

PATNA HIGH COURT

Commissioner of Income Tax

Vs

Visweshwar Singh

Miscellaneous Judicial Case No. 41 of 1936

(Fazl Ali, J.)

25.08.1939

JUDGMENT

Fazl Ali, J.

1. The question to be decided on this reference is whether a sum of ₹ 1,800 received by the assessee as salami for the settlement of certain lands during the years of assessment is taxable. The lands settled are 4 1/2 bighas in area, and the terms of the settlement are to be found in a kabuliyat which is printed at page 16 of the Paper Book. Under this kabuliyat the settlement was made for an indefinite (bemeyadi) period with effect from the beginning of 1340 Fs. and it was provided that rent was payable by the lessee year after year, and "neither the lessee nor his heirs and representatives shall put forward any plea or objection with regard to the payment thereof". It was further provided that in the event of default of two consecutive instalments, "the lessor or his heirs and representatives shall have the power to realise the arrear rent with interest thereon and dispossess the lessee by taking proceedings in Court", and that "the landlord or his heirs and representatives shall have the power to enhance the rent if at any time the area of the land, as specified in the lease, is on measurement found increased. Lastly, the lessee bound himself not to sell the residential right to any one without a reference to the landlord or his heirs and representatives and without obtaining his or their permission in writing. The lease clearly stated that the lands had been settled with the lessee to enable him to build a gold house and platform for ricemill. The first question which arose upon the terms of this lease was whether the lease was a permanent one or it created a mere tenancy at will or a tenancy from year to year. The learned Commissioner of Income Tax relying upon the decision of this Court in *Must. Parshan Kaur v. Must. Tulsi Kuar* held that the lease was not a permanent one. That case, however, is no authority for the proposition that a bemeyadi patta can in no circumstance be regarded as a permanent lease and it has been fully explained in two subsequent cases, viz. *Kangali Charan Mukerji v. Suraja Narain Sah* and *Forbes v. Hanuman Bhagat* In the last mentioned case where the lessee had obtained settlement of a parcel of land under a bemeyadi lease for the purpose of

erecting a goal on the demised land, it was held that the lease was intended to be a permanent one and not from year to year. In *Raja Janki Nath Roy v. Dinanath Kundu* the Privy Council held a *bemeyadi patta* to be a permanent lease in the following circumstance : the lease recited that the executant was already in possession of the premises (a hat, bazar, bandar and ghat) under a *meadi* settlement, that his request for a *bemeyadi* settlement had been granted by the execute on receipt of a premium and on an annual rent being fixed, (such premium being a substantial sum and higher than previously), that the executant had been called upon to execute a *kabuliyat* whereupon he was executing the present *bemeyadi kabuliyat* and promising to abide by the terms as set forth therein. Among the terms was one for an enhancement of rent in specified circumstances and another forbidding *bemeyadi* settlements by the lessee whereas others imposed restrictions on the powers of the lessee to dig tanks and erect masonry structures and also provided for the lessor assuming *khas* possession in certain circumstances. In my opinion, the fact that the lands in the present case were let out for the purpose of enabling the lessee to build a *gola* and a platform for a rice mill strongly suggests that the lease was intended to be a permanent one. This inference is supported by two other facts, viz., (1) that no term was fixed in the lease and (2) provision was made for certain rights being exercised not only by the lessor and the lessee but by their heirs and legal representatives. It is abundantly clear on reading the lease that it was to continue as long as the terms settled between the parties were carried out by the lessee and his heirs or legal representatives, and this shows that the lease was intended to be a permanent one. Besides, the settlement was described as a *Mokarari* settlement in landlords own *challan*, a contemporaneous document, to which reference has been made by the commissioner of Income Tax as evidencing the payment of the *salami* of ₹ 1,800. The next question to be determined is whether this *salami* is to be treated as capital receipt or as income. It may be stated here that this is not the first time that this case has come up before this Court. There was an earlier reference to this court by another learned Commissioner of Income Tax, and in that reference the main argument advanced by him in favour of the view that the *salami* was taxable, was that the lease was not a permanent one but for a period of three years only. It was subsequently discovered, that the learned Commissioner of Income Tax had by mistake overlooked the lease under which the *salami* was received and had proceeded to refer to another lease with which we are not at all concerned in this case. The case was then sent back to Commissioner justified the Taxation of *salami* on the ground that the lease was not a permanent one. The implication of the argument clearly was that if the lease was not a permanent one there was room for holding that the *salami* was a capital receipt and not income. Before us, however, learned Counsel for the Income Tax Department has adopted a bolder line of argument and contends that even if the lease is held to be permanent, the sum of ₹ 1,800 receive as *salami* must be treated as income and not as capital receipt, and he relies in support of this contention, on the following observations made by Mukherji Ag. C.J., in *Birendra Kishore Manikya v. Secretary of State for India* :-

"When a new tenancy is created in respect of unoccupied waste land or lands which had been

abandoned by a previous tenant the premium represents essentially the capitalized value of a portion of the rent. We are not unmindful that in the case of *Dinanath Mukerjee v. Debnath Mullick*, it was ruled that the money payable by a lessee in consideration of a lease granted, whether called nazar or salami cannot be looked upon as rent, but is simply a debt due upon a contract and is recoverable by a suit in a Small Cause Court on the money bond executed in that behalf by the tenant in favour of his landlord. It is not necessary to hold that such salami is rent within the meaning of the definition given in the Bengal Tenancy Act or the Transfer of Property Act. The expression used in the Indian Income Tax Act is "rent or revenue" and this is obviously wider than rent as defined in the Bengal Tenancy Act or the Transfer of Property Act... There can be little doubt that when a lease is granted, the amount fixed for periodical payment is not independent of the amount paid in a lump sum as premium. The capitalised value of the sum periodically payable taken along with the premium constitute in the aggregate the consideration for the grant. From this point of view, we must hold that the premium paid for the settlement of waste lands or abandoned holdings may reasonably be regarded as "rent or revenue" derived from land, within the meaning of that expression as used in the definition of "agricultural income" in Section 2(1)(a)". The view put forward by Mukherji, Ag. C.J., was, however not accepted by this Court in *Raja Shiva Prasad Singh v. The Crown*. In that case the question was, whether a sum of money received by the assessee by way of salami or premium for granting a mining lease was taxable. Sir Dawson Miller who delivered the judgment in the case dealt with the question as follows :-

"There is a vast difference between a sum paid once for all for the lease of mineral rights and a rent or royalty paid annually to the lessor. The lessor in this case who holds an unfettered right of disposal would appear, in granting these leases to have had two objects in view which are distinguishable. In so far as rent and royalty are reserved, he is founding an annual increment to the income of the Raj for himself and his successors, but with regard to salami it is the price he demands for parting with his direct enjoyment of the property by himself and his successors, but with regard to salami it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to person who whilst not purchasers of the fee simple are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated outturn with the capital to persons who, whilst not purchasers of the fee simple are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated outturn but in exchange for the long term transferred. Possibly it may be objected that the distinction is one of degree rather than of kind, recurring payments at short periods being treated as income and a single payment of a similar kind covering a long period being treated as capital, but after all this is a distinction acknowledge in Section 4 of the Act itself, and, as has been observed, the Income Tax Acts are not cast upon absolutely logical lines. Not does there appear to be any reason why we should extend the exception made in the case of rent and royalty to the case of a nonrecurring payment made to cover a long period". In my opinion these observations fully apply to the present case. If the document with which we are concerned in the present case is a permanent

lease, then there can be no doubt that the lessor has by this document permanently parted with the direct enjoyment of the property by himself and his successor" and the lessee, though he is not a purchaser out and out of the entire interest in the land, was undoubtedly purchaser of a large interest therein. In my opinion there is no difference in principle between the salami realised under the present lease and the salami realised on a lease for 999 years in regard to mineral rights. In both cases the real question is whether the salami or premium represents the price for parting with land, or it is only advance rent. If it can be argued that the salami is in fact advance rent, I think that it will be equally plausible to say that rent is to be regarded as "deferred price" of the land. In my opinion there is vital distinction between a single payment made at the time of the settlement of the land and recurring payments made during the period of its enjoyment by the lessee. The distinction is clearly RECOGNISED in Section 105 of the Transfer of Property Act which defines both premium and rent. In this section a lease of immovable property is defined as "a transfer of a right to enjoy such property" and it is clearly stated that "the price is called the premium and the money, share, service or other thing to be so rendered is called the rent". It is obvious that if the premium represents the whole or part of the price of the land it cannot be income. As pointed out by Sir George Lowndes in the Commissioner of Income Tax Bengal v. Messrs. Shaw Wallace and Company in income in the Indian Income Tax Act connotes a periodical monetary return, coming in with some sort of regularity or expected regularity from definite sources. The premium of salami which is paid once for all and is not recurring payment, hardly satisfies this test. I concede that in some cases where the rent is ridiculously low and the premium abnormally high, it may be possible to argue that the premium includes advance rent, but it has not been suggested anywhere that this is one of such cases. In my opinion, upon the facts stated by the learned Commissioner of Income Tax the sum of ₹ 1,800 received in this case must be treated as capital receipt and not as income. I would therefore answer the question pronounced by the learned Commissioner in the negative. The assessee will be entitled to a hearing fee of ten gold mohurs.

Manohar Lall, J.

I have come to the same conclusion I have no difficulty whatsoever in construing in construing the kabuliyats printed at pages 16 and 18 of the Paper Book. The terms of these kabuliyats have a close resemblance to the kabuliyat construed in Forbes v. Hanuman Bhagat. By these Kabuliyats a settlement was made for erecting a gola house and for putting a platform for the rice mill given in lease to the lessee by the assessee by another document. The settlement was for an indefinite period and was expressly made descendible to the heirs and representatives of the lessee. The usual convenient against alienation is also to be found obviously in the interest of the lessor so that he may not be compelled to recognise an undesirable tenant. In such circumstances the principle enunciated by their Lordships of the Judicial Committee in Raja Janki Nath Roy v. Dina Nath Kundu assists in coming to a decisions. I hold in agreement with my learned brother that the terms of these kabuliyats coupled with the description thereof given in the contemporaneous document, namely, the challan of the 14th of September, 1932, point to the

clear conclusion that the settlement was in perpetuity. By the settlement evidenced by these kabulyats the assessee admittedly received a sum of ₹ 1,800 by way of salami or premium and also secured to himself a fixed annual income calculated at the rate of ₹ 100 a bigha. The question which arises for consideration is whether the amount of ₹ 1,800 received by the assessee as the result of these transactions for a permanent settlement attracts Income Tax. I propose in the first instance to examine some cases which are of assistance in order to decide how this question is to be approached, bearing in mind that Income Tax as has been stated over and over again, is a tax on income it does not tax capital (see *Attorney General v. London County Council*). In the very recent case reported in *Commissioner of Inland Revenue v. British Salmson Aero Engines, Ltd.*, the Master of the Rolls pointed out the difficulty which arises in a large number of cases like the present, which fall upon the border line. At page 43 (22 Tax Cas.) he makes these observations : "Indeed, in many cases it is almost true to say that the spin of a coin would decide the matter of almost at satisfactorily as an attempt to find reasons; but that class of question is a notorious one, and has been so for many years". As I stated before the only question which has to be decided in the present case is whether the amount of ₹ 1,800 which was admittedly received by the assessee is an income for the purpose of the Indian Income Tax Act. The term income, as has been often pointed out, has not been defined in the Indian Act. It is always a matter of difficulty and embarrassment to draw a line between what is a capital receipt and what is a revenue receipt, but there is well known distinction and a line must be drawn clearly and firmly. The case already referred to, *Commissioners of Inland Revenue v. British Salmson Aero Engines, Ltd.*, is useful and will be of assistance in deciding the present case. In that case the assessee by period of 10 years to construct, use and sell in a certain territory Salmson Aero Engines. The consideration for the licence was that the licencee were to pay a fixed sum of Pounds 25,000 payable in three installments and in addition to these payments and as royalty a sum of Pounds 25,000 and a like sum each twelve months during the following nine years. The question which required consideration was whether any of these sums, namely, the fixed amount paid in a lump sum in three installments and the fixed sum to be paid annually for nine years were assessable to Income Tax - the Crown contending that all these payments were income and the assessee insisting, on the contrary, that all these payments were in the nature of capital receipts. The Master of the Rolls approached the subject in this way. He pointed out that in the agreement there was "a fundamental difference in the nature of the two classes of sums in this sense, that the former class starts off by being a lump sum payment, definite and fixed which is then to be payable by installments. The other class is not of that description; no lump sum payment is referred to; it is on the face of it, nothing but an undertaking to pay yearly sums as royalty. Speaking quite apart from any close examination of authority and simply regarding the distinction between those two things, it would appear upon the fact of it that, with regard to the latter class, the parties are creating an obligation as between themselves which they choose to describe as a royalty payable each year at a fixed rate". He then considers the argument that it is illegitimate to look outside the terms of the contract under which the licence was granted and observes : "I do not

wish to pay down any such proposition. What has to be ascertained in these cases is the accountancy point of view, and that is a question of fact, I do not wish to say anything which will have the effect job circumscribing the matters which may properly be looked into in answering that question of fact".I now given quotation from page 43 (22 T. C.) :

"It seems to me that in the case of patents, as in the case of any other matters, the fundamental question remains in respect to any particular payment : is it capital or is it income ? and that question has to be decided, as it has to be decided in reference to other subject matters, upon the particular facts of each case, including in those facts the contractual relationship between the parties. It has been said that the question is one of fact and it is when one gets to the bottom of it, an accountancy question. In saying that it is a question of fact, one does not mean that, in deciding it, questions of law may not have to be discussed and decided. For example, the construction of a contract may be one of the element which must be taken into consideration in deciding that question there may be cases where the construction of the contract is of itself the really decisive matter in answering the question. In this case the question of the contract and the terms of the contract is of cardinal importance"Gillatt and Watts v. Colquhoun was a converse case but some observations of Grove, J., are relevant. In that case the question was as to the annual expenditure which should be allowed to an assessee who had taken a lease after paying Pounds 34,000 as a premium with a liability to pay a ground rent of Pounds 250 a year, the lease being for 20 years. Mr. justice Grove makes this observation at page 79 (2 Tax Cas.) : "But in this case the lessee pays a ground rent of Pounds 250 a year and he paid Pounds 34,000 as a premium for the lease. The lease has virtually put him almost in the position of a freeholder with a quit rent, though not quite that, because it is terminable at a certain time, but the rent is swallowed up, or what we may call the rent is much less than what would be the real rent of the premises if they were let from year to year". At the bottom of that page he states :

"I thought the fair mode would be taking the premium into considering and the ground rent, to take what an actuary would put as the fair rent for that lease for the time over which that lease extended; that is supposing a party had taken the lease upon an annual rent, and had paid no premium, and the ground rent was, so to speak, absorbed in the recurrent or the annual rent of the premises. I still adhere to that idea as the fair mode of compensation".

He puts the question not be decided at page 80 thus :

"Therefore we have virtually got to this question : Is that the proper sum to be deducted from the Income Tax, or is whatever fancy price the party pays for a speculative purchase to be dictated ? I think former of these two is the proper alternative, that is to say, the one insisted upon by the Crown in this case. The other would lead to extreme difficulty, and it would lead possibly to a great deal of fraud, because factitious prices would be given; Pounds 50,000 would be handed over for a lease, and Pounds 20,000 out of that would be returned the next day, or some arrangement or that sort would be made, and the price paid would afford no reasonable criterion

for saying what annual deduction ought to be made from the annual profits or gains". He finally adopts the test at page 82 that "the real and proper basis of calculation is the trade value or rent of these premises paid by persons who would take these premises as they would take any other premises which are in the market or for sale, a willing lessee and a willing lessor, the one anxious to make then most of his premises, and the other anxious to get lease, who would settle the bargain upon fair terms, that is the proper criterion".

I take this case as deciding that such questions are really questions of fact which have to be determined by taking into consideration all the circumstances. Mr Justice Smith at the end of his observation state : "It also seems to me that this case, as my brother Grove says, resolves itself into a question of fact and not of law." The Commissioners of Inland Revenue v. Adam dealt with a situation where the assessee had obtained a right to deposit soil on a definite area of land at a certain rate for period of 8 years by agreeing to pay to the owner a sum of Pounds 3,200 payable in 2 installment of Pounds 200 each at the end of every six months each year. The questions was whether the assessee was entitled to deduct from his assessable income the sum of Pounds 400 which he had paid in the year under consideration. The Lord President pointed out that in a question of this sort both form and substance must be considered and he pointedly referred to the fact that Pounds 3,200 and the installment of Pounds 200 were payable whether the quantities referred to in the contract were actually deposited or not and came to the conclusion that in considering this difficult question, which was on the border line, his opinion on the whole was that the price of Pounds 3,200 whether paid in installments or in a lump sum did not alter the character of the price as a capital outlay and that the assessee could not be entitled to say that the installments were paid out in each year for the purpose of earning the profits of that year, in any other sense than it would be true to say that any capital outlay is made for the purpose of earning profits of the years which follow its expenditure. Lord Sands took the same view and agreed that in a matter of this kind one cannot altogether ignore the form because "when parties contract in certain forms different results may flow according to the form of the contract, however little difference there may be in substance". Lord Blackburn took a different view and gave a dissenting opinion. He makes some pertinent observations at page dissenting opinion. He makes some pertinent observations at page 43 (14 Tax Cas.) "If the site has been depreciated in value by the deposit laid upon it, it may very well be that the landowner was fully justified in attributing each and all of the payments to be made to him as capital payments. But if the converse is the case and the value of the land remains unaltered, or possibly has appreciated for building purposes, it would hardly appear to be a good answer to a claim against him for Income Tax on the sums of Pounds 400 received annually, to refer to the agreement as evidence that he had received them as capital payments and as fruits of his land." This case was recently considered in Race Course Betting Control Board v. Wild, 2 Tax Cas 730 is the well known case of Constantinesco v. Rex. The question there was as to the assessability of certain sums received by the patentee as the result of an award made in his favour by the Royal Commission on Awards to Inventors. The award was made after the user of the patent had taken place and the claim which had been settled was a claim by the assessee for successive uses of the invention. Lord

Cave in giving his opinion in the House of Lords stated as one of the facts in the case that the corpus of the patent was not taken away from the assessee and having regard to a number of facts he stated : In view of all the facts I am satisfied that the sum awarded is to be treated as profits or gains, and annual profits or gains, within the meaning of the Income Tax Act", Rowlatt, J., who decided the case in the first instance and whose view was upheld by the appellate Court and House of Lords, gives an apposite illustration at page 740. Suppose a patentee demands Pounds 25,000 as a sum down and tells the licensee "use it as much as you like for a definite time or for the whole length of the patent". In such a case the decision was "That will clearly be a lump sum. It would not be parting with the patent.... but it would be clearly a capital sum in my judgment". The Master of the Rolls at page 743 notices one or two cases where a capital sum is reached by an estimate derived from income, e.g., so many years purchase for a piece of the very large number of cases which are to be found in the English Reports in deciding whether the annual payment concerned in this case was in the nature of a capital payment or a capital receipt or was in the nature of revenue payment or revenue receipt. For instance, see the Annuity Cases beginning *Foley v. Fletcher*, the *Tikari Case* which went up to the Privy Council from this Court (*Commissioner of Income Tax v. Gopal Saran and Gopal Saran v. Commissioner of Income-Tax*) the Railway Cases of which the leading type is *Scobles Case* and lastly, *Minister of National Revenue v. Catherine Spooner*, where sale of land for cash and 10 per cent. mineral oil was decided as a question of fact. The case which I wanted to refer was the case of *Commissioners of Inland Revenue v. Thomas Nelson and Sons, Ltd.*, a case decided in July, 1938 by the Court of Sessions, Scotland. The facts of case were that the assessee company lent a sum of money to an Indian Company under an agreement which provided that interests was to be paid at 3 per cent. per annum and that on repayment of the principal sum or any part thereof there should also be paid an premium varying with the date of repayment. The premium prescribed by the agreement for each of the ten years of the currency of the loan are set out in the agreement, the first of them is at the rate of 2 per cent., the second is at 4 per cent., in each of the next five years there is an increase of 2 1/2 per cent., in arithmetical progression and for the last three years of the ten the rate of increase per annum is 3 per cent. The full amount of the loan was ultimately repaid to the assessee together with the accrued interest and the premium payable under the agreement. The contention raised by the assessee was that the premiums were part of the principal sums repaid and were capital payments. The Lord President decided that question as a question posed on the particular terms of the contract. In his opinion the premiums were in the nature of annual profits or gains being part of consideration given by the borrowers for the use of the capital lent to them, and part of the creditors share of the profit which the borrowers is presumed to make from the use of the money and observed : "It is not irrelevant to notice that agreement provides for a payment by way of premium which may be made in each year of the currency of the loan and that, taken along with the stipulated interest, the effect of this provision is to give the lenders a return on their capital varying between 5 per cent. in the earlier years and something over 5 1/2 per cent. in later years, a rate which can only be regarded as a reasonable return for the use of their capital and not as to any extent an accretion to it". It was however pointed out that "the fact that the borrowers would, under the contract pay a premium only which they choose to make a

capital payment does not necessarily have the effect of making the premium a capital payment, any more than that the lenders waiver of their right to exact payment of interest each year has the effect of converting the payment of arrears of interest into a capital payment". This case, therefore, may also be taken as deciding that each case ought to be decided by the facts and circumstances of that case. I respectfully agree with the observations made by Sir George Rankin in *Gooptu Estate, Limited v. The Commissioner of Income Tax, Bengal* (1929) 4 I. T. C. 146, where that learned and distinguished Chief Justice pointed out that it would be impossible to lay down a hard and fast rule that a salami can in no case be taxable but that the question would depend upon the facts and circumstances of each case. I think that the above review of some leading cases suggests this as the proper way of approach while deciding a question like the present before us. But the learned Standing Counsel wanted to rely, in support of his argument that a salami like the present is always taxable as an income, upon the observation to be found in the case of *Birendra Kishore Manikya v. Secretary of State for India*, where it was stated that a salami is a capitalised rent. But this decision was expressly overruled by a later Full Bench decision of that very Court in *Nawabzadi Meher Bano Khanum v. Secretary of State* 29 C. W. N. 969. Walmsley, J., who was one of the learned opinion which he expressed in that case, but he was overruled by his other learned colleagues. In a case of this Court in *Raja Shiva Prasad Singh v. The Crown*, this decision of the Calcutta High Court was disapproved. The Patna Case dealt with a lease of a coalfield for 999 years for a fixed premium at an annual rent. The learned Chief Justice pointed out that the essence of the transaction was (1) that the salami was really in the nature of a premium paid for granting a lease, in other words it was the purchase price of a leasehold interest and (2) that "in so far as rent and royalty are reserved he, the assessee, is founding an annual increment to the income of the Raj for himself and his successors but with regard to salami it is the price he demands for parting with his direct enjoyment of the property by himself and his successors of a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of the fee simple, are undoubtedly purchasers not based upon the estimated outturn but is paid in exchange for the long term transferred". With respect I agree with these observations and would hold that this applies in proprio vigore to the salami obtained by the permanent settlement in the present case. I notice that the Commissioner, Mr. H.D. Chatterji, was inclined to take the same view in his order of reference to this Court, which is to be found at pages 9-10 of the original Paper Book dated the 24th July, 1936 but as he thought that the period of the settlement in document which he was considering was for three years only he came to the conclusion that the amount of salami was merely a rent in advance. The Commissioner expressly referred to the case of *I. L. R. 4 Pat. 73* also reported in *1 Income Tax Cases 384*, had sought to distinguish it on the ground that in the present case the lease was for three years only and did not cover a long period. The provisions of Section 105 of the Transfer of Property Act were referred to in the course of the argument before this Court in the *Raja of Jharias* case, supra. Section 105 distinctly defines a lease in this country as a transfer of a right to enjoy immovable property for a time or in perpetuity in consideration of a price paid or for a recurring rent or annual services of both and also mention that "the price is called the premium". The Legislature has thus drawn the very distinction between a price and a recurring payment which the eminent judges in England

have drawn while deciding cases under Income Tax Acts. In the present case there is no suggestion that the term embodied in the contract evidenced by the chalan and the kabuliyats was not a fair expression of what the parties intended. It was argued, however, that the amount of premium will always bear some proportion to the amount of rent which is ultimately fixed, and, therefore, it ought to be held that the premium should be taken in law as an advance payment of rent. I think the argument is fallacious. The premium or the price will always be fixed on taking into consideration the amount of rent the lessor will receive, and he may vary it as he does in practice with amount of salami which he insists on receiving as a condition precedent for the parting with the land in favour of the lessee. It may be that in some cases the evidence might show that the parties fixed a particular salami as an advance payment of rent, in those cases I would not hesitate to treat that receipt as income, but I am of opinion that it is not open to me to treat a premium in the nature of a salami as in this case in as a revenue receipt. It should be noticed that the amount of ₹ 1,800 was received not because of the use of the land but before the land was put into use by the assessee.

For these reasons, I have no hesitation in holding that this amount of ₹ 1,800 was a capital receipt in the hands of the assessee as it was a capital payment on behalf of the lessee. I wish to make a few observations regarding the procedure adopted by the Commissioner of Income Tax in sending up the present reference. It appears that the assessee has been considerably harassed by the manner in which the proceedings for reference to this Court were conducted by the Commissioner. On the 16th of November 1937 when the reference came up for hearing before the learned Chief Justice and Agarwalla, J., it was discovered that by some unfortunate slip there was an error in the statement of the case. The learned Judges in agreement with the submission on this point by the learned Advocate for the assessee and the Income Tax Department, directed that the case should be sent back to the Commissioner in order that he may restate the case with such finding of fact as may be considered necessary. The assessee was in no way to blame when the Commissioner gave his opinion regarding a document which admittedly referred to some other case. When the case went back to the Commissioner he sent up a restatement of the case, but unfortunately without hearing the assessee. The re-stated case came up before this Court once again on the 28th of November 1938 when the order which we passed was that the Court was compelled to sent the case back to the Commissioner once again in order that case might be restated with such further finding of fact as the Commissioner may consider necessary after hearing the assessee. The matter then went back to another Commissioner, who instead of restating the case, as he was ordered by this Court to do, sent up a letter to this Court to the address of the Deputy Registrar (page 2 of the Supplementary Paper Book). In that letter he says : "I have not heard the party in regard to the opinion of the Commissioner. In any event, I should not consider that I had power within Section 66(4) to vary an opinion given under Section 66(2) if no new facts were admitted". In my opinion the Commissioner was in duty bound to carry out the order of this Court. He should have re heard the parties, admitted such further evidence as he considered relevant on the point at issue and restated the case with his submission that the High Court should decide the case not upon the case which he was restating (as ordered) but upon the

finding of fact already arrived at by the previous Commissioner on the 4th of August, 1938. I do not agree with the view expressed by the Commissioner that the case did not stand at large, whether under Section 66(2) or Section 66(4). It was within jurisdiction of the High Court to require the Commissioner to restate the case which was not found satisfactory by this Court; and, if the Commissioner was dissatisfied with this order, he should have moved their Lordships of the Judicial Committee against the order passed by this Court. But so long as that order stood, this Court expected that it should be carried out to the very letter and in the spirit in which the order was worded. The result of the procedure adopted by the Commissioner has been that a third hearing in this Court has been inflicted upon the assessee. The further evidence which Sir Sultan Ahmed wanted us to consider was the affidavit of the Chief Manager of the Raj regarding which upon being supplied with a copy the Standing Counsel agreed that this would amount to a decision on the construction of the document in favour of the assessee. I am doubtful, however, how this affidavit can be used to supply the meaning of terms in this document which are in no way ambiguous, or to help us in construing the document. I have therefore, ruled this affidavit out of any consideration entirely in coming to a conclusion as to the meaning to be attached to the word "bemeyadi" in the documents of kabuliyats which fall to be construed.

For these reasons, I agree that the answer to the question should be in the negative and I also agree to the order of costs proposed by my learned brother.

Reference answered in the negative.

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