defined by Lord Atkin in Gallagher v. Lynn [1937] A.C. 863 in these words (p. 870):-

It is well established that you are to look at the 'true nature and character of the legislation'; Russell v. The Queens (1882) 7 App. Cas. 829 'the pith and substance of the legislation.' If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field. Nor are you to look only at the object of the legislator. An Act may have a perfectly lawful object, e.g., to promote the health of the inhabitants, but may seek to achieve that object by invalid methods, e.g., a direct, prohibition of any trade with a foreign country. In other words, you may certainly consider the clauses of an Act to see whether they are passed 'in respect of the forbidden subject.

17. The Punjab Act purports to tax property which prima facie the Provincial Legislature is allowed to do under item 42 of List II of the Government of India Act. But if it appears that the impugned tax, in the guise of dealing with property, is in fact and in substance a tax on the income of the owner of property, then, undoubtedly, the Act is not a valid one. It is argued on behalf of the appellant that the moment it is seen that the basis of the tax is the annual value of

property, which is the very basis used by the Indian Income-tax Act for assessing income from property, it should be held that it is in substance a "tax on income" which is a subject outside the authorised field of the Provincial Legislature. The argument appears at first sight to be quite a plausible one, but, on closer examination, the conclusion suggested does not seem to follow so readily from the premises enunciated, as is assumed. If the annual value of house property represented in every case the actual income of the owner from the property, the question would not have presented so much difficulty. But that is not so. In many cases, the annual value may approximate to actual income, but, in quite a number of cases, it may not. It is evident that in many cases, there may be a great divergence between the annual value of a property and the actual profits derived or received by the owner from it. It is also possible to conceive of cases in which the property to be taxed does not actually yield any income whatsoever, though every property must have some notional annual value. As has been pointed out in treatises on income-tax, many of the rules framed under the Income-tax Act are highly artificial, so that "income calculated for purposes of income-tax does not by any means necessarily correspond with the income actually received in the year which can be spent or saved." One of these artificial rules is the rule of estimating income from property. This was conceded in A Reference under the Govrnment of Ireland Act, 1920 and Section 3 of the Finance Act (Northern Ireland), 1934 In re [1936] A.C. 352, where it was Stated that "the method of assessing income derived by ownership or occupation of property is somewhat arbitrarily based on the annual value and not the actual income." Similarly, Kennedy L.J. observed in Rex v. Special Commissioners of Income-tax: Essex Hall, Ex Parte [1911] 2 K.B. 434, cited in Sir Byramjee Jeejeebhoy v. Province, of Bombay [1940] Bom. 58, 80, s.c. 42 Bom. L.R. 10, f.b.:

An assessment upon 'annual value' may, for certain purposes, be treated, in applying the Income-tax Acts, as an equivalent for an assessment upon 'gains and profits'; but they are not simply synonymous or interchangeable expressions.

18. Now once it is realised that the annual value is not necessarily actual income, but is only a standard by which income may be measured, much of the difficulty which appears on the surface is removed. In our opinion, the crucial question to be answered is whether merely because the Income-tax Act has adopted the annual value as the standard for determining the income, it must

necessarily follow that, if the same standard is employed as a measure for any other tax, that tax becomes a tax on income ? If the answer to this question is to be given in the affirmative, then certain taxes which cannot possibly be described as income-tax must be held to be so. A case in point is to be found in A Reference under the Government of Ireland Act, 1920 and Section 3 of the Finance Act (Northern Ireland), 1934, In re (supra). The question which arose in that case was whether the provisions of Section 3 of the Finance Act (Northern Ireland), 1934, were beyond the powers of the Parliament of Northern Ireland. Section 3 of the Act of 1934 imposed a tax on the council of every county and county borough, and the tax was computed on the basis of the rateable value of the county council or county borough. There was no dispute in that case that the "rateable value" corresponded to the "annual value" as understood in the Income-tax Act, but it was held that the mere fact that the basis of the tax was rateable or annual value was not enough to make it a tax on income. Lord Thankerton, who delivered the judgment in that case, pointed out that "it is the essential character of the particular tax charged that is to be regarded, and the nature of the machinery, often complicated, by which the tax is to be assessed is not of assistance except in so far as it may throw light on the general character of the tax." The tax was not held to be a tax on income, because it was payable by an occupier, and the distinctive feature of the case was described in these words (p. 359):

... the poor rate is levied in respect of the occupation of hereditaments, irrespective of a person's income generally, and irrespective of whether the rate-payer is in fact deriving profits or gains from such occupation. A dwelling-house is a burden, not a source of profit, for the occupier who pays rent for it. He is rated on the value of the burden, while he remains unrated in respect of his whole profits, be they from business or from investments. In their Lordships' opinion this marks the essential difference in character between income-tax and rates, and it is unnecessary to consider other and less important differences between them.

19. This case demolishes the broad contention that wherever the annual value is the basis of a tax, that tax becomes a tax on income. It shows that there are other factors to be taken into consideration and that it is the essential nature of the tax charged and not the nature of the machinery which is to be looked at.

20. Now, when looking at the machinery by which the tax is to be assessed, one cannot overlook the difference in the modes of estimating the annual value adopted under the Punjab Act and the Income-tax Act respectively. Section 5 of the Punjab Act, which lays down the mode of estimating the annual value, has been quoted before, and a reference to it would show that besides making an, allowance for the rent of furniture which, under the section, is to be taken into consideration in estimating the annual value, it permits two allowances only: (1) an allowance of 10 per cent, for the cost of repairs and other expenses necessary for maintaining the building, and (2) any land revenue actually paid in respect of such building. Section 9 of the Income-tax Act however is a much more elaborate provision, and sets out the deductions allowable in seven clauses, which include cost of repairs, insurance premia, interest on mortgages and charges, land revenue, collection charges and vacancies. A comparison of the above provisions will show that whereas under the Income-tax Act every effort has been made to get at the true income or profits from the property, no such intention is apparent in Section 5 of the Punjab Act, which does not permit any deduction in respect of any items of expenditure except' two, and which draws no distinction between encumbered and unencumbered property or occupied and vacant property. Thus, under Section 3 of the Punjab Act, the tax will be payable, whether the property is profitable or not. It would also be payable even though there may be a mortgage existing on the property, no matter what the' amount of interest payable under it may be. Indeed it was contended on behalf of the respondent that the omission from the Act of any allowance for such outgoings as interest on mortgages is difficult to explain, except on the footing that the basis of the tax is something not dependent on the income of the assessee.

21. It was urged on behalf of the appellant that the difference between the two Acts as to the mode of assessing annual value is accidental and is made conspicuous only by reason of the number of deductions allowed under the present Income-tax Act, It was also pointed out that in the old Income-tax Acts, and especially in' the Income-tax Act of 1886, deductions were not allowed on such a liberal scale. That, however, does not, in our opinion, dispose of the matter. It has to be remembered that the Punjab Act was passed in 1940, by which time the Income-tax law had been greatly developed, and a comparison between that Act and the Indian Income-tax Act as it stood then cannot be ruled out lightly. After all, what we have to find is whether the intention of the Punjab Act was to tax income, and whether in fact it did tax income. If we find

that the basis of the tax, though described as annual value, is something not necessarily synonymous with income and is something very different from the annual value as estimated in the Income-tax Act, we have to seriously ask ourselves whether the tax which the Punjab Act purports to impose can legitimately be said to be in substance a tax on income. "Annual value" is after all a mere expression, and what we are concerned with is not the mere expression but its meaning and scope in relation to actual income. It was easy enough for the Punjab Legislature to adopt the standard and the machinery employed in the Income-tax Act for getting at the profits from property, if it was their intention to do so, but it has not been done. The real distinction between these two Acts seems to be that whereas the Income-tax Act purports to get at the true income, there is no such pretence in the impugned Act which uses the annual value merely for the purpose of determining the importance or the value of the property to be taxed.

22. Reference may be made here to the decision of a special bench of the Bombay High Court in Sir Byramjee Jeejeebhoy v. Province of Bombay [1940] Bom. 58, s.c. 42 Bom. L.R. 10, f.b. The point which arose in that case was precisely the same as the one raised before us. The point was whether the Urban Immovable Property Tax levied by Section 22 of the amended Bombay Finance Act, 1932, was beyond the powers of the Bombay Legislature, on the ground that it was essentially a tax on income.

23. Section 22 of that Act provided that "there shall be levied and paid to the Provincial Government a tax on buildings and lands hereinafter called the 'urban immovable property tax' at ten per cent, of the annual letting value of such buildings and lands." The learned Judges who heard the case came to the unanimous conclusion that the Act was not ultra vires, and delivered three very elaborate and instructive judgments which deal with all the important aspects of the case. These judgments were read to us almost in extenso in the course of the arguments, and we agree generally with the conclusions arrived at in them and with most of the reasonings by which they are supported.

24. Our own conclusion may be summed up very briefly. In the first place, we have to look into the charging section of the statute, because as was pointed out in Provincial Treasurer of Alberta v. Kerr [1933] A.C. 710, "the identification of the subject-matter of the tax is only to be found in

that section." The charging section in the present case is Section 3, which in clear terms levies not a tax on income but a tax on buildings and lands. It is true that we must look not to the mere form but to the substance of the levy, and the tax must be held to be invalid, if in the guise of a property tax it is really a tax on income. There is however nothing in the impugned Act to show that there was any intention on the part of the Legislature to get at or tax the income of the owner from the building. It is true that the annual value was used as the basis, but it was very different from the annual value which may be used for getting at the true profits or income. The annual value, as has been pointed out, is at best only notional or hypothetical income and not the actual income. It is only a standard used in the Income-tax Act for getting at income, but that is not enough to bar the use of the same standard for assessing a Provincial tax. If a tax is to be levied on property, it will not be irrational to correlate it to the value of the property and to make some kind of annual value the basis of the tax, without intending to tax income. This is precisely what was emphasized by Broomfield J. in the following passage in his judgment in Sir Byramjee Jeejeebhoy v. Province of Bombay [1940] Bom. 58, s.c. 42 Bom. L.R. 10, f.b (p. 82) :

Suppose a tax were imposed of x rupees on every house in Bombay, payable by the owner. That would be a crude and unequal impost, but perfectly legal. It would be more equitable, but still I imagine perfectly legal, if the tax were graded according to the size of the building, the number of storeys or rooms, or according to the extent of frontage on important streets, or according to the cost of construction. Why should it not be permissible to go a little further in the direction of making the amount of the tax correspond to the importance and value of the properties, by employing the standard basis of assessment of municipal property taxes? If annual value had been equivalent to income that would not be possible, for income may not be taxed by the Provincial Legislature. But when you speak of income being taxed, within the meaning of item 54, what has to be considered in my opinion is actual income, and not the hypothetical income arbitrarily adopted for income-tax purposes.

25. In the case of Subrahmanyan Chettiar v. Muthuswami Goundan [1940] F.C.R. 188 Sir Maurice Gwyer C.J. observed as follows (p. 201):

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance,' or its 'true nature and character,' for the purpose of determining whether it is legislation with respect to matters in this list or in that.

26. Again in In re The Central Provinces and Berar Act No. XIV of 1938 [1939] F.C.R. 18, 53 where, as already stated, the question arose whether a tax on the sale of motor spirits was a tax on the sale of goods within item 48 of the Provincial List or a duty of excise within item 45 of the Federal List, the learned Chief Justice observed as follows (p. 43):

It appears then that the language in which the particular legislative powers which the Court is now considering have been granted to the Central and Provincial Legislatures respectively may be wide enough, if taken by itself and without reference to anything else in the Act, to cover in each case a tax of the kind which has been imposed, whether it be called an excise duty, if imposed by the Central Legislature, or a tax on the sale of goods, if imposed by a Province....

Only in the Indian Constitution Act can the particular problem arise which is now under consideration; and an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If indeed such a reconciliation should prove impossible, then, and only then, will the non obstante clause operate and the federal power prevail; for the clause ought to be regarded as a last resource, a witness to the imperfections of human expression and the fallibility of legal draftsmanship.

27. The principles deducible from these pronouncements are (1) that where there is an apparent conflict between an Act of the Federal Legislature and an Act of the Provincial Legislature, we

must try to ascertain the pith and substance or the true nature and character of the conflicting provisions, and (2) that, before an Act is declared ultra vires, there should be an attempt to reconcile the two conflicting jurisdictions, and, only if such a reconciliation should prove impossible, the impugned Act should be declared invalid.

28. There is also another mode of approaching the subject, which was indicated by the Judicial Committee in Prafulla Kumar Mukherjee v. Bank of Commerce Ld., Khulna (1947) L.R. 74 I.A. 23, s.c. 49 Bom. L.R. 568, where the question was whether the substance of the Bengal Money Lenders Act was money-lending (a Provincial subject) or promissory notes or banking (a Federal subject). Their Lordships made the following observations (p. 43):

Thirdly, the extent of the invasion by the provinces into subjects enumerated in the Federal List has to be considered. No doubt it, is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act. Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking?

29. It is true that in all these pronouncements, the real emphasis is laid on the necessity of ascertaining the pith and substance, but they also contain useful guidance as to how the Courts should proceed when they have to deal with two apparently conflicting enactments. The conclusion we have arrived at is that in substance the impugned tax is not a tax on income, that it is not impossible to reconcile the seeming conflict between the provisions of the two Acts, and that the extent of the alleged invasion by the Provincial Legislature into the field of the Federal Legislature is not so great in the present case as to justify the view that in pith and substance the impugned tax is a tax on income. In our opinion, therefore, the appeal must fail, and it is dismissed with costs to the East Punjab Government, the respondent in the appeal.