

CALCUTTA HIGH COURT

S.B. (House & Land) Pvt. Ltd

Vs

Commissioner of Income-Tax

(Sabyasachi Mukharji, and S M Guha, JJ.)

21.02.1978

JUDGMENT

Sabyasachi Mukharji, J.

1. In this reference under Section 256(1) of the I.T. Act, 1961, we are concerned with four assessment years, namely, assessment years 1966-67 to 1969-70 and the relevant accounting years are Diwali years 2022 to 2025 respectively.

2. The assessee is a private limited company. By a lease dated the 21st September, 1954, entered into between the assessee and one Maharaja Probirendra Mohau Tagore, the latter gave on lease, " all these messuages, lands, hereditaments and premises No. 26, Prosanna Kumar Tagore Street, commonly known as ' Tagore Castle' in the town of Calcutta" to the assessee for a period of 84 years with an option of renewal for a further period of 7 years. In order to appreciate the contentions urged in this case, it would be necessary to set out in extenso the relevant clauses of the said lease dated the 21st September, 1954. In the recital clause it was stated, inter alia, as follows :

"And Whereas the Lessee has agreed to take a lease for the said period of 84 years of the said messuages, tenements or dwelling houses, land, hereditaments and premises No. 26, Prosonno Coomar Tagore Street, commonly known as 'Tagore Castle' together with the land thereto belonging, particularly described in Schedule ' A' hereunder written and delineated in the Map or Plan hereunto annexed and therein enclosed by Red lines including the additions and alterations thereto upon rent hereby reserved and upon terms and conditions hereinafter appearing. Now This Indenture Witnesseth that in consideration of the rent hereby reserved and of the covenants herein contained and on the part of the Lessee to be observed and performed the Lessor doth hereby grant a lease unto the Lessee to commence immediately on the execution of these presents all those messuages, lands, hereditaments and premises No. 26, Prosonno Coomar Tagore Street, commonly known as ' Tagore Castle' in the town of Calcutta particularly described

in Schedule 'A' hereunder written and delineated in the Map and Plan hereto annexed and therein enclosed by Red lines (hereinafter for the sake of brevity called the demised premises) together with all buildings, structures and appurtenances whatsoever belonging to the Lessor or in any way appertaining thereto provided however during the subsistence of the Lease hereby granted the Lessor shall have the free use of four garages and three small rooms forming part of the stables standing on part of and comprised in the demised premises and more particularly shown and delineated in the Map or Plan hereunto annexed and therein marked with hatched lines and also subject to the free right of ingress and egress thereto and therefrom through the Southern gate of the demised premises from and into Prosonno Coomar Tagore Street which would also include the demised premises as may be altered or added to by the Lessee. To Hold the same unto the Lessee as from the date of execution of these presents for the term of 84 years yielding and paying therefor during the terms hereby created the monthly sum of Rs. 3,000 (Rupees Three thousand) only without any abatement or deduction whatsoever on the 7th (seventh) of each and every Bengali calendar month following the month for which the same shall become due and payable....."

3. The lessee took upon himself the obligations to pay the rent reserved on the day and in the manner mentioned in the recital irrespective of the fact that the demised premises or the buildings to be erected thereon, as hereinafter mentioned, or any part thereof, might be destroyed or damaged by fire or other irresistible force or act of God. The other clauses of the lessee's obligations to the lessor were as follows :

" 1. To pay the rent reserved on the days and in the manner aforesaid and that notwithstanding that any time or times the demised premises or the buildings to be erected thereon as hereinafter mentioned or any part thereof may be destroyed or damaged by fire or other irresistible force or act of God.

2. To pay and discharge all existing and future municipal rates and taxes, impositions and all outgoings of whatsoever nature which are to be or shall be assessed, charged or imposed on the demised premises (including in such expression throughout these presents whenever appropriate the buildings and structures to be erected and alterations to be made by the Lessee) and payable by either owner or occupier in respect thereof. The present Municipal Tax in respect of the owners share is Rs. 4,281-2-0 (Rupees Four thousand two hundred eighty-one and annas two) and in respect of the occupier's share Rs. 4,281-2.0 (Rupees Four thousand two hundred eighty-one and annas two only) per annum.

3. The Lessee shall have the option to erect from time to time during the term of these presents at its own cost upon the demised premises in a substantial and workmanlike manner with good materials of the several kinds in accordance with the plans, elevations, sections and specifications

according to the choice of the Lessee and sanctioned by the Corporation of Calcutta and under the inspection of a competent supervisor to be selected mutually buildings with all necessary out offices, out buildings, boundary walls, sewers, drains and to spend upon such work such sums as the Lessee may in its absolute discretion think proper but such sum or sums to be expended by the Lessee shall not be less than the sum of Rupees Five Lakhs only in the aggregate and to allow the Lessor's Surveyor to verify such expenditure if required to his satisfaction.

4. If the Lessee constructs any new structures and/or building as mentioned in the preceding Clause 3 hereof the said structures and/or buildings or erections together with all alterations thereto shall belong absolutely to the Lessor on the expiration or sooner determination of the terms hereby granted.....

7. At the expiration of the term hereby granted or earlier determination thereof to peaceably and quietly yield up the demised premises together with the buildings to be erected thereon as aforesaid and all additions and alterations thereto and all other buildings at any time erected or standing on the demised premises together with all fixtures in such repair or such condition as aforesaid by delivering vacant possession of such portion as will at the time remain vacant and by attornment of tenancy of such portions as will be in occupation of tenants.

8. That the Lessee shall at its own expense comply with, carry out, observe and perform all notices, requirements and requisitions that may from time to time be issued or made by the Government, Municipality or any other authority for the time being vested with such power in respect of the demised premises of the buildings or structures to be erected by the Lessee as aforesaid and shall always keep the Lessor indemnified saved and harmless against any damages, costs and consequences of non-compliance, non-performance or non-observance of any such notice, requirement or requisition....

10. Not to keep or store or permit to be kept or stored in or upon any part of the demised premises or in the buildings standing and/or to be erected by the Lessee as aforesaid any explosive, inflammable, combustible or dangerous articles or things except in such quantities as may be allowed by the Government or Police under licence granted to the occupants for purpose of business.

11. Not to carry on or permit to be carried on upon the demised land or any part thereof of any building that may during the said term be erected thereon any obnoxious or offensive or unlawful business whatsoever and not to cause, permit or suffer upon the same anything which may be or become a nuisance or annoyance to the neighbours.

12. That the Lessee shall not assign this Lease without first obtaining the permission in writing of

the Lessor such permission however is not to be unreasonably withheld by the Lessor provided however that such assignment if permitted will not relieve the Lessee of its obligation and liabilities under these presents to the Lessor. The Lessee shall prior to any assignment of its lease give notice thereof to the Lessor in writing containing the name and address of the assignee and furnish other necessary particulars concerning such assignment notwithstanding anything hereinbefore contained the Lessee shall subject to the conditions and covenants herein contained be entitled to sublet or underlet the demised premises or any part thereof and/or grant sub-lease or sub-leases in respect of the demised premises or any portion or portions thereof for a certain term not exceeding or beyond the term hereby created.

13. And the Lessee will at all times during the said term insure and keep insured from loss or damages by fire or other accident the demised premises as aforesaid up to the amount of Rs. 3,00,000 (Rupees Three lakhs) in the joint names of the Lessor and the Lessee in Concord of India Insurance Co. Ltd. of 8, Clive Row, or any other company to be approved of mutually in Calcutta aforesaid and will from time to time whenever requested by the Lessor produce the premium receipt.

14. In case the demised premises shall be destroyed or damaged by fire or other accidents the Lessee shall immediately thereafter lay out and apply the money to be received by virtue of the said Insurance and also all such other sums of money as may be required for that purpose in well and substantially rebuilding, repairing and reinstating the damaged portion under the inspection and the satisfaction of the Surveyor to be appointed by mutual consent and the Lessor shall also continue in applying such money for such repairs and reinstatement....."

4. Clause II by Sub-clause (iv) provides as follows :

" It is hereby further agreed and declared that in case of acquisition of the demised premises under the Land Acquisition Act or any other Act or enactment or ordinance for the time being in force the Lessor will be entitled to the compensation that may be awarded therefor for the land and the existing structures and the Lessor and the Lessee will be entitled to the compensation awarded for the leasehold right and also the buildings if any constructed by the Lessee in the demised premises in the same ratio as may be finally determined and awarded under law."

5. Sub-clause (vi) of Clause II provides as follows:

" (vi) On the expiration of the term hereby created the Lessee shall have the option of renewal for another seven years on similar terms and conditions save and except this condition for the renewal of the lease provided all rents and outgoings up to the date of such fresh lease have been paid and there has been no subsisting or continuing breach of any of the terms and conditions

herein contained and to be observed and performed by the lessee. Provided however the Lessor shall not be entitled to refuse to extend the terms of the Lease on the ground of any breach of terms or conditions which had been waived earlier. "

6. The assessee was also entitled to install a cold storage plant in the demised premises, clauses in respect of which we need not refer. The area of the premises leased out was over 7 bighas of land with a partly four-storeyed and partly three-storeyed house. It appears that upon taking possession of the said leasehold property, the assessee constructed several buildings thereon including a two-storeyed structure on an area of 8,332 sq.ft. of land and named as Sashi Sadan. By a deed of assignment dated the 6th August, 1962, the assessee in consideration of a sum of Rs. 1,50,000 paid by one Sm. Kiran Devi Khaitan, transferred to her by way of " sublease", the said Sashi Sadan together with the leasehold land appertaining thereto measuring 8,332 sq.ft., for the residue of the unexpired period of the said lease dated the 21st September, 1954, together with the benefits, rights, liberties, privileges thereunder and subject to the payment of a monthly rent of Rs. 51 in respect of the said 8,332 sq.ft. of land on which Sashi Sadan stood and further subject to payment of owner's share and occupier's share of municipal taxes relating to Sashi Sadan. It would also be appropriate at this stage to set out the relevant clauses of the said deed of assignment. The said deed recited as follows:

" The Deed of Assignment made this 6th day of August One thousand nine hundred and sixty-two between S. B. (House & Land) Limited, a private limited company incorporated under the Indian Companies Act, and having its registered office at No. 2, Ganpat Bagla Road, in Calcutta, hereinafter called the Transferor (which expression shall unless excluded by or repugnant to the context be deemed to include its successors) on the One Part And Srimati Kiron Debi Khaitan, wife of Lalit Kumar Khaitan, residing at No. 4, Queen's Park in the town of Calcutta, hereinafter called the Transferee (which term shall Unless excluded by or repugnant to the context be deemed to include her heirs, executors, administrators, representatives and assigns) of the Other Part."

7. The recital clause further went on to state :

" Whereas :.....

3. After the said Lease the Transferor constructed a two storied structure on 8,332 sq.ft. of land (which is used as Cold Storage) which is a portion of the said premises No. 26, Prosonna Coomar Tagore Street, and which is particularly described in the Schedule hereunder written and delineated in the plan hereto annexed and the structure is known as Sashi Sadan.

4. The Transferor is seized and possessed of or otherwise well and sufficiently entitled to All

That Pucca two storied structure known as Sashi Sadan and used as Cold Storage situated on 8,332 sq.ft. of leasehold land being a portion of the said premises No. 26, Prosonna Coomar Tagore Street, Calcutta, and more particularly described in the Schedule hereunder written and delineated in the plan hereto annexed free from all encumbrances whatsoever but subject to the said lease dated 21st September, 1954.

5. The Transferor has agreed to transfer by way of sub-lease unto the Transferee All That two storied brick built messuages or house and structure situated on leasehold land measuring 8,332 square feet be the same a little more or less situate lying at and being a portion of premises No. 26, Prosonna Kumar Tagore Street in the town of Calcutta known as Sashi Sadan and more fully described in the Schedule hereunder written and shown in the plan hereto annexed to Hold the said two storied structure known as Sashi Sadan and being a portion of premises No. 26, Prosonna Kumar Tagore Street, unto the transferee for the residue of the unexpired term of years created by the lease dated 21st September, 1954, and subject to the terms and conditions therein for a consideration of Rs. 1,50,000. (Rupees One Lakh and fifty thousand only)."

8. The first clause in the habendum clause was to the following effect :

"That in pursuance of the said agreement and in consideration of the sum of Rs. 1,50,000 (Rupees One Lakh fifty thousand only) paid by the Transferee to the Transferor at or immediately before the execution of these presents (the receipt whereof the transferor doth hereby and by the receipt hereunder written admit and acknowledge and of and from the same for ever release and discharge the Transferee as well as the said structure and building hereby transferred together with the sub-leasehold land appertaining thereto) the transferor doth hereby transfer unto the Transferee by way of sub-lease All That the said two storied pucca structure known as Sashi Sadan and used as cold storage together with the sub-leasehold land appertaining thereto and measuring 8,332 square feet be the same a little more or less situate lying and being a portion of premises No. 26, Prosonna Kumar Tagore Street in the town of Calcutta and more fully described in the Schedule hereunder written and shown in the Plan hereto annexed (hereinafter referred to as the said premises) To Have And To Hold the same unto the transferee for the residue now unexpired of the said term of the said lease dated 21st September, 1954, together with the benefits, rights, liberties, privileges thereunder, and subject to the payment of rent mentioned hereinafter to the transferor in respect of the sub-leasehold premises being 8,332 sq. ft. of land appertaining to the said structure known as Sashi Sadan."

9. This gave the transferee the following rights :

"2. The transferor doth hereby covenant with the transferee as follows :--...

(b) The transferee shall and may at all times hereafter peaceably and quietly possess and enjoy the said two storied structure known as Sashi Sadan together with the sub-leasehold premises appertaining thereto and measuring 8,332 sq. ft., being portion of premises No. 26, Prosonna Kumar Tagore Street, for the residue of the said unexpired term of years created by the said lease dated 21st September, 1954, without any lawful eviction, interruption, claim or demand whatsoever from or by the transferor or any person or persons lawfully or equitably claiming from under or in trust for the transferor. And that free from all encumbrances whatsoever made or suffered by the transferor or any person or persons lawfully or equitably claiming as aforesaid.

(c) The transferor and all persons having or lawfully or equitably claiming any estate right title or interest whatsoever in the said two storied structure known as Sashi Sadan and the said sub-leasehold premises appertaining thereto and measuring 8,332 sq. ft. being portion of premises No. 26, Prosonna Kumar Tagore Street, Calcutta, or any part thereof from under or in trust for the transferor shall and will from time to time and at all times hereafter at the request and cost of the transferee do and execute or cause to be done and executed all such acts, deeds and things whatsoever for further better and more perfectly assuring the said two storied structure and the said sub-leasehold land appertaining thereto unto the transferee in the manner aforesaid as shall or may be reasonably required."

10. The transferee further covenanted as follows :

" 3. The transferee doth hereby covenant with the transferor as follows :

(a) The transferee shall hold the sub-leasehold land on which the said two storied structure hereby transferred is situated as a sub-lease under the transferor for the unexpired residue of the term of years created by the lease dated 21st September, 1954.

(b) The transferee shall pay to the transferor a monthly sum of Rs. 51 (Rupees Fifty one) only by way of monthly rent in respect of said sub-leasehold land measuring approximately 8,332 square feet on which the structure hereby transferred is situated. The said sum of Rs. 51 (Rupees Fifty one) shall be paid by the transferor within the 7th day of the month following the month for which such rent shall become due commencing from the 6th day of August, 1962.

(c) The transferee shall also pay the owner's and occupier's share of municipal taxes of the said structure hereby transferred. "

11. The Schedule to the said document described the property as under :

" All that two storied structure known as Sashi Sadan and used as cold storage and situated on sub-leasehold land measuring 8,332 square feet more or less being portion of premises No. 26,

Prosonna Kumar Tagore Street, Calcutta, in Sutanutty in the North Division in the town of Calcutta and delineated in the plan hereto annexed therein bounded with the red border or howsoever otherwise the said structure or any part thereof is or are or at any time heretobefore were or was situate called, known, numbered or distinguished. "

12. In the original assessment made by the ITO under Section 143(3) of the I.T. Act, 1961, the ITO had not considered the income from the said Sashi Sadan in the hands of the assessee. Subsequently on the basis of the note prepared by the IAC, Range-VII, the ITO was of the view that since the assessee was the owner of Sashi Sadan, the annual income therefrom should have been included in the total income of the assessee. He, accordingly, reopened the assessment for the years under reference with a view to include such income of the respective years. It would be relevant at this stage to refer to the note of the IAC upon which the ITO was supposed to have acted. The said note was to the following effect:

" The amount of Rs. 1,50,000 received by the assessee is only a lump sum consideration for the agreement and hence this amount is taxable as capital gains in the hands of the assessee being a capital receipt of rent. Hence the capital gains has to be levied on this amount. The assessee being the owner of the superstructure and the deed dated 6-8-62 being only for letting out of the property, the assessee should continue to be taxed on the annual value of the property under Section 22. I find, however, that even the amount of Rs. 51 per month as rent shown by the assessee has not been brought to tax. The annual value of the property may be determined on the basis of the rent which it now fetches to Kiran Devi. The assessee should accordingly be taxed as owner of the property under Section 22 for all years from 6-8-62 (i.e., pertaining to the assessment year 1953-54) and onwards ; suitable action under Section 147(b) for these periods may be taken immediately."

13. After notice to the assessee and after hearing the assessee's contention the ITO included the income from Sashi Sadan in each of the years under appeal in his orders made under Sub-section (3) of Section 143 read with Section 147(b) of the I.T. Act, 1961. The assessee preferred appeals before the AAC and challenged the action of the ITO both on the ground that he had no jurisdiction to reopen as also on the ground that the assessments made were not valid. As regards the initiation of the proceedings under Section 147(b) of the I.T. Act, 1961, it was contended on behalf of the assessee that since it had disclosed all material facts and evidence before the ITO at the time of the original assessments, the reopening of the assessments on the basis of mere change of opinion was bad in law. It was, further, pointed out by the assessee that in the assessment year 1963-64 the ITO had determined the capital account of Rs. 52,528 on the transfer of Sashi Sadan after considering the deed of assignment dated 6th August, 1962. As regards the validity of the assessments made it was submitted by the assessee that since it had

sold the superstructure called Sashi Sadan and had sub-let the land by the deed of assignment dated 6th August, 1962, the assessments, as originally made by the ITO were in order and, therefore, the inclusion of income from Sashi Sadan under Section 22 of the I.T. Act, 1961, in each of the years under reference was bad in law.

14. The AAC, however, in his order dated 15th October, 1973, rejected all the contentions of the assessee and upheld the order of the ITO. Being aggrieved by the said order of the AAC, the assessee went up in further appeal before the Tribunal and, after elaborate discussion, the Tribunal held that the assessments under Section 147(b) of the I.T. Act were valid. The Tribunal, further, on the construction of the two documents were of the opinion that the assessee was the owner of the superstructure known as Sashi Sadan and the income therefrom was liable to be included in the assessee's total income. The Tribunal in its order, inter alia, discussed as follows :

" 14. Now coming to the deed of assignment dated 6-8.-62 it is pertinent to note that all along in the said deed the term used is 'sub-lease' and not sale of the superstructure known as Sashi Sadan and sub-letting the land underneath. We find considerable force in the submissions made on behalf of the department that if the superstructure known as Sashi Sadan was sold to Smt. Khaitan as contended on behalf of the assessee, there was no need of Sub-clause (c) of Clause 3 which stipulated that ' the transferee Smt. Khaitan shall also pay the owner's and occupier's shares of municipal taxes of the said structure, hereby transferred'. We may also mention here that the cost of superstructure was Rs. 2,22,000 as per the letter of the assessee dated 28-11-66 addressed to the ITO during the course of assessment proceedings. If the assessee had spent Rs. 2,22,000 for the construction of the superstructure known as Sashi Sadan, it is difficult to believe why the assessee has sold the same to Smt. Khaitan for a sum of Rs. 1,50,000. This fact would clearly indicate that Rs. 1,50,000 received from Smt. Khaitan was nothing but a premium for the purpose of sub-lease of the superstructure along with the land underneath for the unexpired period of the lease as contemplated in the lease agreement dated 29-9-54. We entirely agree with the submission made on behalf of the department that merely because in the assessment year 1963-64 the ITO had attempted to charge capital gains on the transfer of the Sasbi Sadan would not by itself preclude the department to hold that the assessee was the owner of the superstructure known as Sashi Sadan and, as such, the income therefrom should be included in the total income of the assessee for the years under appeal. The aforesaid decisions relied on on behalf of the assessee as regards the ownership of the superstructure are not of much help to support the assessee's case as, in our view, we have to decide the present appeals on the terms of the agreement contained in the deeds dated 21-9-54 and 6-8-62. Reading the said deeds as a whole, we have no doubt in our mind that the assessee was the owner of the superstructure known as Sashi Sadan and as such the income therefrom was liable to be included in the assessee's total income. In this view of the matter, we uphold the order of the AAC under appeal."

15. Thereupon, under Section 256(1) of the I.T. Act, 1961, the following two questions have been referred to this court :

" 1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the reassessment proceedings under Clause (b) of Section 147 of the Income-tax Act, 1961, had been validly initiated by the Income-tax Officer for the assessment years under reference ?

2. Whether, on the facts and in the circumstances of the case and on a true construction of the lease agreement dated September 21, 1954, and the deed of assignment dated August 6, 1962, the Tribunal was right in holding that the assessee was the owner of the superstructure known as Sashi Sadan and, as such, the income therefrom was liable to be included in the assessee's total income for all the years under reference, under Section 22 of the Income-tax Act, 1961 ?"

16. The first question, as we have noticed! is directed against the reopening of the assessment. Clause (b) of Section 147 of the I.T. Act, 1961, authorises the ITO to reopen the assessment, if in spite of the fact that there has been no omission or failure on the part of the assessee, as mentioned in Clause (a) of Section 147, the ITO has, in consequence of information in his possession, reason to believe that the income chargeable to tax has escaped assessment for that assessment year. Large number of decisions both of the High Courts and of the Supreme Court have considered this question. But it may be profitable to concentrate our attention on the requirements of the section itself. First essential point is that there should be belief that income chargeable to tax has escaped assessment. The next requirement of this section is that such " belief" must be formed in consequence of information. It has been said and said very often that mere change of opinion does not justify the reopening of assessment under Clause (b) of Section 147 of the Act. It is, however, important to remember that wherever a completed assessment is to be reopened there has to be a change of opinion. The assessment that was made originally must have been because it was thought to be all right by the ITO on the basis that all income had been included in the assessment. Subsequently the ITO forms the belief that some income has escaped assessment or has been under assessed. Therefore, change of opinion must be there in the belief that this is tentatively formed under Clause (b) of Section 147 of the Act in reopening the assessment. But what has been emphasised is that such change of opinion must not be " mere change of opinion". The change of opinion must be brought about "in consequence of information ". This has been introduced in the section and so was interpreted by the different courts from time to time in order to prevent arbitrary and unilateral reopening of assessments depriving any finality to the assessment orders passed. But the section itself visualises the possibility of reopening on the change of opinion but such change, as we have mentioned before, must only be in consequence of information, in the possession of the ITO and such information,

again, must have a reasonable nexus to that opinion that income has escaped assessment or has been under-assessed for any assessment year. In this light the contentions urged in this case will have to be examined. It is now well settled that the information may be regarding the facts as well as the law. It is also well settled that the information may be from the internal source or external source. The information may come from the records of the revenue department. Counsel for the assessee urged before us that the information must be confined to the premises, either major or minor, whereby he described the legal proposition as major premises and the factual aspect as minor premises and the information may be pertaining to either of these premises, but he submitted that there could not be any new information which could lead to the formation of the belief contemplated under Clause (b) of Section 147 on the conclusion or the deduction made from those premises. But, if on certain information, the ITO comes to the belief that the opinion formed by him previously was wrong or incorrect then though that would be a change of opinion, yet such change of opinion, in our opinion, would still be supported by the information received. The process of reasoning or inductive lead, as counsel for the assessee suggested, is a process inevitable in the formation of the belief and if the information, internal or external, throws any light on the process of reasoning then that information justifies the change of opinion and such change of opinion would not fall within the mischief of " mere change of opinion " condemned by the courts. This position, in our opinion, is clearly brought out in the judgment of the Bombay High Court in the case of CIT v. H. Holck Larsen [1972] 85 ITR 467, where Chandrachud J. made the following observations at page 479 of the report :

" What is obligatory in order to apply Section 34(1)(b) is that he must have 'information' in his possession in consequence of which he has reason to believe that the income has escaped assessment or is under-assessed, etc. The distinction really consists in a change of opinion unsupported by subsequent information on the one hand and a change of opinion based on information subsequently obtained, on the other. In the former class of cases, the assessment proceedings are attempted to be reopened without the discovery of an error and without receiving any information as to fact or law..... Such a reopening is based on a 'mere' change of opinion and is without jurisdiction.....In the latter class of cases, the reopening is based on information leading to the requisite belief and is, therefore, within the jurisdiction of the officer."

17. The aforesaid observations were noted by the Supreme Court in the case of Kalyanji Mavji & Co. v. CIT [1976] 102 ITR 287. There, what had happened was in its original assessment for the assessment year 1956-57, a sum of Rs. 43,116 being interest paid by the appellant-firm on amounts borrowed by it was allowed as a deduction. During the course of the assessment proceedings for the assessment year 1958-59, the ITO had discovered that the assessee had not utilised the entire borrowed money for the purpose of its business but had given interest-free loans to its partners for clearing up their income-tax dues. The ITO reopened the assessment for

1956-57, under Section 34(1)(b) of the Indian I.T. Act, 1922, and disallowed the interest paid. The Appellate Tribunal held that the ITO had merely changed his opinion on the basis of the very materials that were before him when the original assessment was made and that was not sufficient to attract Section 34(1)(b). On a reference, the High Court held that the reassessment was valid in law as the information on the basis of which the ITO had sought to reopen the assessment was based on subsequent facts as also on the materials of the original assessment revealed by more careful and closer investigation. On appeal, the Supreme Court, affirming the decision of the High Court, held that the reassessment under Section 34(1)(b) was valid in law inasmuch as the ITO proceeded on the basis of information which came to him after the original assessment by fresh facts. The word "information " in Section 34(1)(b) of the Indian I.T. Act, 1922, was of the widest amplitude and comprehended a variety of factors. Nevertheless, the Supreme Court observed, the power under this section, however wide it might be, was not plenary because the discretion of the ITO was controlled by the words " reason to believe ". Information might come from external sources or even from the materials already on record or might be derived from the discovery of new and important or fresh facts and, according to the Supreme Court, Section 34(1)(b) of the Indian I.T. Act, 1922, would apply to, (a) where the information was as to the true and correct state of the law derived from relevant judicial decisions, (b) where in the original assessment the income liable to tax had escaped assessment due to oversight, inadvertence or a mistake committed by the ITO, (c) where the information was derived from an external source of any kind, such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment, and (d) where the information might be obtained even from the record of the original assessment from an investigation of the materials on the record or the facts disclosed therefrom or from other enquiry or research into facts or law. Where, however, the ITO got no subsequent information but merely proceeded to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which formed part of the original assessment, Section 34(1)(b) would have no application. The Supreme Court quoted the aforesaid observations of Chandrachud J. of the Bombay High Court and expressed the opinion that they were inclined to agree with the observations of Chandrachud J.

18. The content and nature of information which would justify the reopening had been considered in the decision of this court in the case of *Diamond Sugar Mills Ltd. v. ITO* and in the Bench decision of this court in the case of *ITO v. Panama P. Ltd.* . Counsel for the revenue further drew our attention to the observations of Lord Denning M.R. in the case of *Parkin v. Cattell* [1971] 48 TC 462 (CA). There what happened was that the assessee was the appellant and at all material times a director of a building company. Between the years 1954 and 1962, at the instigation of his father, who was short of liquid resources, he bought from him a number of houses including those to which that case related. When he purchased those houses they were

occupied by sitting tenants at controlled rents. As they became vacant the appellant sold them. They were not regarded as capable of being relet so as to give an economic yield. The appellant did not set up any selling organisation and did not employ estate agents to exploit the houses which became vacant. On examining the appellant's income-tax returns which disclosed the material transactions, the Inspector of Taxes considered that they did not give rise to liability to income-tax. Subsequently, being of opinion that each of the acquisitions and sales had the characteristics of a venture in the nature of trade and that taken together they amounted to the carrying on of a trade, another Inspector raised assessments to income-tax under Case I of Schedule D for the years 1958-59 to 1960-61 and 1963-64 in respect of the relevant profits. On appeal, the assessee contended that the transactions were not of a trading nature and that there was no evidence of the discovery by the Inspector of any new fact which justified the raising of the assessments. The General Commissioners found that the acquisition and sale of the properties in question constituted a trade and the profits therefrom were taxable. In the High Court, the appellant contended further that the Crown could not rely on discovery unless the Inspector concerned gave evidence before the Commissioners to show what had been discovered. It was held by the Court of Appeal that there was evidence to justify the Commissioners' conclusion that the appellant was trading and the Inspector had made the requisite discovery that income which ought to have been assessed had not been assessed. After setting out the relevant section which permitted the revenue to act if the surveyor or the Board " discovers or discovered ", Lord Denning M.R. observed at page 474 of the report as follows :

" Mr. Marcus Jones says that this case does not come within the word 'discover' in either of these sections. He relied on *Anderton & Halstead Ltd. v. Birrell* [1931] 16 TC 200 (KB), at page 208 where Rowlatt J. said that a change of opinion was in his view not enough ; ' The word " discover " does not, in my view', include a mere change of opinion on the same facts and figures upon the same question of accountancy, being a question of opinion.' The decision in that case may well be justified on its own facts, but the dictum cannot stand in the light of latter cases. The word ' discover ' simply means ' find out'. That is what Lord President Normand said in *Commissioners of Inland Revenue v. Mackinlay's Trustees* 22 TC 305 (at page 312) with the approval of Tucker L.J. in *Commercial Structures Ltd. v. Briggs* [1948] 30 TC 477 (at page 492); [1949] 17 ITR (Supp) 30 (CA). An Inspector of Taxes ' discovers ' (that income has not been assessed when it ought to have been), not only when he finds out new facts which were not known to him or his predecessor, but also when he finds out that he or his predecessor drew a wrong inference from the facts which were then known to him ; and further, when he finds out that he or his predecessor got the law wrong and did not assess the income when it ought to have been. That appears in *Cenlon Finance Co. Ltd. v. Ellwood* [1962] AC 782 ; [1965] 58 ITR 255 (HL). I venture to quote what I said at page 799: ' Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an Inspector of Taxes. '

Mr. Marcus Jones suggested that the recent case of *Banning v. Wright* [1972] 48 TC 421 (HL) had altered the law in some way. I do not think so. That case turned on the fact that, after notice of appeal, there was an agreement which was equivalent, under Section 510 of the Income-tax Act, 1952, to a determination of the appeal. There was nothing of the kind here.

In the present case, I accept that the previous Inspector of Taxes knew all the facts about the acquisition and sale of houses. He clearly made a mistake. He drew the wrong inference from the facts. The new Inspector found out that the previous Inspector was wrong. He thought that the true inference was that these acquisitions and sales had the characteristics of a venture in the nature of trade. He made the assessments accordingly. This was a 'discovery' within the statute. The Commissioners were quite entitled to uphold those assessments which they did."

19. Therefore, it appears that according to Lord Denning M. R., a view with which Lord Justice Stamp agreed, finding out fresh facts as well as drawing new inference would be "to discover". On behalf of the revenue, it was urged that if finding out fresh facts could amount to discovery then changing an opinion from a previously held one in view of certain facts coming to the knowledge of the ITO would be acting on information as contemplated under Clause (b) of Section 147 of the I.T. Act, 1961. It may in this connection be noted that in the section as it stood in 1922 the word "information" was not there and the section empowered the ITO to reopen the assessment for any year where income chargeable to tax had escaped assessment. No conditions or limitations on the power of the ITO were at all laid down under the section. It was thereafter by the Indian I.T. (Amend.) Act, 1939, that the expression "definite information" was introduced within the section. The word "information" was then qualified by the word "definite" and a further condition was imposed that the ITO had to discover that income chargeable to tax had escaped assessment. Thereafter by the Income-tax and Business Profits Tax (Amendment) Act, 1948, the section was recast and only information was required for the ITO to act in terms of Clause (b) of Section 147 of the Act. In view of the aforesaid history and in view of the expression used in the Act with which we are concerned it would not be proper to say that drawing new inference from the old facts would be acting on information. In the case of *R. K. Malhotra, ITO v. Kasturbai Lalbai* [1977] 109 ITR 537, the Supreme Court had to consider whether the audit department note could be considered to be an information. There, what had happened was that in the original assessment of the respondent, the ITO had allowed deductions on municipal taxes in computing the annual value of house properties in the occupation of the respondent. Subsequently, the audit department of the office of the Comptroller and Auditor-General of India pointed out that on the true interpretation of Section 23(2) of the I.T. Act that the deduction of municipal taxes in respect of self-occupied properties was not admissible. Treating this as information within the meaning of Section 147(b) of the Act, the ITO had issued a notice under s. 148 to reopen the assessment. It was held that the audit department was the proper

machinery to scrutinise the assessments of income and about the errors, if any, in law and the intimation received by the ITO constituted an information within the meaning of Section 147(b) in consequence of which the ITO could reopen the assessment. It was reiterated that two conditions were necessary for invoking Section 147(b). First, the officer should receive an information after the original assessment and, second, in consequence of such information he should have reason to believe that the income has escaped assessment. The information may be on facts or on law. The information on a fact may be from internal source. The fact that the ITO, if diligent, could have obtained this information from the previous assessment on a proper investigation of the materials on the record or the fact disclosed thereby would not make any less information if the fact was in fact obtained and came to the knowledge only subsequently. So also the fact that on research as to the state of law, the ITO would have ascertained the true legal position, would not make any difference if the officer came to know the real position of the law subsequently. The external source need not mean that it must be outside the record. The information may be gathered from the assessment record itself. In the case of *Anandji Haridas & Co. (P.) Ltd. v. S. P. Khushare* [1968] 21 STC 326 the Supreme Court had to consider this aspect under the provisions of the C. P. & Berar Sales Tax Act, 1947. There, at page 336 of the report, the Supreme Court observed that the term "information " in Section 34(1)(b) of the Indian I.T. Act, 1922, really meant knowledge. Therefore, if there is new knowledge or new information and such knowledge leads to a change of opinion, then, in our opinion, as was observed by the court in the case of *CIT v. H. Hoick Larsen* [1972] 85 ITR 467 (Bom) that would not be a case of mere change of opinion but it would be a change of opinion supported by or in consequence of the knowledge received by the ITO and such a change of opinion will not be outside the scope of Clause (b) of Section 147 of the I.T. Act, 1961. As, in this case, there was such an information or knowledge that the original assessment might have been wrong and the ITO because of that information had to re-examine the facts of this case and formed the belief that the income had escaped assessment, in our opinion, it cannot be said that the proceedings were not validly initiated. In the premises, the question No. 1 referred to this court must be answered in the affirmative and in favour of the revenue.

20. This leads us to the second question which is the main controversy on the merits of this case. The question is, whether the assessee was the owner of the superstructure known as Sashi Sadan and as such the income therefrom was liable to be included in the assessee's total income for all the years under reference under Section 22 of the I.T. Act, 1961. Whether a particular assessee is the owner of house property or not depends upon the facts and circumstances of each case. In the instant case, we have primarily to construe the effect of the document or the deed of assignment dated 6th August, 1962. In order to construe such a deed, it has primarily to be examined in the background of the facts and circumstances of the case.

21. We must notice that the revenue did not adduce before the Tribunal any evidence as to the question whether appropriate stamp duty had been paid in respect of the deed of assignment if the same was to be considered as a sale or conveyance. Counsel for the revenue drew our attention to the fact that in the instant case only a sum of Rs. 2,287 had been paid as stamp duty while according to him if the deed was considered to be a deed of sale or conveyance of the superstructure known as Sashi Sadan it should have borne the stamp duty of Rs. 5,000. We are, however, unable to go into this aspect of the matter because this aspect of the matter had not been examined by the Tribunal and the revenue had not sought to place any materials before the Tribunal on this aspect of the matter which might have given some evidence on the intention of the parties as to how they had treated this transaction. It is also not possible for us to consider the circumstances in which a sum of Rs. 1,50,000 was paid in respect of the superstructure, which according to the assessee was being conveyed as outright sale and which had cost the assessee a sum of Rs. 2,20,000. The Tribunal, though it had referred to it in its order, as we have mentioned hereinbefore, had not any further material to investigate this aspect of the matter and, therefore, it is not possible for us to pursue the examination on this aspect of the matter.

22. There is, however, one important context in which the deed of assignment dated 6th August, 1962, has to be understood, viz., the deed of lease in favour of the assessee from Maharaja Prabirendra Nath Tagore dated 21st September, 1954. We have set out hereinbefore the provisions of the said deed so far as relevant for our present purpose. We have set out that there are two definitions of the "demised premises". According to one, indisputably the structures to be built on the leasehold land by the lessee would come within the purview of the " demised premises ". According to the other, the first definition of the " demised premises " as set out in the recital portion, it is, however, doubtful whether the expression " demised premises " would include the structure or structures built on the leasehold land by the lessee. It is, however, clear that Clause (b) of the lease speaks of the obligation to pay rent notwithstanding that the demised premises or the building erected thereon may be destroyed or demolished. In that clause the expression " demised premises " certainly does not cover the structures to be built on subsequently by the lessee in pursuance of the lease. Under the said lease, on the expiry of the term, that is to say, 84 years or earlier determination, the lessee took upon himself the obligation to peaceably and quietly yield up the demised premises together with the buildings to be erected thereon and all additions and alterations thereto and all other buildings at any time erected or standing on the " demised premises " together with all fixtures in such repair or such condition or by delivering vacant possession of such portion as would at the time remain vacant and by attornment of tenancy of such portions as would be in the occupation of tenants. The lessee took upon himself the obligation to meet all the notices, requirement and requisitions of the Government and of the municipality and not to permit or to keep in any part of the demised premises on the buildings standing and/or to be erected any explosive inflammable combustible

or dangerous articles and also not to carry on or permit to be carried on upon the demised land or any part thereof of any building during the said term be erected thereon any obnoxious or offensive or unlawful business. Clause 12 of the said lease is important in the sense that it permitted sub-lease but not assignment of the lease except on certain conditions up to the term of the lessee's interest. In case of acquisition of the property we have noticed the provision in Clause 4 and also the obligation of the lessee under Clause 6 on the expiry of the lease. It is in this context and in this background that the deed of assignment dated 6th August, 1962, would have to be considered whether it amounted to a lease or a sale. It is common knowledge that a document of this nature must first be understood in the context in which it is executed. We have noted the context so far as it is relevant for our present purpose. It is well settled that such a document must be construed or interpreted reasonably, fairly and reading the document as a whole and it is also clear that the document must primarily be interpreted on its plain meaning, or, in other words, the intention of the parties have to be gathered from the language used. It is in this light important to remember that in the recital clause it has been recited that the transferor, viz., the assessee, is entitled to sub-lease or underlease the " demised premises ". It is also recited that the transferor has constructed certain structure on 8,332 sq. ft. of land of which he is the absolute owner thereof. It is in this context that Clause 5 recites this purpose of the deed of assignment. The purpose is, as the clause says, " to transfer by way of sub-lease ". The second important aspect of this clause is the object of such transfer. It is clearly stated to be the " two-storeyed brick-built messuage or house and structure situated on leasehold land measuring 8,332 sq. ft." and the object is to allow the transferee to " hold the said two-storeyed structure known as Sashi Sadan and being a portion of premises No. 26, Prasanna Kumar Tagore Street, unto the transferee for the residue of the unexpired term of years created by the lease dated 21st September, 1954, and subject to the terms and conditions therein ". Incidentally we may note that counsel for the assessee made a point that while in the deed, that is, the headlease with Maharaja Probirendra Mohan Tagore, the expression used was " to hold " indicating thereby that a lease was being created; in the habendum clause of the instant deed of assignment the expression used on this aspect was " to have and to hold ". Counsel, therefore, sought to urge that while by the lease the lessee was holding only but was not having in the instant deed of assignment the transferee was having it and also holding it. We are of the opinion that much cannot be made of such terminological differences between these two documents. Indeed, the recital portion of the present deed says that the document was being executed for the purpose of "to hold" and not " to have and to hold". Nothing of significance, therefore, in our opinion turns on this difference in the language used. But the important point is that in the recital clause the parties recite that they want to transfer by way of sub-lease. Counsel for the assessee urged that in the case of the structure the expression " sub-lease " would be inappropriate in any event. He submitted that as the assessee was the owner of the structures, it would be wholly inappropriate to say, even in the

case of a lease, that the transfer was by way of sub-lease. The appropriate expression, if it was a lease, according to the counsel for the assessee, was the expression by way of sublease of land and lease of the structures. But that expression had not been used. Counsel, therefore, sought to urge that the expression " by way of sub-lease " was only confined to the act of sub-leasing the leasehold land upon which the structure was standing. The difficulty of accepting this contention of the counsel for the assessee is that the parties have in cl. 5 clearly indicated what they wanted to transfer and that is this two-storied brick-built messuage or house and the structure situated on the leasehold land measuring 8,332 sq.ft. Therefore, by way of sub-lease what was being transferred was the two-storied brick-built messuage or house. So, in our opinion, this factor of the intention of the parties, which is recited in clear language has to be borne in mind in considering the effect of the document. Then Clause 1 of the habendum clause clearly provides that the " transferor doth hereby transfer unto the transferee by way of sub-lease ". Here again the object of such transfer has been clearly indicated, namely, that all two-storied pucca structure known as Sashi Sadan and used as cold storage together with the sub-leasehold land and appurtenances thereto. If this Clause I of the habendum clause is taken in conjunction with Clause 5 of the recital clause, then the intention and the action of the parties to transfer by way of sub-lease the property in question becomes abundantly clear. Then again, though Clause 3 deals with the transferee's right and specifically provides that the transferee shall hold the sub-lease until the expiry of the period of the leasehold term of the head lease, it does not specifically provide that the transferee should enjoy the property or superstructure as the owner thereof. The obligation of the transferee to pay the monthly sum of Rs. 51 is reiterated together with the obligation to pay the owner's and occupier's share of the municipal taxes of the said superstructure transferred. In the background of the head lease, therefore, it appears to us that the transaction, read in its entirety, indicates a desire to convey the property, that is, the superstructure in question, by way of sub-lease rather than a conveyance of the property by way of sale. In this connection it would be appropriate to remember that assignment can be both by way of lease or sale. Therefore, the use of the expression as " the deed of assignment " does not conclude the matter. Under Clause (j) of Section 108 of the Transfer of Property Act it is provided that a lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. The lessee shall not by reason of such transfer cease to be subject to the liabilities attached to the lease. Lease as defined in Section 105 of the Transfer of Property Act means as follows :

" 105. A lease of immovable property is a transfer of a right to enjoy such property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent."

23. A sale under Section 54 of the Transfer of Property Act means a transfer of ownership in exchange for a price paid or promised or part paid and part promised. The question is, whether in this case there has been this transfer of the right to enjoy the superstructure for the unexpired period of the assessee's interest in the original lease in consideration of a price paid, or a transfer of ownership in exchange for a price paid or promised. Counsel for the assessee contended that there has been transfer of ownership. Ownership consists of a bundle of rights in respect of a property as have been aptly discussed in the Full Bench decision of the Allahabad High Court in the case of Indar Sen v. Naubat Singh [1885] ILR 7 All 553 at page 556. There Mr. Justice Mahmood observed that the term " ownership " is not merely a word of technical legal meaning, but it is a general

canon

of construction, to be interpreted in its broadest 'possible meaning and it consists of a bundle of rights. Counsel for the assessee contended that in this case, though there can be a sub-lease of the entirety of the unexpired period, there must be something reserved for the owner to remain the owner. If all the rights of the ownership in respect of the superstructure had been divested or transferred by the deed of assignment, then such a transaction must be considered to be a sale as contemplated under Section 54 of the Transfer of Property Act. It appears, however, that the ownership rights may be of a very limited nature in a particular context. It was contended on behalf of the revenue that certain obligations, namely, the obligations contained in Clause 13 of the document of 21st September, 1954, had not been affected by the deed of assignment. It is doubtful, however, whether Clause 13 dealt with the insurance in respect of the building to be constructed by the lessee. It was because the said structure might not have been included in the expression " demised premises " in the context of Clause 13 of the document of 21st September, 1954. It is, however, clear that the obligations and the rights flowing from such obligations as contemplated in Clause 8 of the document of 21st September, 1954, had not been parted with by the deed of assignment. Similarly, the right or the option to have the renewal has not been parted with in the deed of assignment. Counsel for the assessee contended that on expiration the property would have to be vested in the lessor and, therefore, thereafter it would be given on lease again if the option clause is exercised and renewal is made to the lessee. But exercise of an option of renewal does not transfer any property. (See the observations of the Supreme Court in the case of R. Kempraj v. Burton Son & Co. P. Ltd.,). But this right, which the lessee had, and a valuable right in our opinion, of exercising the renewal was not parted with by the deed of assignment and that right of the ownership of the superstructure remained with the transferor.

Then again under Clause 4 of the lessee's obligations under the head lease it appears that in case the property is acquired then the compensation awarded should be divided between the lessor and the lessee. But this will also apply in case of the acquisition of the superstructure. This right to share the compensation in the event of acquisition under the Land Acquisition Act in accordance with law had not also been parted with in the deed of assignment mentioned hereinbefore. Counsel for the assessee, however, contended that these rights were not really rights but mainly obligations. But as we have mentioned before, these are obligations carrying with them certain rights. Therefore, it appears to us that the entire interest of the transferor has not passed and many obligations by which the lessee was bound had not been passed by the deed. Perhaps it is for this reason that the deed did not contain any power in express terms to sell the superstructure. However, on behalf of the assessee, it was contended that such express power was not necessary because the transferor would be the owner of the said superstructure.

24. In this context, it is now necessary for us to examine some of the decisions in which some of the aspects were considered. In the case of *Sohan Lal v. Moka Lal* [1928] AIR 1928 All 726 [FB], at page 731, Mr. Justice Kendall referred to the meaning of ownership as appearing in Salmond's Jurisprudence. The concept of ownership is treated at page 731 of the report thus:

" In Salmond's Jurisprudence, 6th edn.. Chap. 12, the author points out that although strictly nothing can be owned except abstract rights, yet a very common form of speech enables us to speak of the ownership of a material thing and that (on p. 22) :

The ownership of a material thing means the ownership of a *jus in re propria* in respect of that thing.....The ownership of a *jus in re aliena* is always incorporeal, even though the object of that right is a corporeal thing ...In its full and normal compass a *jus in re propria* over a material object is a right to the entirety of the lawful uses of that object. It is a general right of use and disposal, all *jura in re aliena* being merely special and limited rights derogating from it in special respects. It is only this absolute and comprehensive right--this *universum jus*--that is, identified with its object..... This compass, however, may be limited to any extent by the adverse of *jura in re aliena* vested in other persons. The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees, and other encumbrances. His ownership may be reduced to a mere name rather than a reality. Yet he none the less remains the owner of the thing, while all the others own nothing more than rights over it."

25. This decision was reversed on the point of registration in the case of *Raghunath v. Kedarnath*, . The Supreme Court was not concerned with this aspect of the matter. Our attention was also drawn to the decision of the Judicial Committee in the case of *Abhiram Goswami v. Shyama Charan Nandi* [1909] LR 36 IA 148 ; ILR 36 Cal 1003 (PC) and reliance was placed on the observations at page, 166. There Sir Andrew Scoble for the Judicial Committee observed as

follows (see p. 1015 of ILR 36 Cal) :

" Sir Robert Finlay, in his able argument for the respondents, contended that a mokurari lease is tantamount to a conveyance in fee simple, and that the lessee must therefore be treated as a purchaser within the meaning of the Limitation Act. But the distinction between the two transactions has been well pointed out by Jenkins J. in his judgment in the case of Kally Dass Ahiri v. Monmohini Dasse [1897] ILR 24 Cal 440, 447. ' Because at the present day ', says the learned Judge, ' a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result..... The law of this country does undoubtedly allow of a lease in perpetuity..... A man who, being owner of land, grants a lease in perpetuity carves a subordinate interest out of his own, and does not annihilate his own interest. This result is to be inferred by the use of the word lease, which implies an interest still remaining in the lessor'. He held, therefore, that, whether the Transfer of Property Act applied or not, such a lease is forfeitable, notwithstanding that it is permanent. In this opinion their Lordships concur, and it follows that they are unable to give to the Limitation Act the wider interpretation adopted by the High Court, and to treat the lessee as a purchaser under Article 134 of the Act. The purchaser must be the purchaser of an absolute title."

26. Reliance was also placed on the judgment of the Privy Council in the case of Hunsraj v. Bejoy Lal Seal [1930] LR 57 IA 110 at page 113; AIR 1930 PC 59.

27. For the reasons mentioned hereinbefore, we are inclined to think that in this case the documents in its entirety in the context of the headlease of 21st September, 1954, indicate that it was a lease of the superstructure and not a sale denuding the transferor of all rights of ownership in respect of the superstructure. On behalf of the assessee reliance was placed on certain observations in Halsbury's Laws of England, 4th edn., Vol. 12, at page 606, para. 1472, in aid of the proposition that such a document should be construed in favour of the grantee. This principle in our opinion is not in dispute, but this principle will only be applicable subject to the terms and conditions of the document itself.

28. On behalf of the assessee, it was contended that in this case the owner in terms of Section 22 should be construed to mean one who has the right to receive the rent. Therefore, reliance was placed on the observations of the Supreme Court in the case of R. B. Jodha Mal Kuthiala, v. CIT [1971] 82 ITR 570. It is clear, however, that under Section 22 the annual value of property consisting of any building or lands of which the assessee is the owner will be chargeable to income-tax. Therefore, the liability to income-tax is attracted by the fact that the assessee is the owner of the property and is not dependent on whether the assessee has the right to receive the income thereof. This point is clearly settled by the decision of the Judicial Committee in the case of CIT v. Dewan Bahadur Dewan Krishna Kishore [1941] 9 ITR 695, where the judicial

Committee dealing with Section 9 of the Indian I.T. Act, 1922, which is a similar provision, emphasised that the words were " property of which he is the owner " and that cannot be read as to mean " of which annual value he is the owner ". The decision of the Supreme Court in the case of R.B. Jodha Mal Kuthiala [1971] 82 ITR 570 was given in the facts and in the circumstances of the case and in the light of the provisions of the Pakistan (Administration of Evacuee Property) Ordinance. There analysing the relevant provisions of the said Ordinance, the Supreme Court had come to the conclusion that Section 6 of the said Ordinance provided that the property should vest and it shall be deemed always to have vested in the custodian. The effect of the Ordinance read in its proper perspective was to make the custodian the owner both in law and in fact and, therefore, in that context it was observed by the Supreme Court that an assessee whose property had remained vested in the custodian of evacuee property was not the owner of the property for the purpose of Section 9 of the I.T. Act. In that light it was further held that the assessee could not exercise any rights over the property except with the consent of the Government and though he had some residuary beneficial interests in the property that he had left in Pakistan those residual beneficial interests would not be considered to be the ownership for the purpose of Section 9. The Supreme Court decision affirmed the decision of the Delhi High Court which is reported in [1968] 69 ITR 598 [FBJ]. The said decision of the Delhi High Court was considered by a Division Bench of this court in the case of CIT v. Ganga Properties Ltd. and it was held that in the case of sale of immovable property a registered document was necessary to give effect to the sale and the sale took effect only from the date of execution of the document. It was further held that in Indian law beneficial ownership was unknown, there was but one owner, namely, the legal, owner, both in respect of vendor and purchaser, and trustee and trust and that the expression " income from property " used in Sections 6 and 9 of the Indian I.T. Act, 1922, refers to the income of the legal owner of the property and he was the only person assessable to tax on the basis of the bona fide annual value thereof. Reliance was also placed on the decision of the Supreme Court in the case of S. G. Mercantile Corporation P. Ltd. v. CIT [1972] 83 ITR 700, where at page 704, the Supreme Court observed that the liability to tax under Section 9 of the Indian I.T. Act, 1922, is that of the owner of the building or land appurtenant thereto. In case the assessee was the owner of the building or land appurtenant thereto he would be liable to pay tax under Section 9 even if the object of the assessee in purchasing the landed property was to promote and develop a market thereon. In the case of CIT v. Union Land and Building Society Pvt. Ltd. [1972] 83 ITR 794, the Bombay High Court had to consider this aspect of the matter in question and there at page 813 of the report the Chief Justice observed :

" The liability to income-tax on property depends on the fact that the assessee is the owner of the property. The assessee is made liable to pay the income-tax on the annual value of the property computed in the manner prescribed. That liability does not depend either on the power of the owner to earn the income therefrom or on the power or capacity of a person to let it out or his

own power to receive rent or income from the bona fide annual value. "

29. Reliance for this may also be placed in the observance in the case of *Sir Currimbhoy Ebrahim Baronetcy Trust v. CIT* [1963] 48 ITR 507 at page 512 (Bom). In view of the fact that we have come to the conclusion that by the document in question there has been a transfer by way of lease and not a sale divesting the transferor of all its rights of ownership, the assessee remained the owner of the property in question and was, therefore, liable to be assessed. Counsel for the revenue contended that this aspect of the matter was not agitated before the Tribunal and should not be allowed to be agitated here. But as this aspect of the matter appears to us to be another legal aspect of the matter we allowed the assessee to raise this contention.

30. In the view we have taken, however, the question No. 2 is answered in the affirmative and in favour of the revenue.

Sudhindra Mohan Guha, J.

31. I agree with My Lord and want to add a few words as regards question No. 2. The crux of the whole dispute hinges on the interpretation of the deed of assignment dated 6th August, 1962, which is characterised by the revenue as a deed of sub-lease. The assessee on the other hand describes it as a combined deed of transfer by way of sale of a two-storied structure used as a cold storage, and by way of sub-lease of land underneath measuring about 8,332 sq. ft. By a deed of lease dated 21st September, 1954, registered on 22nd September, 1954, Maharaja Prabindra Mohan Tagore demised unto S. B. (House & Land) Ltd., a private company, the assessee, all those messuages, lands, hereditaments and premises No. 26, Prosonna Kumar Tagore Street, commonly known as Tagore Castle for a term of 84 years from 21st September, 1954, with an option of renewal for a further period of 7 years. Under the terms and conditions the lessee was not entitled to make any structural alterations or additions to the main building known as Tagore Castle without the prior permission in writing of the said Maharaja; but the lessee was free to make any addition or alteration to any other part of the demised premises including the out-house or to erect at its own cost upon the demised premises. The new structures and/or buildings or erections together with alterations thereto were to belong to the lessor on the expiration or sooner determination of the terms of the lease.

32. The area of the demised premises was over 7 bighas of land. Upon taking possession of the demised premises the lessee constructed several buildings thereon including a two-storied structure on an area of 8,332 sq. ft. of land known as " Sashi Sadan ". The assessee claimed to have transferred by way of sale this building known as " Sashi Sadan " to Smt. Keeran Debi Khaitan. The learned counsel for the assessee argues that the assessee was the absolute owner of this building and had every right to transfer the same in favour of Smt. Khaitan by sale on

consideration. He drew our attention to Clauses 2(a), 2(b), 2(c), 3(a) and 3(b) of the deed of assignment and argued that the intention of the parties was clear thereunder that the building, Sashi Sadan, would be sold on consideration and the land underneath would be sub-let at a monthly rent of Rs. 51.

33. In order to find out whether the transaction is sale or any other form of transfer, the court shall examine the real nature and essence of the transaction, taken as a whole, not merely the words used in the deed or the ostensible appearance of the sale. The conclusion shall be the cumulative effect of the totality of the circumstances emerging from the agreement. It should be remembered that in a sale there is an absolute transfer of all rights in the property sold, but in a lease there is a partial transfer or divesting of the rights left in the transferor which are called the reversion.

34. It is noticed that under Clause 4 of the deed of lease dated 21st September, 1954, a newly constructed structure would belong absolutely to the lessee on the expiration or sooner determination of the terms of the lease. So, the lessee or the assessee did not have the absolute proprietary right in " Sashi Sadan ", though it had constructed the same at its own cost. In other words, the lessee had not acquired any better or superior right than that of leasehold. Again, under para. 12 of the deed of lease, the lessee, subject to, conditions and covenants, was entitled to sub-let or under-let the demised premises or any part thereof and/or grant sub-lease in respect of the demised premises or any portion or portions thereof for a term not exceeding beyond the term created under the deed of lease. Thus, no right of transfer by way of sale was granted to the lessee or the assessee.

35. With this background let us examine the deed of assignment dated 6th August, 1962, between the assessee and Smt. Kalyani Debi Khaitan, Under para. 5 of this document, the transferor was agreeable to transfer by way of sub-lease to the transferee the building known as " Sashi Sadan " situate on leasehold land measuring 8,332 sq. ft. on consideration of Rs. 1,50,000. It would also be clear from the recital in Clause 1 that both the building and land underneath were transferred by way of sub-lease on payment of consideration of Rs. 1,50,000 and subject to payment of rent of Rs. 51 per month, specifically mentioned in Clause 3(b) for the unexpired residue of the term of years created by the lease dated 21st September, 1954. It is argued that unlike the leasehold land measuring 8,332 sq. ft. no rent was reserved for the building "Sashi Sadan ". A sum of Rs. 1,50,000 was said to have passed as a consideration for sale. The sum of Rs. 1,50,000, according to the revenue, passed as prima facie for the sublease. The consideration for lease is either a premium or rent. Premium is the price paid or promise in consideration of the demise. In India there may be a lease, even if no rent is payable. The absence of the right of alienation to the transferee under the deed of assignment goes to indicate that it was not a

conveyance on consideration. Again, where a document provides that municipal taxes are payable by the lessee, that may have formed a part of rent.

36. On examination of the recitals of the deed in question it cannot be said that the assessee was divested of all rights, title and interest in the property known as " Sashi Sadan". The right of reversion of the assessee was still there. Thus, on consideration of the recitals of the deed of assignment, taken as a whole, it appears that there was no transfer of the buildings known as "Sashi Sadan" by way of sale. On the other hand, both the building and the land underneath had been transferred by way of sub-lease.

