1964

March, 3.

C. RAJAGOPALACHARI

v.

CORPORATION OF MADRAS

(P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, J. C. SHAH, N. RAJAGOPALA AYYANGAR AND S. M. SIKRI JJ.)

City Municipality Act 1919 (*Act No.* 4 *of* 1919), *s.* 111(*b*), *Government of India Act*, 1935, *ss.* 142A(1), 143(2), 292, *Constitution of India*, *Art.* 277—*Drawing pension—If amounts to employment or profession within the meaning of Act—Whether taxable.*

The appellant held office as the last Governor-General of India. He has been drawing Rs. 15,000 per annum as pension while residing in the city of Madras. The Corporation of Madras demanded profession tax from him under section 111(i)(b) of the City Municipal Act, 1919 for the year 1958-59 on the ground of his residence being within Madras city and his drawing the pension to which he was entitled. The appellant addressed a communication to the Corporation asserting that this demand was illegal as the Corporation was empowered by the relevant constitutional provisions merely to levy a tax "on a profession, trade calling or employment" and that as he as a pensioner did not fall under any of these classes, the said demand was illegal. The Corporation did not accept the contention of the appellant and therefore, the appellant filed a writ petition under Art. 226 of the Constitution before the High Court. The High Court dismissed the writ petition of the appellant. The High Court granted a certificate under Art. 133(1)(c) of the Constitution to the appellant to file on appeal to the Supreme Court. Hence the appeal.

The question before the Supreme Court was whether the Corporation was entitled to levy a tax on pensioners in respect of the pensions received by them in Madras City.

Held: (1) that the power of the Corporation to levy the tax is dependent on the subject of the tax being within the State Legislative power under the Constitution. The present levy comes within the purview of item 60 in the State list in Schedule VII of the Constitution, which reads as follows:—

"Taxes on profession, trades, callings and employments."

Being a "pensioner" cannot be a "profession, trade, business or calling", nor could a tax on a person because he is in receipt of a pension be said to be a tax on "employments". The tax, therefore, under the last portion of sec. 111(1)(b) reading—profession tax on persons "in receipt of any pension or income from investments"—is nothing but a tax on income falling within Entry 82 of the Union List.

The taxes specified in item 60 are taxes on the carrying on of a profession, trade etc., and would, therefore, apply only to a case of present employment. The mere fact that a person has previously been in a profession or carried on trade etc. cannot justify a tax under this entry. The tax on the receipt of pension or on the income from investments which is referred to in the last part of sec. 111(1) is in truth and substance a tax on income. At the time the tax is levied the appellant-pensioner is in no employment but is only in receipt of income.

(ii) The present levy of tax cannot be saved by Art. 277 of the Constitution because the tax was a new levy and not a continuance of a tax which had been levied just prior to April 1, 1937. On the facts of this case it was held that if the statutory charge to profession tax imposed on pensioners by the Act of 1919, was lifted by the Act of 1936, and the tax again came into operation only on April 1, 1937, it would follow that there was no "levy of the tax" immediately before the commencement of Part III of the Government of India Act, 1935, so as to bring it within the saving in s. 143(2) of that Act. Besides, the two circumstances, *viz.*, that residence within the city for a specified period was made a condition of the liability to the tax, as well as the increase in the rates would both serve to emphasise that the levy was a new one, with a different texture and not a continuation of the tax which was levied just prior to April 1, 1937.

(iii) The mere fact that prior to 1st April, 1937 the Corporation had under Act of 1936 the power to bring the tax into force by a resolution does not on a proper construction of s. 143(2) bring it within the range of those taxes or duties which "were being lawfully levied" prior to the commencement of Part III of the Government of India Act 1935, which alone are permitted to be continued to be levied notwithstanding that these duties were in the Federal Legislative List. The mere existence of a power to bring a tax into operation, cannot be equated with "a tax which was being lawfully levied" before Part III of the Government of India Act, 1935.

The High Court erred in holding that s. 292 of the Government of India Act applies to this case.

The Town Municipal Committee, Amravati v. *Ramchandra Vasudeo Chimote,* [1964] 6 S.C.R. 947, *South India Corporation (P) Ltd.* v. *The Secretary, Board of Revenue, Trivandrum,* A.I.R. 1964 S.C. 207, relied on.

(iv) Under s. 111(1) as amended, the tax could be levied only in accordance with the rules in Schedule IV and as those rules did not make a provision for the levy of a tax on pensioners, it would follow that the tax "was not being lawfully levied" on them. The High Court erred in holding that such defect would be removed by s. 18 of the Madras General Clauses Act.

(v) S. 142-A(1) of the Government of India Act, 1935 would assist the respondent's case only if tax imposed were on a profession, trade, calling or employment. In the present case, the tax is being imposed

on an income of a pensioner and so this provision has no application. It is not the intention of Parliament that State might levy a tax on income and call it "profession" tax.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 580 of 1962.

Appeal from the judgment and decree dated May 1, 1961, of the Madras High Court in Writ Petition No. 975 of 1959.

R. M. Seshadri and *R. Gopalakrishnan*, for the appellant.

R. Ganapathy Iyer, for respondent No. 1.

A. Ranganadham Chetty and *A. V. Rangam*, for respondent No. 2.

March 3, 1964. The Judgment of the Court was delivered by

Ayyangar J.

AYYANGAR, J.—This appeal comes before us by virtue of a certificate of fitness granted by the High Court of Madras under Art. 133(1)(c) of the Constitution against its judgment dismissing a petition filed by the appellant under Art. 226 of the Constitution seeking a writ of prohibition against the Corporation of Madras challenging the constitutional validity of a notice requiring the appellant to pay profession tax.

The appellant held office as the last Governor-General of India. Under s. 3 of Central Act XXX of 1951 the appellant is entitled to a pension of Rs. 15,000/- per annum and has been drawing this sum residing in the city of Madras. The Corporation of Madras—the first respondent before us demanded profession tax from the appellant under s. 111(1)(b) of the City Municipal Act, 1919 hereinafter called the Act for the year 1958-1959 on the ground of the appellant's residence within the city for the period therein specified and his drawing the pension to which he was entitled. The appellant addressed a communication to the Corporation asserting that this demand was illegal as the Corporation was empowered by the relevant constitutional provisions merely to levy a tax "on a profession,

trade, calling or employment" and that as he as a pensioner did not fall under any of these classes, the said demand was illegal. The authorities of the Corporation, however, insisted on compliance with the demand on the ground that under the express terms of the Act persons in receipt of pensions were also liable to the tax. The appellant thereupon filed a writ petition for the relief already set out, and as the validity of the State Act was impugned impleaded the State of Madras also as a respondent.

It would be seen from the foregoing that the question for consideration is whether the 1st respondent Corporation is entitled to levy a tax on pensioners in respect of the pensions received by them. In order to appreciate the submissions made to us by learned Counsel for the appellant it would be necessary to set out the history of the legislation in relation to profession tax and the impugned tax on persons in receipt of pensions applicable to the City of Madras because it is on a construction of these provisions that the learned Judges of the High Court have upheld the validity of the levy and dismissed the appellant's writ petition. For this purpose it is not necessary to travel to any period anterior to the enactment of the Madras City Municipal Act (Madras Act IV of 1919) which with certain amendments to be referred to presently is still in force. The Act received the assent of the Governor on March 26, 1919, of the Governor-General in June, 1919 and came into force on publication in the Gazette which was in the same month. Having been enacted while the powers of the Local Legislatures were governed by the Government of India Act, 1915, the constitutional validity of the legislation is not open to any challenge. Section 111(1) of this enactment ran :—

> "Every person not liable for the companies' tax, who, within the city and for the period prescribed in Sec. 113, exercises a profession, art, trade or calling or holds an appointment, public or private, bringing him within one or more of the classes of persons specified in the taxation rules in Schedule IV, shall pay by way of licence fee and in addition to any other licence fee

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> that may be leviable under this Act a tax as determined under the said rules but in no case exceeding rupees five hundred in the half year and such tax may be described as the profession tax."

The Section had two explanations of which the second is material and this reads:

Explanation 2:

> "A person in receipt of a pension paid from any source shall be deemed to be a person holding an appointment within the meaning of this section."

The next change in the relevant provision was effected by Madras City Municipal Amendment Act, 1936 (Madras Act X of 1936) which came into force on 14th April 1936. By this amendment a new section—s. 111 was substituted for the old one just set out, and under this Explanation (2) was deleted and the substituted provision ran:

> "111(1). If the Council by a resolution determines that a profession tax shall be levied, every person not liable to the tax, on companies, who after the date specified in the notice published under sub-sec. (2) of Sec. 98-A in any half year—
>
> (a) exercises a profession, art or calling or transacts business or holds any appointment, public or private—
>
> (i) within the city for not less than sixty days in the aggregate, or
>
> (ii) outside the city but who resides in the city for not less than sixty days in the aggregate; or
>
> (b) resides in the city for not less than sixty days in the aggregate and is in receipt of any pension or income from investments, shall pay in addition to any licence fee that may

be leviable under this Act, a half yearly tax assessed in accordance with the rules in Schedule IV in no case exceeding rupees five hundred."

Along with this was added a new section—s. 98-A which ran :

Sec. 98-*A*(1):

"Before the council passes any resolution imposing a tax or duty for the first time it shall direct the Commissioner to publish a notice in the Fort St. George Gazette and in the local papers of its intention and fix a reasonable period not being less than one month from the date of publication of such notice in the Fort St. George Gazette for submission of objections. The Council may, after considering the objections, if any, received within the period specified, determine by resolution to levy the tax or duty. Such resolution shall specify the rate at which, the date from which and the period of levy, if any, for which such tax or duty shall be levied.

(2) When the Council shall have determined to levy any tax or duty for the first time or at a new rate the Commissioner shall forthwith publish a notice in the manner laid down in sub-section (1) specifying the date from which the rate at which and the period of levy, if any, for which such tax or duty shall be levied."

At this stage it is necessary to refer to Schedule IV in accordance with which the tax has to be assessed under the terms of s. 111(1). In the Act as enacted in 1919 the relevant rule in Schedule IV divided persons assessed to profession tax etc. into 8 classes, based upon the amount of monthly salary received in the case of those holding appointments, and income derived in the case of those in trade, art, calling etc. Each of these classes was again sub-divided into two—the first sub-class comprising "persons holding appointments upon a monthly salary" and the other of

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"persons exercising any profession, trade, art, calling or transacting business". It would be seen that having regard to Explanation 2 to s. 111, as it stood in 1919, before its amendment by Act X of 1936 by reason of the provision which enacted that "persons in receipt of pension" were deemed to be "persons holding appointments" when the rule in Schedule IV referred to "persons holding appointments" it included by the statutory fiction—pensioners who on the basis of the amount of pension which they derived were classified as "persons holding appointments" under the various classes. But when this Explanation to s. 111 was deleted by the Amending Act X of 1936 and when the new s. 111(1)(b) referred to the "half-yearly tax assessed in accordance with rules in Schedule IV, it was urged that there could not have been an assessment of persons in receipt of pension unless they could be comprehended as within the category of persons holding appointments, or of persons exercising any profession, trade, or art or calling"—as these were the only classes—relevant to the present purpose who were within the scope of the rules under Schedule IV.

We shall refer to the submission based on this feature as regards the terminology employed in Schedule IV in its proper place. The Corporation of Madras availed itself of the provisions of s. 98-A and after the issue of the notices prescribed by it passed a resolution at a meeting held on March 31, 1937 to levy *inter alia* "profession tax" for the year 1937-38 at the rates which were specified in the resolution. As regards "profession tax", the resolution read:

> "Resolved that the profession tax in respect of clauses 1, 2, 3, 4, 5 and 6 be fixed at the maximum rate and 25 per cent over and above the minimum rates prescribed in Schedule IV of the Act in respect of clauses 7, 8 and 9."

This resolution further specified that the tax at the rates therein set out which were higher than what prevailed before, were to have effect from April 1, 1937. Notwithstanding the apparent inapplicability of the rules in Schedule IV to the levy of profession tax on pensioners, the Corporation continued to assess pensioners to the said tax and

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collected the same. The lacuna in the enactment was apparently noticed in 1942 when by a notification in the official gazette the Schedule was amended in exercise of the powers conferred on Government by s. 347(3) of the Act. Under the amendment instead of the words "Persons holding any appointment or persons exercising profession, trade or calling etc. "the classes were divided on the basis of "the half yearly income received by the individual specified in s. 111(1)". This amendment to the Schedule was directed to come into force from April 1, 1942. The relevant terms of Schedule IV have continued up to date in the same from as amended in 1942—only the rate of tax has been progressively increased; first in 1950, then in 1958 and again in 1961, but in the view we take of the principal contention raised by the appellant it is not necessary to set out or deal with these increases.

Pausing heie the ground upon which the demand for "profession tax" made by the Corporation was impugned may be briefly stated. The power of the Corporation to levy the tax is dependent on the subject of the tax being within State legislative power under the Constitution. The relevant entry in the Legislative Lists conferring taxing power on the State under which alone, if possible, the present levy could be supported was item 60 in the State List in Schedule VII of the Constitution reading:

> "Taxes on profession, trades, callings and employments."

Being a "pensioner" cannot be a "profession, trade, business or calling", nor could a tax on a person because he is in receipt of a pension be said to be a tax on "employments". The tax therefore under the last portion of s. 111(1)(b) reading—Profession tax on persons "in receipt of any pension or income from investments"—is nothing but a tax on income falling within Entry 82 of the Union list. If, therefore, the Corporation could not justify the tax as being within the State legislative power the only manner in which it could be done would be by reference to Art. 277 of the Constitution by which "taxes, duties, etc." which "were being lawfully levied" prior to the commencement of the

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Constitution were permitted to be levied "notwithstanding that the tax was in the Union List" and "to be applied to the same purposes" as before. Unless therefore the Corporation could make out that the tax now impugned was being lawfully levied from before the Constitution the levy would be illegal and besides there was the complication introduced by the enhancement of the rates of tax which, as stated earlier, were effected in April, 1950, April 1958 and in 1961. Leaving aside for the moment the question of the effect of the enhancement of the rate, we have to see whether it has been established that the duty was lawfully levied by the Corporation prior to the Constitution.

The answer to the question whether it was "lawfully levied" prior to 26th January, 1950 when the Constitution came into force would depend upon the effect of certain provisions of the Government of India Act, 1935. Under that enactment, as under the Constitution, the State legislative power as regards taxes of the nature now in controversy was couched in terms identical with that employed in entry 60 of the State List in the Constitution. Entry 46 in the Provincial Legislative List under the Government of India Act, 1935 ran :

> "Taxes on profession, trades, callings and employments" :

and "taxes on income" fell within the exclusive Federal Legislative power under Entry 54 of List I. By the Indo-Burma Miscellaneous Provisions Act, 1940 the Parliament of the U.K. enacted s. 142-A to whose terms we shall advert later and by the same enactment entry 46 was amended and the words :

> "Subject, however, to the provisions of s. 142-A" :

were added at the end of entry 46. Here, again, it would be seen that if the right of the Corporation to levy profession tax on the pension received by a pensioner had to rest on the legislative entries it would fail because it was outside the legislative power of the Province under the Lists read with s. 100 of that Act corresponding to Art. 246 of the Constitution. The validity of the levy during the period when the Government of India Act was in force *i.e.* between 1st April, 1937 and 25th January, 1950 was dependent on

its falling within the saving contained in s. 143(2) of the Government of India Act which ran :

> "Any taxes, duties, cesses or fees which, immediately before the commencement of Part III of this Act, were being lawfully levied by any Provincial Government, municipality or other local authority or body for the purposes of the Province, municipality, district or other local area under a law in force on the first day of January, nineteen hundred and thirty-five, may, notwithstanding that those taxes, duties, cesses or fees are mentioned in the Federal Legislative List, continue to be levied and to be applied to the same purposes until provision to the contrary is made by the Federal Legislature."

No doubt the Amending Act was not in force on 1st January, 1935 having been passed in April 1936, but this would not take it out of s. 143(2) because para 3 of the Indo-Burma (Transitory Provisions) Order, 1937, being an Order in Council by His Majesty in Council authorised by s. 310 of the Government of India Act, provided :

> "*Para* 3(1): For a period of two years from the commencement of Part III of the Indian Act, the provisions of sub-section (2) of section one hundred and forty-three of that Act (which authorises the continuance until provision to the contrary is made by the Federal Legislature, of certain provincial taxes falling within the Federal List) shall have effect as if the reference to the first of January nineteen hundred and thirty-five were a reference to the commencement of the said Part III."

It would follow, therefore, that for the present demand to be sustained as valid it would be sufficient if it was shown that the tax was lawfully levied immediately prior to the commencement of Part III of the Government of India Act, 1935, *i.e.*, on 31st March, 1937. The learned Judges of the High Court held that this condition was satisfied and on this basis they have dismissed the appellant's petition.

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Learned Counsel for the appellant submitted four points in support of the appeal: (1) That the amending Act X of 1936 was not validly passed by reason of its contravening the Devolution Rules framed under s. 45-A of the Government of India Act, 1919 by which Local Governments were given legislative power *inter alia* to levy taxes on professions, trades, etc. but that the present tax which is really a "tax on income" was a Central subject outside the competence of the Local Legislature, (2) Even assuming that Act X of 1936 was valid, the tax which was permitted to be levied under it was, having regard to the terms of s. 111(1) a new tax which was levied for the first time by the resolution of the Corporation only on and from April 1, 1937 and, therefore, the present tax was not in operation prior to the commencement of Part III of the Government of India Act, 1935 and not therefore saved by s. 143(2) of that Act, (3) Besides, between 1st April, 1937 to 1st April, 1942 it was not lawfully levied by reason of the lacuna created by the words of the rules in Schedule IV being inapplicable to the levy of a tax on pensioners, (4) The increase in the rates from 1937 onwards could not be justified even under s. 143(2) or Art. 277 and by reason of these changes in rates the tax became virtually a new tax and could not continue to be lawfully levied to any extent after the increases.

The first point need not detain us long. *Prima facie* it would seem that there being no rigid distribution of legislative power between the Central and Local Governments under the Government of India Act, 1919 any infraction of the rules made under the Devolution Rules framed under s. 45-A would be validated by s. 80-A(3) and s. 84(2) of the Government of India Act, 1919. The learned Judges of the High Court before whom this contention was urged rejected it, and the learned counsel submitted that the decision on this point was not correct. But in the view that we took of the other submissions made to us, we did not hear learned counsel fully on this point and therefore do not propose to express any final opinion on the tenability of the argument on this head.

As preliminary to the consideration of the second point it would be necessary to advert to one feature of the change effected by the Amending Act of 1936 to the tax levy. Under s. 111, as it originally stood, the liability to pay the tax, *i.e.*, the charge for the tax, was imposed by virtue of the statute itself, on persons who for the period prescribed "exercised a profession or trade or calling or held an appointment", persons in receipt of pensions being deemed to be persons holding appointments. This structure as regards the imposition of liability was altered by the Amending Act. Under the provision, as recast, before a liability to pay the tax could arise the Council had to determine by a resolution that profession tax shall be levied and it was only that resolution which brought the charge into operation. Thus, the resolution of the Council was substituted for the statute itself as the mode by which the charge was to be imposed. There was also a second change that was introduced by rendering residence for six months within the city, besides the receipt of pension in the city, a necessary ingredient of the chargeability of the "profession tax" on pensioners. The effect of these two changes now calls for consideration. On the amendment of s. 111 by the Act of 1935 coming into force in April 1936, the statutory imposition of the charge to tax laid on persons in receipt of pensions within the city of Madras ceased, and the liability to tax as regards the period after that date was dependent on the passing of a resolution by the Council in terms of the amended s. 111(1) of the Act. In this connection it has to be pointed out that though recourse to the procedure as respects previous publication etc. prescribed by s. 98-A was necessary only in the case of taxes newly levied, and might have been adopted in the present case because of the enhancement of the rates, still, a resolution of the Council was necessary to impose the tax as without it, no liability to profession tax would arise. The charge to tax was imposed, as stated earlier by the resolution of the Council which was to have effect from April 1, 1937. In other words by reason of the repeal of the original section 111, the statutory charge to tax on pensions ceased in April 1936. A charge was imposed again under the resolution of the Council effective from 1st April, 1937, so that

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between April 1936 to 31st March, 1937, no charge was imposed by virtue of any "law". Learned Counsel for the Appellant submits that this is in effect a new levy—a levy of a tax which was not legally in existence on 31st March, 1937, and if this levy could not be supported as being sanctioned by s. 143(2) of the Government of India Act, 1935, it is common ground that the lawfulness of the levy cannot be sustained. We consider this submission well founded. If the statutory charge to profession tax imposed on pensioners by the Act of 1919, was lifted by the Act of 1936, and the tax again came into operation only on 1st April, 1937, it would follow that there was no "levy of the tax" "*immediately before*" the commencement of Part III of the Government of India Act, 1935, so as to bring it within the saving in s. 143(2) of that Act. Besides, the two circumstances, *viz.*: that residence within the city for a specified period was made a condition of the liability to the tax, as well as the increase in the rates would both serve to emphasise that the levy was a new one, with a different texture and not a continuance of the tax which was levied just prior to the 1st April, 1937.

Learned Counsel for the respondents the Corporation of Madras and the State have urged that it was in substance the old levy. We are unable to agree. The mere fact that prior to 1st April, 1937 the Corporation had under Act X of 1936 the power to bring the tax into force by a resolution does not on a proper construction of s. 143(2) bring it within the range of those taxes or duties which "were being lawfully levied" prior to the commencement of Part III of the Government of India Act which alone are permitted to be continued to be levied notwithstanding that these duties were in the Federal Legislative List. This question has been considered by us in great detail in *The Town Municipal Committee, Amravati* v. *Ram Chandra Vasudeo Chimote and Another, etc.*(1) in which judgment has been pronounced today and it is unnecessary to re-examine the same. The mere existence of a power to bring a tax into operation, cannot, as pointed out, be equated with "a tax

(1) [1964] 6 S.C.R. 947.

which was being lawfully levied" before Part III of the Government of India Act, 1935.

The 3rd submission of learned Counsel for the appellant is also well-founded. The conclusion we have reached as to the effect of the amendment to s. 111 by Act X of 1936, and of the tax being imposed by resolution of the Council from 1st April, 1937 not being a tax which was being lawfully levied immediately prior to 1st April, 1942, is reinforced by reference to the rules in Schedule IV which remained unamended till 1942. Under s. 111(1) as amended, the tax could be levied only in accordance with the rules in Schedule IV and as those rules did not make a provision for the levy of a tax on pensioners, it would follow that the tax "was not being lawfully levied" on them. As already pointed out, the relevant rules in that Schedule were framed at a time when Explanation 2 formed part of s. 111 and "pensioners" were deemed to "hold appointments". With the deletion of the Explanation, the fiction created by the original Madras Act IV of 1919 ceased and thereafter if the rules in Schedule IV had to be applied to them these had to be suitably modified. This, as we have pointed out earlier, was done only from April 1, 1942, so that in reality taxes on pensioners were "lawfully" levied upto 1936 and then after a break from April 1, 1942, we use the word "lawfully" on the assumption that this could have been legally done under the Government of India Act, 1935, a point already discussed. The learned Judges of the High Court have rejected the argument addressed to them under this head by reference to s. 18 of the Madras General Clause Act corresponding to s. 24 of the General Clauses Act (Central Act X of 1897). With great respect to the learned Judges we do not see how this provision affords any assistance in the matter. The Schedule and the rules continued without repeal or amendment when the new s. 111(1) was substituted in 1936, and when this section made a reference to the rules in Schedule IV it could only be a reference to the rules in the Schedule IV which stood unaltered. If the phraseology employed in the Schedule was inappropriate to a class which fell within s. 111(1), the only effect would be that the tax could not be levied, because

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of the defect in the law imposing the tax, but such a situation is not remedied by reference to the provision in the General Clauses Act on which the learned Judges have relied.

If, therefore, the tax was one not lawfully levied just prior to April 1, 1937 and was one brought in after the Government of India Act, 1935 came into force, and really only from April 1, 1942 assuming this to be lawful—it is obvious that the validity of this tax could not be sustained as a continuation of a lawful pre-existing levy under s. 143(2).

In this view it is not necessary to consider the last of the points urged by learned Counsel and examine whether in case of an increase of rate, the entire tax would become a new tax and so unconstitutional or whether it is only the increase in the rate that would become unenforceable.

Learned Counsel for the respondent-Corporation submitted that the tax could not be deemed to be a tax on income, as was suggested by the appellant, but was really a tax on employment because it was in consideration of past services during employment that pension was payable. This argument was admittedly not urged before the learned Judges of the High Court and is obviously untenable. The taxes specified in item 60 are taxes on the carrying on of a profession, trade, etc. and would, therefore, apply only to a case of present employment. The mere fact that a person has previously been in a profession or carried on a trade, etc. cannot justify a tax under this Entry. The tax on the receipt of pension or on the income from investments which is referred to in the last part of s. 111(1) is in truth and substance a tax on income and in fact the argument before the High Court proceeded on this basis, so have the learned Judges. At the time the tax is levied the pensioner is in no employment but is only in receipt of income though it might be for past services, in an employment.

He next submitted that Act X of 1936 which had been enacted prior to the Government of India Act, 1935 was continued as an existing law by s. 292 of the Government of India Act and as there was nothing in the Government of India Act against its continuance it would have effect

even if the terms of s. 143(2) were not satisfied by the present levy. The learned Judges of the High Court accepted this submission. In our opinion, they were in order. The question of the correlation between Art. 372 corresponding to s. 292 of the Government of India Act and Art. 277 corresponding to s. 143(2) of the Government of India Act was considered by this Court in *South India Corporation (P) Ltd.* v. *The Secretary, Board of Revenue, Trivandrum*(1) and this Court said:

> "It is settled law that a special provision should be given effect to the extent of its scope, leaving the general provision to control cases where the special provision does not apply. The earlier discussion makes it abundantly clear that the Constitution gives a separate treatment to the subject of finances, and Art. 277 saves the existing taxes etc. levied by States, if the conditions mentioned therein are complied with. While Art. 372 saves all pre-Constitution valid laws, Art. 277 is confined only to taxes, duties, cesses or fees lawfully levied immediately before the Constitution. Therefore, Art. 372 cannot be construed in such a way as to enlarge the scope of the saving of taxes, duties, cesses or fees. To state it differently, Art. 372 must be read subject to Art. 277."

Learned Counsel next drew our attention to s. 142-A(1) of the Government of India Act, 1935 and faintly suggested that it might afford him some assistance. This provision, again, was not adverted to before the learned Judges of the High Court and for a proper reason. S. 142-A(1) which corresponds to Art. 276(1) of the Constitution enacted:

> "Notwithstanding anything in section one hundred of this Act, no Provincial law relating to taxes for the benefit of a Province or of a municipality, district board, local board or other local authority therein in respect of professions,

(1) A.I.R. 1964 S.C. 207.

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trades, callings or employments shall be invalid on the ground that it relates to a tax on income."

This section would assist the respondent only if tax imposed were one on a profession, trade, calling, or employment and in that event the section provides that such a tax shall not be deemed to be a tax on income, but where the tax imposed is one not on a profession, etc. at all, it does not mean that the State might levy a tax on income and call it "profession tax". This is sufficient to dispose of a similar argument as regards the scope of the amended Entry 46 in the Provincial Legislature List (List II) to which we have adverted earlier.

The appeal accordingly succeeds and the appellant is held entitled to the relief prayed by him in the petition he filed in the High Court, *viz.*, a writ of Prohibition against the respondent-Corporation from enforcing the demand. The appellant will be entitled to his costs from the respondents here and in the High Court.

Appeal allowed.

1964

March 3.

MATIULLAH SHEIKH

v.

THE STATE OF WEST BENGAL

(K. SUBBA RAO, K. C. DAS GUPTA AND RAGHUBAR DAYAL JJ.)

Criminal Law—Murder not actually committed—If conviction possible under s. 449*—"In order to", meaning of—Charge under s.* 307 *with s.* 34*, if sustainable in law—Indian Penal Code,* 1860 (*Act* 45 *of* 1860) *ss.* 34, 307, 449.

The appellants were alleged to have entered the house of one E with the common intention of killing him. One of the appellants injured E with a dagger while the other three held him. E's injury did not prove fatal. The Sessions Judge convicted them under ss. 449 and 307 with s. 34 of the Indian Penal Code, which on appeal was upheld by the High Court. On appeal by certificate, it was contended that there can