Maharaja Chintamani Saran Nath Sah Deo

Vs

The C. I. T., Bihar and Orissa

Civil Appeal No. 1732 of 1967

(K.S. Hegde, A.N. Grover JJ)

05.08.1971

JUDGMENT

GROVER, J. -

1. This is an appeal from a judgment of the Patna High Court in a reference made to it under Section 66(1) of the Income-tax Act, 1922, by the Appellate Tribunal by which the following question of law was referred for determination by the High Court :

> "Whether on the facts and circumstances of this case, the Tribunal was right in holding that the sum of Rs. 2,20,000/- was the income of the assessee, assessable to tax under the provisions of the Income-tax Act ?"

2. The original assessee was Maharaja Pratap Udainath Sah Deo, the holder of an impartible estate. On January 22, 1944 the assessee granted a lease of certain mining rights to Aluminium Production Company Ltd., in respect of 171.03 acres of land for a period of 30 years. The main terms were as follows :

#(i) Salami (inclusive of Moharkari and Dewani Negiamounting to Rs. 5,000/- Rs. 2,25,000/-(ii) Rent -/8/- per acre(iii) Royalty -/6/- per ton(iv) Minimum royalty Rs. 22/- per acre.##

Previously the assessee had granted a prospecting lease of 311 acres of land to the same Company on March 20, 1941 for a period of one year. The area covered by that lease though larger included substantially the area leased out subsequently. The terms of the 1941 lease were that salami was payable at the rate of Rs. 100/- per acre and royalty at the rate of - /8/- annas per ton.

3. While making the assessment for the year 1944-45 the Income-tax Officer took the view that the assessee had chosen to take a large sum by way of salami while granting the lease in the year 1944 and had accepted lesser rate of royalty, the salami represented an advance payment of royalty. He treated Rs. 5,000/- out of the sum of Rs. 2,25,000/- as Dewani Negi an Moharkari and the balance of Rs. 2,20,000/- was treated by him as income of the assessee, and the assessment was made accordingly. On appeal the Appellate Assistant Commissioner held that the amount of Rs. 2,20,000/- was paid by the Company to the assessee as salami and as such it was a capital receipt and not taxable. On appeal by the revenue the Appellate Tribunal by an order, dated August 7, 1952, remanded the case to the Appellate Assistant Commissioner for finding whether there were circumstances to indicate that the salami was really receipt of income. The Appellate Assistant Commissioner made a report, dated April 12, 1956. He gave a finding that the assessee had intentionally accepted lower royalty and taken higher Salami and therefore the major portion of the

sum of Rs. 2,20,000/- had been taken in exchange of royalty that would have accrued during the period of lease. The Tribunal by an order, dated July 26, 1956, allowed the appeal of the Revenue and restored the order of the Income-tax Officer. The High Court held that out of the sum of Rs. 2,20,000/- the amount which could be registered to be salami and treated as a capital receipt could reasonably be estimated at a sum of Rs. 20,000/- which was assessable to tax but the remaining amount of Rs. 2,00,000/- was revenue receipt and was taxable as such. The question referred was reframed as follows :

> "Whether on the facts and the circumstances of this case, the Tribunal was right in holding that the sum of Rs. 2,20,000/- or any portion thereof was the income of the assessee assessable to tax under the provisions of the Income Tax Act ?"

It was answered partly in favour of the assessee but substantially in favour of the Revenue.

4. The principles on which the courts have acted whenever a question has arisen whether a payment described as a salami is capital or revenue receipt are well settled. Salami is a single payment made for the acquisition of the right of the lessor by the lessee to enjoy the benefits granted to him 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 merely because a certain amount paid to the lessor is termed as Salami, it does not follow no inquiry can be made to determine whether it has to has not an element of revenue receipt in the shape of advance payment of royalty or rent. The onus, however, is upon the income tax authorities to show that there exist facts and circumstances which would make payment of what has been called salami income. The position may be summed up in this way. When the interest of the lessor is parted for a price the price paid is premium or Salami but the periodical payments made for the contains enjoyment of the benefits under the lease are in the nature of rent; the former is a capital receipt and the letter a revenue receipt. Parties may camouflage the real nature of the transaction by using clever phraseology and, therefore, it is not the form but the circumstances of the transaction that matter. The nomenclature used may not be decisive or conclusive but it helps the courts, having regard to the other circumstances, to ascertain the intention of the parties. (See Commissioner of Income-tax Assam, etc. v. The Panbari Tea Co. Ltd.). ((1965) 3 SCR 811 : AIR 1965 SC 1871 : 57 ITR 422)

5. Now the Appellate Tribunal appears to have based its decision only on the difference between the amount of salami and the rate of royalty between the prospecting lease which was granted in 1941 and the subsequent lease of 1944. This is what the Tribunal stated in Para 7 of its order :

> "In 1941, the assessee had granted a prospecting lease in favour of the very lessee taking a much smaller premium fixing the royalty at - /8/- per ton. He has not shown any justifiable reason for fixing up a lower amount of - /6/- per ton by way of royalty in the later lease. We found that out of the area of 171 acres that was covered by the later lease as substantial portion of it about 140 acres were comprised in the area leased out by the earlier deed of 1941. A week argument was attempted by the assessee's representatives the older lease was only for Bauxite whereas the later lease was for Laterite also. In view of the fact that major portion of the area that is covered in the new lease was in the older lease and as in the course of the producing Bauxite, Laterite also becomes available, we do not see any justification for the assessee agreeing to take a lesser amount by was of royalty."

The Tribunal proceeded to say :

> "Here in the present what we find is that the assessee had chosen to take a large amount by was of premium but a lesser amount by way of royalty. The patent reason for the assessee to take a lesser amount by way of royalty was that the amount received by him as Salami was not taxable. There is, therefore, no doubt in this case that the sum received by the assessee by way of salami or premium was in substance an advance payment of royalty. We are, therefore, in entire agreement with the Income-tax Officer's Order."

We are unable to appreciate how a comparison of the terms of the lease of 1941 which was only for one year and which was for a different purpose, namely, prospecting could afford a reasonable basis for determining whether the terms of the 1944 lease were fixed in such manner that part of the proceedings of royalty were included in the figure of the salami. The object of a prospecting lease is entirely different and since the period was only one year it is quite reasonable to assume that the royalty was fixed at a higher rate because it was not known how much quantity of mineral would be extracted during that period. The lease of 1944 was for a much longer period i.e., 30 years. When a lessor creates a lease for that period he is legitimate for him to charge more amount by way of salami or premium as he is transferring possession of the demised land for a considerably long period. A lessor may also think that the rate of royalty need not be the same as it was in the case of the prospecting leas and taking an over all business view royalty at a slightly less rate may be charged. The Tribunal's decision based as it was only on a comparison of the terms of the leases of 1941 and 1944 does not appear to take into consideration all these relevant matters. It must not be forgotten that the mere fact that the amount taken on account of salami was substantial and on the face it looked considerably large would not justify the view that that amount represented capitalised royalty. In the Panbari Tea case (supra) certain tea estates had been leased out for a period of 10 years. The lease was executed on a consideration of a sum of Rs. 2,25,000/- as and by way of premium or salami and an annual rent of Rs. 54,000/- to be paid by the lessee to the lessor. The payments were to be made by instalments. This court declined to assume that the parties had camouflaged their real intention and fixed a part of the rent in the shape of premium and it was observed that no material had been placed either direct or circumstantial to disbelieve the description given in the lease deed to the amount as premium and to hold that it was not in fact premium but only rent. The position does not seem to be different in the present case.

6. A good deal of emphasis has been laid on behalf of the Revenue on the statement in the order of the Tribunal towards the conclusion that it was in entire agreement with the Income-tax Officer's order. It is submitted that the Income-tax Officer had gone into the details of other leases which had been granted by the assessee of similar nature and after a comparison of the terms of those leases the Income-tax Officer had reached the conclusion that the amount of salami represented the capitalised royalty. We cannot read the order of the Tribunal in that way. The Tribunal agreed only with the operative part of the order of the Income-tax Officer but not with his reasoning. At any rate, the Appellate Assistant Commissioner had submitted a remand report pursuant to a previous order of the Tribunal and it does not appear that the facts given in that report were at all considered by the Tribunal although the High Court based its decision largely on them. The terms of the leases on which the High Court relied, related to the years 1933, 1938 and 1945; the rate of royalty varied from 8 Annas to 12 Annas per ton and that of Salami from Rs. 100/- to Rs. 130/- per acre. No attempt was made to examine anyone on behalf of the assessee to explain all the circumstances in which these leases had been granted. The High Court felt that it was for the assessee to furnish an explanation as to why salami in the case of 1944 lease was raised to Rs. 1,284/- per acre where as in the other leases the figure was much less as stated before. This approach cannot be regarded as correct. The onus was on the Revenue to show that stipulated in the indenture of lease as a payment

by way of salami was some other kind of payment, namely, royalty, camouflaged as salami. In this situation it was open to the Appellate Assistant Commissioner at the stage of submitting the remand report to have examined the assessee or his representative and discovered all the reasons for the terms being different. Another factor that was relied upon was the report of the Mines Superintendent, dated January 7, 1956, according to whom the area leased out in 1944 contained commercial grade Bauxite of approximately 13 lakh tons. The Appellate Assistant Commissioner at the stage of remand worked out the amount which would be payable as royalty on this estimated quantity of the total reserve of Bauxite in the demised area. The total amount of royalty was calculated at Rs. 6,50,000/- according to the rates fixed by the 1941 lease and at Rs. 4,87,500/- according to the rate agreed upon in the 1944 lease. The High Court was of the view that these figures showed that the major part of the salami of Rs. 2,25,000/- had been taken in exchange of the royalty that would have accrued during the period of the lease. We have already pointed out that a comparison of the terms of the prospecting lease which was only for one year with the subsequent lease of 1944 which was for 30 years could not furnish a proper basis for determining the point in dispute. Moreover the High Court lost sight of the fact that the report of the Mines Superintendent was made long after the date of the 1944 lease and it could not be assumed that at the time of the granting of that lease the assessee knew how much quantity of the mineral could be extracted from the area which had been leased out. Even the High Court felt, in disagreement with the Tribunal, that the entire amount of the Salami could not be regarded as representing the capitalised value of royalties. The High Court proceeded to assess the salami at Rs. 20,000/- on the basis that for the other leases the rate agreed upon was Rs. 100/- per acre. We are unable to concur in this method of computing the amount of the salami. Much more material was required for discharging the onus which lay on the Revenue to show that the assessee was bound to charge only the same amount of salami which had been taken for the other leases about which the details of the quantity of minerals which could be extracted from the area covered by them were altogether lacking.

7. For the reasons given above the appeal is allowed and the order of the High Court is set aside. The answer to the question referred is returned in favour of the assessee and against the Revenue. The assessee shall be entitled to costs in this court and in the High Court.

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