PATNA HIGH COURT

Commissioner of Income Tax

Vs

Kumar Kamaksha Narain Singh

(Harries, C. J.)

06.09.1940

JUDGMENT

Harries, C. J.

1. This is a reference made by the Commissioner of Income-tax Act, Bihar and Orissa, under section 66 (2) of the Income-tax Act, 1922, at the instance of the assessee, the Maharaja of Padma. The assessee is the owner of minerals and receives large payments by way of royalty for coal leased out to various mineral lessees. The estate had been under the Court of Wards paid income-tax upon sums received as royalty. At the time when the tax return in question in this case was filed the estate was still under the management of the court of Wards, and in that return a sum of Rs. 5,32,368 is shown as having been received as coal royalty. Before the assessment was made, however, the court of wards released the estate and the present assessee assumed the management of his own estate. Apparently the assessee did not at once raise the contention that coal royalties were not assessable, but in the grounds of appeal to the Assistant Commissioner he took the point that coal royalty was not income and therefore not assessable. The Assistant Commissioner of Income-tax allowed the assessee to take this contention and the rejected it on the merits. When the matter came before the Commissioner he was requested to state a case for the opinion of this court on two points :
(1) Whether royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax ?

(2) What should be the principle on which the cost of management in collection of royalties is to be determined when there is a combined management covering both the zamindari collection of agricultural income and royalties from the mines ?The Commissioner of Income-tax has made a reference to this court and has expressed his opinion that the sums received by way of royalty were rightly held by the Assistant Commissioner to be annual income and not capital installments of purchase price. As to the second question, the Commissioner points out that it is a

pure question of fact and that no legal question whatsoever is involved in it. He therefore recommended that this second question should not be answered by the Court. The royalty received by the assessee is in respect of minerals or mineral rights leased out to various lessees. Three mineral leases have been put in evidence, and we are told that they are typical of all the leases granted by the assessees predecessors to the various lessees. The three leases which are printed in the paper book are very similar in terms. The two leases to Bokaro and Ramgarh, Ltd., are made in consideration of a salami or premium, whereas the lease to the Karanpura Development Co. Ltd., is made in consideration not only of salami, but all the rents and royalties reserved in the said lease. All the leases, however, contain covenants to pay royalties, and it appears to me that there is no real difference in the three leases. It is a mere difference in drafting. The leases Bokaro and Ramgarh, Ltd., purport of grant and demise unto the lessees all and singular the under ground coal mining rights specified in the schedules to the leases and all the estate, right, title, interest, claim and demand of the lessor into and upon the same and very part thereof with full liberty and power to the lessees to search for, work, make merchantable and carry away the coal there found and also liberty and power for the purposes aforesaid and all other purposes connected therewith with power to dig, sink, drive, make, repair and use all such pits, shafts, drifts, levels, etc., and to erect engines machinery, dressing floors, buildings, workshops, store houses, cottages, godowns, coke-ovens, furnaces, brick-kilns, lime-kilns and other erections and to make such railways and tramways and other roads and communication as are required and to make spoil heaps and other conveniences as may be necessary upon the said land.The lease in favour of the Karanpura Development Company Ltd., actually demises the mines, beds, veins and seams of coal lying within and under land described in part 1 of the schedule annexed to the lease together with liberties, powers and privileges mentioned in part 2 of the said schedule and those rights and privileges are very similar to the rights conferred in the other leases. All the leases contain covenants for the payment of royalty, namely four annas per ton on steam coal, three annas per ton on rubble coal, two annas six pies per ton on dust coal or slack coal, eight annas per ton on hard coke, and six annas per ton on soft coke. There is a further provision as to payment of a sum by way of minimum royalty in the event of the royalty calculated on the coal raised and coke manufactured not amounting to that sum. All the leases further contain provisions giving the lessor a right to re enter in case of failure to pay the rent or royalties reserved. This case first came before a Bench, and when it was opened it was apparent that counsel for the assessee desired to challenge the correctness of a number of Bench decision of this Court. That being so, it was thought desirable that the case should be heard by a larger Bench, and this special bench of three Judges has been constituted in consequence. It will be convenient to deal firstly with the first question which is :

> "Where royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax ?"

This is framed rather too widely, because the question which has to be determined is whether the royalty payable to this assessee under the various leases granted by him or his predecessors is assessable to income-tax, and in this judgment I shall confine myself to the facts of this particular case. It has been strongly urged by counsel for the assessee that the sums received as royalty by the assessee do not constitute income but are in fact capital receipts. He has contended that a mining lease is not a lease at all but is in fact a sale of the minerals, and the royalties reserved in the so called lease are noting but the prices of the various types of coal sold under the terms of the so-called lease. Counsel admits that there are a number of Indian decisions, and particularly, of this court to the effect that royalty on coal payable in circumstances similar to those existing in this case is income and, therefore, taxable; but it has been urged that all these cases are wrongly decided and should be overruled or dissented from. Great reliance has been placed upon certain dicta of distinguished English judges upon the question whether coal royalties are to be regarded as income or repayment of capital. The earliest case relied upon is Gowan v. Christie. The question which has to be determined in this case was not the question in issue in that case; but reliance is placed upon an observation of Lord Cairns at p. 283, which is in these terms :

> "But without pursuing the question with respect to agricultural leases further, I should doubt extremely whether dicta of this kind apply at all to leases of mineral subjects; for although we speak of a mineral lease, or a lease of mines, the contract is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit : that is to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term; and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is liberty given to a particular individual for a specific length of time, to go in to and under the land, and to get certain things there if he can find them, and to take them away, just as if he had bought so much of the soil. It is very difficult to apply to a case of that kind dicta which evidently relate to the ordinary process of agriculture."

A very similar view was expressed by Lord Balckburn in Coltness Iron Co. v. Black. At page 335 the learned lord observed :

> "It was said by lord Cairns in Gowan v. Christie, that a lease of mines is not in reality a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is to say, there is no sowing and reaping in the ordinary sense of the terms, and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of the land. I think this is a perfectly accrued statement. But the argument that no income-tax should be imposed on what is, perhaps not quite accurately, called rent reserved on a mineral lease, because it is a payment by installments of the price of minerals forming part of the land, any more than on the price paid down in

> one sum for the out and out purchase of the minerals forming part of the land, is I think, untenable."

Here again lord Balckburn points out that a mineral lease is not a lease in the sense in which that term is used in connexion with agricultural property and that the rent reserved is really a payment by installments of the price of minerals leased. He, however, states that the arguments that no income-tax should be imposed on these payments is untenable. The matter was again referred to in Secretary of State in council of India v. Scoble, a case not concerning coal royalties. At page 303 Earl of Halsbury, L.C., observed :

> "Where you are dealing with income-tax upon a rent derived from coal, you are in truth taxing that which is capital in this sense, that it is a purchase of the coal and not a mere rent. The income-tax is not and cannot be, I suppose from the nature of things, cast upon absolutely logical lines, and to justify the exaction of the tax the things taxed must have been specifically made the subject of taxation....."

A similar view was expressed by Cozens Hardy, L. J., is In re Aldams settled Estate. At page 63 the learned Lord Justice observed :The use of the word rent in the case of a meaning lease is somewhat misleading. It is really purchase money for coal worked....."Counsel for the assessee has also relied upon two decisions of their lordships of the Privy Council the first being Thakur Giridhari Singh v. Megh Lal Pandey, in which it was held that the expression "mai haq haquq" (with all rights) in a mukarrari lease of land did not add to the true scope of the grant nor cause mineral rights to be included within it. Reliance has been placed on an observation of Lord Shaw, who delivered the opinion of the Board which appears at page 92 :

"It is said that minerals must be included because of the use of the expression "mai haq haquq" in this pottah. On the assumption that the expression means "with all rights" or may be properly amplified as "with all right, title, and interest," such expressions, in their Lordships opinion, do not increase the actual corpus of the subject affected by the pottah. They only give expressly what might otherwise quite well be implied, namely, that the corpus being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but it may be of rights of passage, water or the like, which ensure to the subject of the pottah and may even be derivable from outside properties. It must be borne in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter speculate to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased."It has been urged that this case establishes that minerals cannot be the subject-matter of a lease because the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of

which does not in the nature of things and by reason of the user disappear. Lord shaw however points out that minerals may be made part of the subject-matter of a lease, and in such a case the lease would permit the idea of the partial consumption of the subject-matter leased. This decision of their Lordships of the Privy council can in no way assist the assessee in this case, and it appears to me that the case is against the present contention, because it is expressly stated that minerals may from part of the subject-matter of a lease if it is so stated in the lease itself. Counsel for the assessee also relied on a latter case of their Lordships of the Privy Council. Bejoy Singh v. Surendra Narayan. In that case their lordships held that a patni grant of zamindari lands including all interest therein, and jalkar, banker, falkar, beels and jhils at an annual jama did not give to the patnidar any right to excavate the soil for the purpose of making bricks. In my view this case also does not assist the assessee, because all that is laid down is that brick, earth or minerals would not pass to a lessee without word in the lease making it clear that such was intended to from part of the subject-matter of the lease. In fact, this like the previous cases, is against the assessees contention. In all these cases the question which is now before the court for decision, was not the question considered. Certain receipts may be in one sense in the nature of capital, but that does not conclude the matter. The question which has to be decided is, whether, as the result of the arrangement made between the lessor and the lessee, payments, which might in one sense be regarded as capital, have become income in the hands of the lessor and assessee.

As early as 1907 it was held by the Calcutta High court that coal royalty received by the lessor was income and assessable to income-tax. Such was the decision in Manindra Chandra Nandi v. Secretary of State, in which it was held that an owner of mines (whether worked by himself or lessees) is liable to pay both income-tax and road case on the same net profits derived, or royalty received by him from the mines. Mookerjee, J., discussed some of the English cases to which I have made reference, but eventually came to the conclusion that royalty was income within the meaning of the Income-tax Act then in force, namely, Act II of 1886. It has been strongly urged by Mr. P. R. Das on behalf of the assessee that this case was wrongly decided, and he has contended that Mookerjee, J., misunderstood the position in England. He has argued that the learned Judge held that royalty was income within the manning of the Indian Income-tax Act, because coal royalties were taxable in England. Mr. Das has pointed out that royalties formed the basis of taxation of minerals in England because of the provisions of schedule A and Rule 3 of that schedule. But for those provisions, it is contended that royalty would not be taxable because it is in fact the purchase price of coal and not income as observed by the learned Lords in the English cases to which reference has already been made. In my judgment, Mookerjee, J., did not hold that royalty was income within the meaning of the Indian Income-tax Act then in force because royalty formed the basis of taxation in England. He came to the conclusion that royalty from its nature, though in one sense repayment of capital, was received by the lessor or owner of the minerals as income. There was an appeal in this case to His majesty in council but not on the

question whether royalty was income.In In re Joyti Prasad Singh Deo, the question whether royalty was income was discussed by the learned Judges, who formed the Special Bench which heard that case, and it was held that income derived from rents and royalties of collieries does not fall within income derived from business under section 5 (iv), Income-tax Act, 1918, but within income from other sources under cl. (vi) of that Section. Mr. Das has contended and rightly that this case, though decided by three Judges, is not binding on the present Bench, because the question to be decided in this case was really not in issue in the previous case, In that case it appears to have been conceded that royalties were income and the issue was whether they were income derived from business or were income from other sources. At page 67 Dawson Miller, C. J., dealt however with the nature of royalties. He observed :

> "But I can see no reason why royalties received from mines should be regarded as anything other than income in the ordinary sense. There is no definition of the word income in the Act itself but its meaning as there used can, I think, be determined with sufficient accuracy from a perusal of the Act. Without giving an exhaustive definition it may be described as the annual or periodical yield in money or reducible to a money value arising from the use of real or personal property or from labour or services rendered, bearing in mind that in some cases e.g., income derived from house property, the yield must be taken as the bona fide annual value and not necessarily as the actual yield."

The question next came for consideration in this court in Shiva Prasad Shing v. Emperor, in which it was held that in so far as a lease is a transaction by which lump sum is paid under the name of salami for the granting of the lease, the transaction is in the nature of an out and out sale of property and the sum received by the lessor as salami is not income within the meaning of Section 4 of the Act. At page 83 Dawson Miller, C. J. observed :

"Royalties paid to the lessor although they may be regarded in one sense as installments of the purchase price of the minerals forming part of the land are treated in England as income and have been so treated in this Court..... They are none the less income merely because they are paid for rights the exercise of which involves a waster of the capital. As was pointed out by lord Halsbury, L. C., in Secretary of State in council of India v. Scoble where you are dealing with income-tax upon a rent derived from coal (and the same would apply to royalties) you are in truth taxing that which is capital in this sense that it is a purchase of the coal and not a mere rent, but he adds the income-tax is not and cannot be, I suppose, from the nature of things cast upon absolutely logical lines."Here is a clear statement by the learned Chief Justice that royalties payable under a mining lease must be regarded in this country as income. Similar view was expressed by this court in Mahadeo Ashram Prasad v. Commissioner of Income-tax, B. and O. in which it was held that income derived from nimak sair (i.e., income from the settlement of the

right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre) is indistinguishable from the rents or royalties arising from the letting of coal or other minerals in the earth, and, therefore, is income from "other sources" within the meaning of section 12, Income-tax Act. The same view taken in a more recent case of this Court, Janki Kaur v. Commissioner of Income-tax, B. and O. in which it was held that sums received on account of royalties for preparing bricks are assessable to income-tax just as royalties on quarries or royalties on coal. Dealing with the observation of Lord Halsbury in Secretary of State in Council of India v. Scoble, Courtney-Terrell, C. J., at page 277 observed :

"That part of the passage which relates to the taxation of rent derived from coal together with the contention that coal is as far as income is concerned the subject of special legislation in England is what is relied upon by the assessee. But an examination of the English Income-tax Act shows that the only justification for saying that coal is the subject of special legislation is that coal is mentioned in that part of the schedule to the act which deals with the special method of the schedule to the act which deals with the special method of ailing with certain classes of income derived from land and it is not a specific enactment that coal rents are to be specially taxable. And when Lord Halsbury dealt with income-tax upon the rent derived from coal he was not in that passage dealing with income derived from coal as a matter of special legislation."It will thus be seen that over a long period of years it has been held in India that coal royalty is income and assessable to income-tax. The contention, however, that all these cases were wrongly decided but courts in India will naturally be reluctant to dissent from these cases which cover a long period of years. It is to be observed that there is a very material difference between the English Income-tax Act and the Indian Income-tax Act. By Section 1, English Income-tax Act of 1918, the tax is charged in respect of all property, profits and gains described or comprised in the schedules and in accordance with the rules applicable to those schedules. What is taxed is all property, profits and gains. By Section 6, Indian Income-tax Act, what is taxed are the following heads of income, profits and gains, namely salaries, interest on securities, income from property, profits and gains of business, profession or vacation, and income from other sources. This last head "income from other sources" has been held to means income from sources other than those specified previously in that section. Royalty can not fall within the heading "income from property" because such income is defined in section 9, Income-tax Act but what has to be decided is whether it is "income from other sources."These royalties are payable under covenants continued in the various leases granted by the assessee. As I have stated earlier, these leases give to the less very wide powers. They have the right to enter on the land, sink pits, win and remove the coal, erect buildings on the surface, make railways, erect coke ovens and manufacture coke. For the sum total of these rights the lessee pays a sum by way of salami or premium and an annual sum computed on the amount of coal raised and the amount of coke manufactured subject always to minimum annual sum fixed in the respective leases. In one sense a part of this annual sum maybe

regarded as the price of the coal actually removed but what is paid to the lessor is paid not only for the coal and the right to remove it but also for the other rights granted to him by the lease. No attempt is made in the lease as regards annual payments to differentiate between what is paid merely for the coal or what is paid for the other rights such as the rights to erect buildings, make railways, erect coke ovens and manufacture coke. What is paid is paid for the whole of the rights granted and that is salami and an annual sum payable year after year until the lease comes to an end by effluxion of time or by any other means. It would be very difficult to argue that the minimum royalty payable under these leases is the price of coal, because such would be payable even if no coal was gotten and would be payable even if the royalty calculated on the amount of coal gotten did not amount to the sum fixed as the minimum royalty.Counsel for the assessee conceded that where no coal was raised the minimum royalty would have to be regarded as income and assessable to income-tax. He however contended that the moment any coal was raised the actual royalty paid on that coal was the purchase price of that coal and if the amount of such royalty did not amount to the minimum royalty then the difference only would be income in chargeable to income-tax. Counsel found it difficult to explain what the minimum royalty was paid for when no coal was raised unless it was paid as rent reserved under the lease. Where the royalty on the coal raised does not amount to the minimum royalty the lessee has to make good the difference to bring the total up to the amount of the minimum royalty. In such a case, counsel contended, that the royalty computed on the actual coal raised was price but he could not explain satisfactorily what the difference between that sum and the minimum royalty represented and what it was paid for. Again a royalty is charged on all hard and soft coke manufactured, and it is impossible to regard this royalty as merely the price of the coal sold to the lessee. The royalty for hard and soft coal is at a higher rate than the royalty paid for coals gotten and sold and obviously part of this royalty is payable for the right not only of winning the coal and bringing it to the surface but also for converting it on the surface into coke.Though a portion of the royalty paid may in one sense be regarded as a payment for the coal yet it is in my view, quite impossible to regard the annual payment as anything else but income in the hands of the assessee. By the various mining leases the assessee transferred to the various lessees certain rights of entering upon his land, sinking shafts, erecting colliery building and such like and winning and taking away the coal. In return for those rights he obtained covenants from the lessees by which they bound them selves to pay annual sums for those rights depending upon the amount of coal removed and the amount of coke manufactured and with a minimum which was always payable irrespective of what coal was produced or coke manufactured. By these covenants that assessee in return for the rights and privilege granted assured for himself an annual sum which was never to be less than the minimum royalty and in my judgment such annual sum is income and not a periodic return of capital.

Even if these leases can be regarded in a sense as a sale or transfer of the coal to the so called

lessees that does not conclude the matter. A sale may be made for a price which could properly be regarded as a capital receipt and therefore not assessable to income-tax such a transaction would amount to the exchange of one form of capital for another. The consideration for such a sale however, need not be in the form of capital. A vendor might secure by the terms of the sale an income for himself, and such would undoubtedly be assessable to income-tax. Such was the case in Gopal Saran Narain Singh v. Commissioner of Income-tax Bihar and Orissa. In that case the assessee transferred an estate in consideration of (a) the payment of a lump sum, (b) the discharge of certain debts and (c) the payment to him for life of an annuity of Rs. 2,40,000. By a separate deed the payment of the annuity was made a charge on the lands transferred. The taxing authorities held that this annuity was income and assessable to income-tax. It was held by their Lordships of the Privy Council that this annuity was not a capital sum payable in installments, but income in the hands of the vendor. In that case it had been strenuously argued that these yearly payments were in the nature of payments by installments of the purchases price but their Lordships, upholding the view of this court held that the transaction amounted to a transfer of the estate in consideration, inter alia, of the payment of annular income to the vendor. In short, the vendor, by this transaction, secured for himself not only a lump sum payment and payment of debts but an annual income. Similarly, by these mining leases, however they are regarded, the lessor has secured for himself an annual income which is never to be less than the minimum royalty payable under the various leases.This case must be decided according to the law in force in India, and it has been frequently pointed out by their lordship of the Privy council that much reliance must not be placed upon English cases which are decided upon an Income-tax Act which differs in many respects from the India Act. I have dealt with the English cases at length in deference to the able argument which has been addressed to us by Mr. P. R. Das, Shri Sultan Ahmed and Sir Manmatha Nath Mukerji. In my view, these mineral leases must be regarded in India as leases and not as sales of coal. The matter was considered in Falakrishna Pal v. Jagannath Marwari. It had been urged before the Bench in that case that a mining lease was not a lease of immovable property under section 105, Transfer of Property Act. At page 1329 Kukerji, J., observed :

> "For certain purposes, therefore, and in orders to consider whether some particular principle or dictum applicable to leases strictly so called, apply to mining leases, a distinction may have to be drawn since such a distinction undoubtedly exists. But settlements of this character are everywhere regarded as leases and indeed the mortgagor, as well as the appellants, have, as the documents show, dealt with the subject-matter on the footing of its being a leasehold. We are not prepared to regard the settlement as any thing else than as a lease though not falling strictly within the definition contained in Section 105, Transfer of Property Act, or partaking of the essential character of please within the meaning of the statute".

The question whether a mining lease was a lease within meaning of Ss. 105 and 108, Transfer of Property Act, expressly arose for decision in H. V. Low and Co., Ltd. v. Joyti Prasad Singh Deo the facts of which are as follows : By a contract in writing, the appellants were to take a lease for 999 years of the underground coal rights in two mauzas within the respondents zamindari, and if within two months they failed to do so, "except for the reason of the want of the lessors title to the said mauzas," a salami of Rs. 34,440 which they had paid, was to be forfeited. After the contract, it appeared that, at some unknown date, an ancestor of the respondent had made Brahmottar grants of the mauzas. The appellants called for production of copies of the grants in order that they might be satisfied that they did not include the minerals. The respondent being unable to produce copies, the appellants refused to take the lease, and, sued to recover the salami. There was no evidence that the Brahmottardars had ever claimed subsoil rights. It was held that, under the contract, the appellants could recover the salami, upon proof that the title to the subject of the lease was not free from reasonable doubt, the text being the same as under section 25 (b), Specific Relief Act, 1877, upon a suit by a lessor for specific performance and that the suit failed as they had not discharged that onus; it was not shown that respondent had failed, or was not in a position to perform any of the obligations incumbent upon a lessor under S. 108, Transfer of Property Act, 1882. In that case, Mr. Raikes, K. C., arguing for the appellants, contended that the right of mining contracted for was not a lease within S. 105 or S. 108. Transfer of Property Act, 1882; it was really a sale of property out and out. The respondent was, therefore, under the obligations laid down by S. 55, Transfer of Property Act, and not those laid down by Ss. 105 and 108 of the Act. Lord Macmillan, who delivered the opinion of the Board at page 708 observed :

> "The rights and liabilities of lessor and lessee are defined in the Transfer of Property Act, 1882 (IV of 182), section 108. These contrast markedly within the rights and liabilities of buyer and seller as defined in Section 55, particularly in the matter of the requirements as to title which the seller must satisfy. The appellant company has not shown that the respondent has failed, or is not in a position to perform any of the incumbent on a lessor under section 108."

> This case clearly holds that a person in the position of the assessee in the present case is a lessor and the duties incumbent on him are those imposed under S. 108, Transfer of Property Act. However these transactions may be regarded in England, it is, in my view, clear that they are in India leases properly so called. Counsel for the assessee has argued that even if the transactions be regarded as leases the royalties paid are nevertheless not rents but the price of coal actually obtained by the lessees. Annual payments which have to be made by the lessee to the lessor constitute rent (see section 105, T. P. Act.), and in my judgment, the annual payments of royalty in this case must be regarded as a rent in the hands of the assessee. It these payments are regarded as rent, then, in my view, they are

assessable to income-tax as they constituted income from other sources. It is impossible having regard to the nature of the transactions, to regard the payments as price of coal, particularly as in each of the leases in the present case large payments have been made as salami or premium. Such payments, and when they are so treated, it is quite impossible to regard the annual payments as other than rent or income payable under the various leases.For the reasons which I have given, I am satisfied that the royalties received by the assessee in this case constitute income and were rightly assessed to income-tax by the taxing authorities. I would, therefore, answer the first question accordingly. The second question raises no point of law as pointed out by the Commissioner, and should be answered accordingly. I may point out that no argument of any kind was addressed to us upon this question. The assessee must pay the costs of this reference which I would assessee at 20 gold mohurs. The Commissioner will also retain the sum of Rs. 100 deposited in this case.

FAZI ALI, J. - This is a reference made by the Commissioner of Income-tax, Bihar, under section 66 (2) ,Income-tax Act, and the question of law which he has formulated for our decision is as follows :-

"Whether royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax ?"

The question has arisen with reference to a sum of Rs. 5,32,368-2-10 said to have been received by the proprietor of Ramgarh Raj, on whose application this reference has been made, on account of royalty on coal under certain mining leases held by a number of persons from him during the years of assessment. All these leases were given for a period of 999 years and contain a number of clauses which are usually to be found in a mining lease. Before the Assistant Commissioner of Income-tax the assessee contended that the royalty on mines was in fact the value of the corpus and therefore should not have been taken into account in computing income-tax, super tax and surcharge leviable on him. The contention being negatived, the assessee moved the Income-tax Commissioner under section 66 (2) and persuaded him to make this reference. In the Transfer of Property Act a lease of immovable property is defined as the transfer of right to enjoy such property. It is contended by Mr. P. R. Das, the learned counsel for the assessee, that the leases under which the royalties are payable to the assessee are in the nature of sale, because they confer upon the lessee not merely the right to occupy the coal lands but to take out coal therefrom. In support of this argument he relies on the famous observations of Lord Cairns in Gowan v. Christie at page 284 which are to the following effect :

"Although we speak of a mineral lease, or a lease of mines the contact is not, in reality, a lease at all in the sense in which we speak of an agricultural lease. There is no fruit; that is

> to say, there is no increase, there is no sowing or reaping in the ordinary sense of the term and there are no periodical harvests. What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land. It is the liberty given to a particular individual, for a specific length of time, to go into and under the land, and to get certain things there if he can find them and to take them away, just as if he had bought so much of the soil."

The other cases cited by Mr. Das in support of this observation were Coltness Iron Co. v. Black, Campbell v. Wardlaw, and Secretary of State in Council of India v. Scoble. Reliance was also placed by him upon the observations made by the Judicial Committee in Thakur Giridhari Singh v. Megh Lal Pandey, and Bejoy Singh v. Surendra Narayan to the effect that the essential characteristic of a leases is that the subject is one which is occupied and enjoyed and the corpus of which does not, in the nature of things and by reason of the user, disappear. The first question to be considered is whether a mineral lease is not in fact a lease but a sale and whether royalty merely represents the price of the coal taken out by the lessee. In my opinion, even though the distinction drawn by Lord Cairns between agricultural and mineral leases is by no means to be overlooked, it will be going too far to say that a mineral lease does not at all partake of the character of a lease as that term is ordinarily understood and that there is no difference between a mining lease and a sale of minerals. One of the essential points of distinction between a mining lease and a sale of coal land is that while in a mining lease the lessor has the right of reversion, there is no such right of reversion in a sale. The leases which have been printed in the paper book of this case also contain certain clauses such as the forfeiture clause and the clause as to the surrender of the land, which are not found in a deed of conveyance. Another point of distinction is that while in a sale the consideration is the price, in a meaning lease we have the price otherwise called premium and the royalty which at least outwardly bears a closer resemblance to rent than to price.Therefore, notwithstanding the fact that the view of Lord Cairns has been re-affirmed in a number of cases, the expression "mining lease" is still in common use and has been adhered to in several important English statutes : see the Law of Property Act, 1925, Section 205, and Settled Land Act, 1925 Section 117. Under the Roman Law minerals and stones obtained from pits and quarries were regarded as of the character of fruits or profits though not falling within the ordinary comprehension of these words : see observations of West J., in Faki Ismail v. Umabai Bivalkar. They undoubtedly bear some resemblance to fruity and profits, because it usually takes a long time for a mine to be exhausted and until it is exhausted, it produces a regular and recurring income by the application of labour and capital which is essential for the production of all income including agricultural income. Therefore, before lord cairns emphasized the distinction between a mining lease and agricultural lease, no one considered that the expression mining lease was not an appropriate one on the whole and up to this day numerous documents are drafted in the form of a lease and not in the form of a conveyance and in many

respects the relationship between the so called lessor and lessee is governed by the law relating to leasehold property. In Thakur Giridhari Singh v. Megh Lal Pandey, their lordship of the privy council held that a mukarrari lease of lands "with all rights" does not carry a right to the subjacent minerals and then proceeded to observe as follows :

> "It must be born in mind also that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter speciality to arise, minerals must be expressly denominated, so as thus to permit of the idea of partial consumption of the subject leased."

This observation has been greatly relied upon by Mr. Das but in my opinion there is nothing in it to suggest that a lease of lands in which minerals are expressly denominated will not operate as a lease. On the other hand, it implies that a mukarrari lease may carry with it a right to subjacent mineral if adequate words are used therein to cause the mineral rights to be included within it. In Munro v. Didcott Lord Atkinson, while recognizing that lord Cairns had described the true nature of a mining lease, proceeded to hold that a document which purported to be a mining lease was a lease within the meaning of the Natal Statute XIX of 1884." In discussing the question whether the document required registration in the Deeds Registry he observed as follows :

> "The objects of all registration are, amount other things, to afford to the public the means of knowing to whom the ownership of the land of a country belongs, what are the interests carved out of it, and what are the charges upon and encumbrances affecting it, so that these owners may discharge the liabilities ownership entails, that those who deal with them may be protected, and in many cases that the transfer to other of their proprietary interests may be easily and inexpensively effected. All these considerations apply as directly and as forcibly to mining leases as to leases as to leases of the surface above the mines and there does not therefore seem to be any reason why the legislature should necessarily exclude mining leases from the operation of the Statute. The words used are general any lease."

The case however, which seems to be more directly in point is that in H. V. Low and Co. Ltd. v. Jyoti Prasad Singh Deo. In that case the appellants had contracted to take from the respondent a lease of the underground coal rights in two mauzas and one of the terms of the contract was that if within a certain period they failed to do so except for the reason of the want of the lessors title to the mauzas, they would forfeit a sum of money which they had paid as salami. Subsequently they refused to take the lease on the ground that the appellants had previously made Brahmottar grant of the mauzas and sued to recover the salami. It was conceded that there was no evidence that the Brahmottardars had ever claimed subsoil rights and it was also established that though

the appellants had called for production of copies of the grants to Brahmottardars in order to satisfy themselves that they did not include the minerals, the respondent was unable to produce them. One of the grounds which was urged on behalf the appellants before the privy council was that as laid down in Gowan v. Christie, the mining right contracted for was really a sale of the property and the respondent was under the obligation laid down in S. 55, sub-s. (1) (a) (b) and (2), Transfer of Property Act, 1882. Their Lordships of the Privy Council, however, negatived this contention and pointed out that the rights and liabilities of lessor and lessee are defined in S. 108, Transfer of Property Act, and the appellants had not shown that the respondent had failed or was not in a position to perform any of the duties incumbent on a lessor under section 108. In my opinion, this decision fully supports the view that the rights and liabilities of the parties to a mining lease will be those of a lessor and a lessee and not those of a vendor and purchaser.

Therefore, on the whole, I am inclined to agree with the view taken by the learned Judges of the Calcutta High court in Falakrishna Pal v. Jagannath Marwari that a mining settlement to take coal on payment of royalty is a lease notwithstanding the fact that logically it may also be regarded as a sale in certain respects. The question which still remains to be considered is whether royalty is not essentially the price of the coal taken out, because S. 105, Transfer of Property Act, sates that the consideration for a lease also may be price as well as "rent". It appears that as long ago as in Queen v. Westbrook Lord Denman expressed the view that royalty "was a sum which after all such expenses were paid the occupier could afford to render to the landlord". His observation on this point were these :

> "When the case is thus laid bare, there is no distinction between it and that of the lessee of coal mines, of clay pits, of slate quarries : in all these the occupation is only valuable by the removal of portions of the soil and whether the occupation is paid from in money or kind, is fixed beforehand by the contract, or measured afterwards by the actual produce, it is equally in substance a rent it is the compensation which the occupier pays the landlord for that species of occupation which the contract between them allows."

In appears tome that, whatever may be the true nature of royalty what has been observed in this passage represents the proper view upon which mining leases are based. Besides, as was pointed out in the course of his argument by Sir Manmatha Nath Mukerji, who appeared for the Income-tax Department a mining lease is a somewhat complex transaction which confers upon the leases not only the right to take out coal, but a number of other rights which are incidental to his so doing such as the right of entering upon the surface, digging pit, constructing buildings etc. etc. What portion of royalty is charged in consideration of these rights being exercised and what portion of it in essence represents the price of coal is often difficult to define. The expression "price" may not also be quite appropriate in every case, because in many instances what is charged as royalty does not represent the actual market value of the coal extracted. The matter

however, need not be pursued because in my opinion the problem before us admits of a simpler solution. Let us suppose that the parties to a mining lease meet together and say to themselves as follow : "whatever may be the true nature of the royalty and whatever may be the correct legal view about it, is suits us that it will be payable as rent and we shall treat is as a rent". I take it that any two businessmen knowing their requirements are free to put their transaction in any form they like and if they do so, it will be idea to say that royalty should still be regarded as the price of the land or minerals.

The leases to which the assessee is a party mention a premium which in some cases at least amounts to a large sum of money. This is undoubtedly in the nature of the price referred to in Section 105, Transfer of Property Act. The Minimum royalty which is also chargeable under all the lease relied on by the assessee is unquestionably a payment in the nature of rent. If, therefore, the view which we are asked to take on behalf of the assessee is taken by us, the position becomes a somewhat anomalous one. The minimum royalty is chargeable in every case whether the lessee works the mine or not. It is also chargeable where the lessee works the mines but extracts coal below a certain limit specified in the lease. It is only after that limit is exceeded that a royalty other than the minimum royalty is chargeable. The learned counsel for the assessee conceded that where a mine is not worked and minimum royalty is paid, it is "rent"; but he says that if the mine is worked and coal is not extracted beyond the limit fixed in the lease for the payment of the minimum royalty, the minimum royalty become partly rent and partly price of the coal taken out. The royalty other than minimum royalty, however, is according to him always price for the coal taken out. In my opinion it is difficult to accept this view, because the leases before us nowhere state that where the coal is extracted within the limits for which only the minimum royalty is payable the minimum royalty shall include the price of the coal, nor does it state at what rate the so called price is to be charged in such cases. In my opinion the more logical view seems to be that the royalty is to all intents and purposes a payment of the same nature and category as the minimum royalty. I am also of the opinion that it is difficult for anyone to find how much of "royalty" represents "price" in the true senses of the term and how much is money rendered to the Landlord in consideration of the leases occupation of the land and exercising the manifold rights without exercising which mining operation cannot be successfully carried out.I have discussed these points because the learned counsel for the assessee had argued them at considerable length but truly speaking the real question to be considered is whether the payments made in the shape of royalty represent income within the meaning of the Indian Income-tax Act. I think that there is ample authority for the proposition that where a person while selling his property arranges to receive consideration in such a manner as to secure "an income" for himself, the payment made to him will be chargeable to income-tax. In Gopal Saran Narain Singh v. Commissioner of Income-tax, Bihar and Orissa, Captain Gopal Saran Narain Singh had transferred an estate to another person in consideration of (a) the payment of a lump suit, (b) the

discharge of certain debts, and (c) the payment to him for life of a sum of Rs. 2,40,000 a year. This payment was to continue as long as Captain Gopal Saran Narain Singh was alive. It was not denied that the transaction was a sale and logically speaking the payments to Gopal Saran Narain Singh were in a sense the price of the property sold, but notwithstanding these facts it was held by the Privy Council that the payments made under the document were income in the hands of the vendor. Their Lordships dealing with the contention of the assessee that the suits payable to him in that case were nothing but installments of the price, observed as follows :

> "This is clearly no ordinary bargain and sale by a vendor and purchaser at arms length, for the money consideration bears no relation to the actual value of the property. The amount ultimately payable by the purchaser depends upon the life of the vendor. It is, their Lordships think clearly a case where the owner of the estate has exchanged a capital asset for (inter alia) a life annuity which is income in his hands. It is not a case in which he has exchanged his estate for a capital sum payable in installments.Income literally means what means who comes in and as was observed by Jessel, M. R., in a well-known case "it is as large a word as can be used to denote a persons receipts." For the purpose of this case, however, it is sufficient to refer to the following observations of the Privy Council in Commissioner of Income-tax, Bengal v. Shaw Wallace & Co."Income, their Lordships think, in this Act connotes a periodical momentary return "coming in" with some sort of regularity, or expected regularity from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as "capital". But capital, though possibly the source in the case of income from securities, is in most cases hardly more an element in the proves of production."

In my opinion royalty is income, because it is a periodical monetary return coming in with some sort of regularity from a defoliant source. The mere fact that if the transaction is mentally dissected by a student of political economy, he may say that royalty is merely a form of capital, will not conclude the matter. In fact the distinction made in Section 105, Transfer of Property Act, between premium (otherwise called the price) and rent is also a some what artificial one, because in one sense the premium may be regarded as advance rent and rent may similarly be regarded as deferred price. It must be admitted that if royalty is to be regarded as income, then in producing this income a portion of the property is destroyed. That is also not conclusive because capital "is hardly more than an element in the process of production". As was remarked by Farwell, L. J., in Hudsons Bay Co. Ltd. v. Stevens at page 437, "the income is not the less income for the purposes of income-tax because it is produced by embarking capital in a wasting

subject-matter, for example in buying and working the mines."In Shiva Prasad Singh v. Emperor Sir Dawson Miler dealing with the question as to whether royalty is chargeable with income-tax or not observed as follows :

> "Royalties paid to the lessor although they may be regarded in one sense as installments of the purchase price of the minerals forming part of the land are treated in England as income and have been so treated in this Court. They are none the less income merely because they are paid for rights the exercise of which involves a waste of the capital..... At the same time, 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 for as rent and royalty are reserved, he is founding an annual increment to the income of the Raj for himself and his successor, 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 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 out-turn but is paid 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 single payment of a similar kind covering a long period being treated as capital, but after all this is a distinction acknowledged in Section 4 of the Act itself, and as has been observed, the Income-tax Acts are not cast upon absolutely logical lines".Again in Mahadeo Ashram Prasad v. Commissioner of Income-tax B. & O., the same learned Chief Justice dealt with the question as follows :"It was further argued with regard to this part of the case that the income derived from the source is really not income at all, but in the nature of a sale of a part of the earth appertaining to assessees zamindari, in other words, that it was a transfer of one kind of capital into another, namely, the transfer of this particular sort of earth into money. It is, however, of a recurring nature and it is not causal and in such cases it seems to me it is quite impossible to distinguish the rents or royalties, whatever they may be called, arising from the source, from the rents or royalties arising from the letting of coal or other minerals in the earth, or income which arises from the produce of the earth whether it be that on the surface or whether it be that beneath the surface, provided that it is not non-recurring or casual, and provided that it is not in the nature or a sale".

I respectfully agree with these observations and I would like to emphasize that if we apply the rough and ready test which has to be applied in the administration of the Income-tax Act which is by no means cast on logical lines, it is difficult to hold that royalty is not income. It must be

pointed out that notwithstanding the observations made by Lord Cairns and other Judges in England as to the true nature of a mining lease and royalty, royalty has always been assessed to income-tax in England. It has been contended on behalf of the assessee that this is due to the use of express words in certain rules set out in one of the Schedules of the English Income-tax Act. This argument overlooks the fact that what is taxed in England as well as in India is income and the schedules merely provide the mode of taxation. This is clear from the following observations made by Lord Macnaghten in London County Council v. Attorney-General :

> "Income-tax, if I may be pardoned for saying so, is a tax income. It is not meant to be a tax one anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of Income-tax assessed under Schedule D and those assessed under Schedule A or any of the other schedules A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income as above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all, Schedule A contains the duties chargeable..... In every case the tax is a tax on income, whatever may be the standard by which the income is measured."

Even, however, if we ignore the practice prevailing in England, there can be no doubt that in this country royalty has always been charged to income-tax and the view which was so far prevailed in the Calcutta High Court and in this Court is that they are properly assessable under the Income-tax Act : See Manindra Chandra Nandi v. Secretary of State, In re Jyoti Prasad Singh Deo, Shiva Prasad Singh v. Emperor, Mahadeo Ashram Prasad v. Commissioner of Income-tax, B. & O. and Janki Kaur v. Commissioner of Income-tax, B. & O. It is true that in some of these cases the point was not raised strictly on the form in which it has been raised here, but the learned Judges who decided them did express the view that royalty is assessable to income-tax and have given good reasons in support of their view. I would therefore answer the question formulated by the Commissioner of Income-tax as follows :

Royalty on mines upon the terms of the leases relied on by the assessee must be regarded as income and is as such liable to be taxed. In India "royalty on mines" must be regarded as "income from other sources" within the meaning of that expression as used in Section 6 of the Act, because though properly, speaking it is in come received in relation to property, yet Section 9 of the Act suggest that the tax lived under the head "property" must be confined to property "consisting of any buildings or lands appurtent there to". In this respect there is a distinction between the English and the Indian Income-tax Acts, but as I have already indicated, under both the Acts royalty is income. I thus find myself in complete agreement with my Lord the Chief Justice and I also agree to the proposed order as to costs.

MANOHAR LALL, J. - This is a reference made by the Commissioner of Income-tax, Patna, On 23rd December 1938, under the provisions of Section 66 (2) of the Income-tax Act (XI of 1922), hereinafter referred to as the Act, asking for the opinion of the Court on the two questions formulated in the letter of reference, namely (1) whether royalty on mines being capital revenue should not have been excluded in computing the total income determined for income-tax, and (2) what should be the principle on which the cost management in collection of royalties is to be determined when there is a combined management covering both the zamindari collection of agricultural income and royalties from the mines? The second question, it will be noticed, is purely a question of fact and the parties did not address any argument on this question. The answer suggested by the Commissioner is correct. It is necessary to give the facts of the case in brief in order to answer the first question. The assessee was assessee to income-tax for the year 1937-38 by the Income-tax Officer by an assessment order dated 10th August 1937, on a total income of Rs. 5,78,817 including a sum of Rs. 5,32,368-2-10 being the amount of royalty received by him from certain mica, coal and limestone quarries from his lessees after giving certain deduction of expense out of this amount of royalty. In appeal the Assistant Commissioner of Income-tax confirmed the assessment by an order dated 14th February 1938. The assessee raised the contention before the appellate authority that as the royalty on the mines was capital revenue the amount should have been excluded in computing his total income for income-tax and super-tax purposes. The contention was overruled and the Commissioner of Income-tax upon being so requested made the references to this court under Section 66 (2) of the Act as already stated.

Three leases which were granted by the assessee in the years 1919, 1925 and 1927 are printed in the record; the covenants contained therein are the foundation of the royalty received by the assessee which was made the subject of taxation. The learned counsel for the assessee drew attention to the terms of one of these counsel for the assessee drew attention to the terms of one of these leases in order to substantiate his argument. As the terms of the leases are similar it is enough to make reference to the relative provision in one of the leases, namely the lease of 3rd April 1919. In that lease (so far as is relevant to the present controversy) it is stated that in consideration of the salami or premium rupees thirty seven thousand and forty (being at the rate of rupees forty per standard bigha on nine hundred and twenty-six bighas) in respect of the premises the assessee granted to the lessee the under-ground of the premises the assessee granted to the less the under-ground coal mine rights under the lands specified therein in order that the lessee may "search for, work, make merchantable and carry away the coal there found" on paying therefor by monthly payments in each year a royalty on all coal and coke raised and dispatched at the rate of four annas per ton with the provisions for the payment of a minimum royalty at the rate of Rs. 5 per annum per standard bigha of land whether coal shall be raised or not.

The argument advanced before this court was that what is called a lease of coal land is in reality the sale of coal belonging to the assessee and therefore the royalty thus received by the assessee under the terms of these leases is merely the purchase price of his coal and not income which can be assessed to income-tax. It was admitted that the authorities in the Calcutta High Court and this courts ever since the case in Manindra Chandra Nandi v. Secretary of State have taken a contrary view but Mr. P. R. Das, who appeared for the assessee, seriously challenged the correctness of those decisions on grounds which will be examined hereafter. This Full Bench has been constituted to consider this question. In arguing the case before this court Mr. Das ignored the warning by Sir George Lowndes when delivering the judgment of their Lordships of the Judicial Committee in the well-known case in Commissioner of Income-tax, Bengal v. Shaw Wallace & Co. and let loose in this court a flood of decisions which were based upon the construction of the English Income-tax Statutes and of the English and scotch laws relating to coal mining leases. I refer to other passage at page 180 :

> "Again their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income-tax Statutes, both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board".

It was pointed out in that case as well as in other decisions of their Lordships that the Indian Income-tax Act is not in pair material with the English Income-tax Act, and that "it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal."This practice of referring to the English decisions and ignoring the Indian law on the subject was also severely condemned by their Lordships of the Judicial Committee in Hunsraj v. Bejoy Lal Seal. Sir John Wallis in delivering the judgment of the Board made this observation at page 114 :

> "The question having arisen in India, it has, of course to be decided in accordance with the law, not of England, but of India; it does not however seem to have occurred to anyone in the Courts below to see, in the first place, before resorting to English decisions, whether under the law of landlord and tenant in India a sub-lease by a lessee for the unexpired residue of the term operates as an assignment of the term. That law is to be found in the Transfer of Property Act, 1882, which has now been in force for nearly half a century. Though founded on English law, and drafted in the first instance by eminent lawyers in England, it has only applied the English law in so far as it was considered applicable to India. It is not surprising to find that the rule, arising out of the special conditions of land tenure in England, that a conveyance to operate as a lease must reverse a reversion to the lessor finds no place in the Act."

And then his Lordship proceeded to refer to Ss. 105 and 108, Transfer of Property Act, and applied the provision stated in those sections to decide the question in controversy before their Lordships. I therefore propose to answer the question without any reference to the Indian Statutes only. It cannot be denied that the object of the Indian Act is to tax income, a term which it does not define. It would be useful to bear in mind the observation made by Sir George Lowndes in Commissioner of Income-tax, Bengal v. Shaw Wallace & Co. that "an income in this Act connotes a periodical monetary return "coming in" with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as "capital". But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the proves of production."In India we are governed by the provisions of the Transfer of Property Act, 1882. In section 105 a lease of immovable property is defined to be 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;"and then in the following clause it is expressly stated that the price so paid in consideration of the transfer is called the premium and the money, share, service, or other thing to be so rendered is called the rent. The coal mining lease of 1919 in the present case satisfies all the requirements of this Section. The assessee has received a salami or premium and has also provided for a periodical payment to him of money which is rent as defined by section 105. But Mr. Das argued that as the subject matter of the lease is coal and as the lessee cannot enjoy this property but must in the very nature of things destroy it, there cannot be any lease of coal mines in Indian within the meaning of the Transfer of Property Act and submits that, call it by whatever name you will, the transaction called 1919 is nothing more than a sale of or an agreement to sell coal. He relies upon the well-known Scotch case in Gowan v. Christie and certain other cases decided in England. In my opinion this argument is fallacious. The "right to enjoy such property" which is spoken of in Section 105 means the right to enjoy the property in the manner in which that property can be enjoyed. If the subject-matter of the lease is coal land it can only be enjoyed and occupied by the lessee by working it as indicated in S. 108, Transfer of Property Act, which regulates fully the rights and liabilities of lessors and lessees in this country. That this is so appears to be supported by the observation of their Lordships of the Judicial Committee in a number of cases. In Nageshwar Bux v. Bengal Coal Co., a dispute arose between the zamindari and a coal company who held a mukarrari lease of a certain village and believed that they were entitled to the subjacent minerals in which they openly carried mining operation for 12 years.

The zamindari on the other hand contested this claim on the ground that the lessor of the coal company had no right to grant a lease authorizing the company to work coal. Lord Mammalian who delivered the judgment of their Lordships made this observation at page 35 which is very germane to the present discussion :

> "In considering the character and effect of acts of possession in the case of a mineral field, it is necessary to bear in mind the nature of the subject and the possession of which it is susceptible. Owing to the inaccessibility of minerals in the earth, it is not possible to take actual physical possession at once of a whole mineral field : it can be occupied only by extracting the minerals and until the whole minerals are exhausted the physical occupation must unnecessarily be partial."

The Question in the form in which it was argued by Mr. Das was argued boldly by the learned counsel for the appellant in H. V. Low & Co. v. Jyoti Prasad Singh Deo a case not cited at the bar. The facts of that case were that by a contract in writing the company were to take a lease for 999 years of the subjacent coal rights in two villages within the zamindari of the respondent and if within two months they failed to do so except on account of want of title of their lessor in these villages, the salami which they had deposed was to be forfeited. The lessees refused to take the lease upon the ground that they were not satisfied with the title of their lessor owing to certain transactions which had taken place with some Brahmottardars. In these circumstances the question arose whether the contract should be treated as a contract for lease within the meaning of Ss. 105 and 108, Transfer of Property Act, or as a sale within the meaning of the English and scotch decisions so as to make S. 55, Transfer of Property Act, applicable. Mr. Raikes, the learned counsel for the appellant, actually argued that the mineral right contracted for by the company was not a lease within the meaning of Ss. 105 and 108, Transfer of Property Act, but was really a sale of property out and out and relied upon sub-section 1 (a) (b) and sub-section 2 of that section. Mr. Upon for the respondent relied to this argument in these words :

> "There is no ground for the suggestion that Section 55 and not Section 108, applied. The cases cited for the view that the contract was for a sale, not a lease, related to the law in Scotland. Even a mukarrari pottah is not to be regarded as a conveyance of the fee simple."

Lord Macmillan who delivered the judgment of their Lordships expressly held at page 401 that "the rights and liabilities of lessor and lessee are defined in the Transfer of Property Act (IV of 1882), Section 108. These contrast markedly with the rights and liabilities of a buyer and seller as defined in Section 55 particularly in matter of the requirements as to title which the seller must satisfy; The appellant company has not shown that the respondent has failed, or is not in a position, to perform any of the duties incumbent on a lessor under Section 108."In my opinion,

this decision is a clear answer to the argument which Mr. Das was painfully evolving by relying upon the English and Scotch decisions and the dictum of several other eminent Judges in England based upon the view that what is called a coal-mining lease in England is really in the nature of an out and out sale. However attractive this description of the coal-mining lease in India is governed by Ss. 105 and 108. Transfer of Property Act, IV of 1882. In Abhiram Goswami v. Shyama Charan Nandi the question which arose inter alia for decision was whether the suit which was instituted to the eject the defendants from the possession of under-ground rights of a village which was granted in mukarrari by the preceding mahant was or was not barred by limitation. Sir Andrew Scoble in delivering the judgment of the Board made this important observation at page 166 :

"Statutes of limitation, like all others, ought to receive such a construction as the language, in its plain meaning imports." Luchmee Buksh Roy v. Runjeet Ram.Now, what is the plain meaning of the words "purchased for a valuable consideration"? They mean that the ownership of the property sold has been absolutely transferred from the Vendor to the purchaser to the vendor. Sir Robert Finally, in his able argument for the respondents, contended that a mukarrari lease is tantamount to a conveyance in fee simple, and that the lessee must, therefore, be treated as 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 Kally Dass v. Monmohini Dassee. "Because at the present days" says the learned Judge "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 indubitable allow of a lease in pertetuity..... 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."This quotation was cited with approval by Sir Lancelot Sander son in Bejoy Singh v. Narayan a case involving the construction of a patni lease. In that case it was pointed out by Sir Lancelot Sanderson who delivered the judgment of their Lordships at page 328, that the "grant of 18th July 1853 was a clearly a lease, and the intention of the parties is to be gathered from the terms of the grant, and if it be found that the grantee or his assigns is using the subject of the lease in a way not contemplated by the grant, the fact that it was made in accordance with the terms of Regulation VIII of 1819 is not sufficient to prevent the plaintiff from suing for the purpose of obtaining an injunction to restrain such user. The question still remains, what was the subject of the lease?"Mr. Das relies upon the passage towards the end of this page where his Lordship in referring to the case in Thakur Giridhari Singh v. Megh Lall Pandey, stated that :In that case attention was drawn to the point that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear."But the fallacy of this argument of Mr. Das becomes apparent if the succeeding lines are perused

where it was stated that the intention of the parties as to what was the subject and extent of the lease must depend upon the true construction of the terms of the grant and that it did not contain any reference to minerals or to the subsoil or to the right to excavate for making bricks and there was nothing to suggest in the lease that the land included therein was to be put to any use other than that to which zamindari lands were subject at the time of the lease. Upon a consideration of all the terms of the lease his Lordship came to the conclusion that "it was not intended by the parties that the grantee should be entitled to use the lands for the purpose of making bricks."It will be seen, therefore, that a lease can be granted where a lessee intends to use the land for the purpose of making bricks. Now the use of the land for the purpose of making bricks must in the very nature of things result in the destruction of the things used and would cause subsequent damage and deterioration to the property leased. In this view it will be perhaps unnecessary to refer to the other cases but as Mr. Das strongly relied upon the case in Thakur Girdhari Singh v. Megh Lal Pandey, it is but right that I should deal with this case. In Thakur Giridhari Singh v. Megh Lal Pandey, the question which arose for decision was whether a mukarrari lease of lands "mai hak hakuk," that is, with all rights, carries a right to the subjacent minerals. Lord Shaw who delivered the judgment of the Board observed at page 250 :

> "It must be borne on mind also that the essential characteristic of lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter speciality to arise, minerals must be expressly denominated, so as thus to permit of the ides of partial consumption of the subject leased."

It will be noticed that his Lordship pointed out that the subject "leased" can be permitted to be partially consumed if it is so expressly stated in the document. In my opinion this decision negatives the argument of the assessee. The case in Hari Narain Singh v. Sriram Chakravarti is also a case of coal mining lease. The truth of the matter as was pointed out by Lord Collins, who delivered the judgment of their Lordships, is that the rights of mining, fishing, and other incorporeal rights are included in the proprietorship of the zamindar and he is at liberty to grant leases of those rights. Before referring to the Indian income-tax cases which were cited before us it is necessary to clear the ground by pointing out what is the true import of the rule that in income-tax cases the substance of the matter should be looked at and that its form should be disregarded because Mr. Das strongly relied upon this rule and asked us to hold that the substance of the matter in the present case was that the assessee was receiving money as the purchase price of the coal, the right to extract which he had parted with temporarily in favour of the lessee. Pollock, M. R., thus expressed himself as to his rule in Westleigh Estates Co. Ltd., :

> "It is will-recognized principle that, in revenue cases regard must be had to the substance of the transactions relied on to bring the subject within the charge to a duty, and that the

form may be disregarded."

Similarly, Lord Hanworth, M. R., in Perrin v. Dickson, at page 619 observed :

"For the purposes of the revenue the substance of the matter must be regarded. It matters not whether in the contract it is, or is not, called an annuity. If in truth and in fact it is an annuity no dressing of the transaction can alter its character. Stripped of its form, the transaction is a method of saving up money for future use."But it is impossible for a Court to ignore altogether the form in which the parties have chosen to express their contract. In Helby v. Matthews, at page 475 Lord Herschell, L. C., stated :

> "My Lords, it is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree. But the substance must, of course, be ascertained by a consideration of the rights and obligations of the parties, to be derived from a consideration of the whole of the agreement."

In Inland Revenue Commissioners v. Adam, Lord President Clyde made this important observation at page 41 :

> "A great deal has been said about form and substance. I think that, in a question of this sort, both form and substance must be considered; because the form of the transaction by which the respondent acquired the right to dump waste soil may bear very materially on the question of the capital or revenue character of the outlay made to acquire it."

Lord Sands agreed at page 42 in these words :

> "In a matter of this kind one cannot altogether ignore form. 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. Here the parties have chosen to contract in a certain way which in certain relations and particularly as regards the consequences of breach of contract of liability for local rates might have a result different from that of a contract for an annual payment without any reference to a capital sum. I think that we must take the contract as we find it to be a contract for a lump sum payable installments."

Lord Tomlin delivering his opinion in the now famous case in Inland Revenue Commissioner v. Duke of Westminster protested against the limit to which this doctrine of the substance of the matter was being pushed and observed at page 520 :

> "Apart, however, from the question of contract with which I have dealt it is said that in revenue cases there is a doctrine that the Court may ignore the legal position and regard what is called the substance of the matter is that is annuitant was serving the Duke for

something equal to his former salary or wages and that therefore while he is so serving, the annuity must be treated as salary or wages. This supposed doctrine (upon which the Commissioners apparently acted) seems to rest for its support upon misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight mete of the law" (4 Inst. 41).

"Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland revenue or his fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so-called doctrine of "the substance" seems to me to be nothing more than an attempt to make a an pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally climbable.

"The principal passages relied upon are from opinions of Lord Herschell and Lord Halsbury in your Lordships House. Lord Herschell, L. C., in Helby v. Matthews observed at page 475 : "It is said that the substance of the transaction evidenced by the agreement must be looked at, and not its mere words. I quite agree", but he went on to explain that the substance must be ascertained by a consideration of the rights and obligations of the parties to be derived from a consideration of the whole of the agreement. In short, Lord Herschell was saying that the substance of a transaction embodied in a written instrument is to be found by construing the document as a whole.

"Support has also been sought by the appellants from the language of Lord Halsbury, L. C., in Secretary of State in Council of India v. Scoble, at page 302. There Lord Halsbury said, "Still looking at the whole nature and substance of the transaction (and it is agreed on all sides that we must look at the nature of the transaction and not be bound by the mere use of the words), this is not the case of a purchase of an annuity". Here again, Lord Halsbury is only giving utterance to the indisputable rule that the surrounding circumstances must be regarded in construing a document.

"Neither of these passages in my opinion affords the appellants any support or has any application to the present case. The matter was put accurately by my noble and learned friend lord Warrington off Clyffe when, as Warrington, L. J., in In re Hinckes, Dashwood v. Hinckes, at page 489, he used these words : "It is said we must go behind the form and look at the substance. I do look at the substance, but, in order to ascertain the substance. I must look at the legal effect of the bargain which the parties have entered into." It is unnecessary to state that there may, of

course, be causes where documents are not bona fide nor intended to be acted upon but are only used as a cloak to conceal a different transaction and it sin those cases that the Court will look to the substance of the transaction and not the form which the transaction is dressed.

SINGLETON, J., in Earl of Carnarvon v. Inland Revenue Commissioner put this matter very clearly at page 465 : "If I had been free to form my own opinion as to what was contemplated at the time of entering into the agreement, I am by no means satisfied that I should have arrived at the same conclusion; but I am not at liberty to deal with the matter on my conception of what the parties intended. I must look at the documents; and I cannot, under the plea of looking at the substance of the matter, rewrite the contract between the parties".The Courts have not hesitated to tear down deeds if they are cloaked to shield a wholly different arrangement but only where the deeds are not genuine and are attempted to hide different transactions. The quotations from the judgment of the Master of the Rolls in Inland Revenue Commissioner v. Duke Westminster, given by Singleton, J., at page 466 are instructive :

> "Certain definite considerations arise and must be stated upon these deeds. It is not suggested that they are all part of a device or stratagem improperly entered into for the purpose of defeating a proper charge under the Income-tax Acts. Their genuine nature is not impugned."

And a little later he observed :

> "It appeals to me that the only way in which you can reach the conclusion adopted by the Commissioners is by throwing aside the deeds, and I see great difficulty in throwing them aside temporarily during the time when services are rendered to the appellant, and recognizing them as valid and subsisting during all other times, whether present or future. It seems to me that, unless you are able to tear down these deeds as a cloak to shield a wholly different arrangement, you must accept them and, when you have accepted them, you have got a case in which the covenantee, and the covenantee, being the recipient, is bound etc."

In the same case Slesser, L. J. stated :

> "But yet, as Mr. Greene has pointed out, when you have looked at the whole of the substance, you are still to look at it from the point of view of the law and see what the effect is as a legal relation;" and Romer, L. J., said :
>
> "The legal effect of the contract as it stands must be ascertained and not what would or might be the legal effect it the words of the contract be disregarded and the substance of the matter be considered".

It is unnecessary to multiply references to other English decisions. It may be noticed that I have not hesitated to refer to English decisions on this topic because the principle that the form and not the substance of the matter should or should not be disregarded is not a principle which is to be found in the English Income-tax Act alone but is a principle which is common to all systems of jurisprudence. If then the substance of the matter as laid down by the cases which I have been just considering is looked as it is clear that the lessee has covenanted with the assessee to pay him an annual sum by way of rent for the lease of his materials, a minimum is fixed and the mode of calculation of the annual sum is provided in circumstances in which the minimum is to be exceeded. The assessee in the present case like the assessee in Shiva Prasad Singh v. Emperor holds an unfettered right of disposal and in granting these leases so far rent and royalty are served, he is founding an annual increment to the income of the Raj for himself and his successors for the period of 999 years.Mr. Das, when the question was put to him as to whether a minimum royalty would be taxable if no coal was extracted by the lessee, concealed that it would be taxable; but he argued that in case the minimum royalty was paid on the extraction of a small amount of coal then income-tax would be payable on this amount less the price of the coal extracted - the price of coal, it may be noticed, it not the price at the date of the extraction but it is fixed for all times at 4 annas a ton. He also argued that where the royalty received exceeds the minimum royalty, the Income-tax Officer should be directed to find out the value of the coal extracted and deduct it from the royalty received in the year. It seems difficult to accept this argument and as Sir Manmatha Nath Mukerji, who appeared for the Commissioner of Income-tax, argued, if once it is conceded that a minimum royalty was taxable the whole argument of Mr. Das seems to disappear. How could the character of the amount paid by the lessee for the use of the mines change so violently the moment the minimum limit is exceed ?I now briefly refer to the Indian cases this topic. The earliest case is the case in Manindra Chandra Nandi v. Secretary of State, which has been considered up to now to be the leading case on the taxability of royalties on coal mines; so far as it decided the liability of the proprietor for cesses (the view has been affirmed by the Judicial Committee on an appeal from the decision). Mr. Das argued that this decision was erroneous because Mookerjee, J., failed to notice that in England royalty is made taxable expressly by statute or by the schedules of the various Income-tax Acts that have been passed from time to time. I do not wish to embark upon an investigation of the English law of the reason already stated but I am unable to hold that Mookerjee, J., based his decision merely upon the English law and the English decisions. There are a number of cases of this Court which negative the argument advanced by Mr. Das. In In re Jyoti Prasad Singh Deo, it was held that income derived as rents royalties is not income derived from business within the meaning of Section 5 (iv). Income-tax Act. The case in Manindra Chandra Nandi v. Secretary of State was followed :In Shiva Prasad Singh v. Emperor, already referred to, the question which, arises in the present case was decided in favour of the income-tax department. In Mahadeo Ashram Prasad v.

Commissioner of Income B. & O., one of the questions which arose for decision was whether income received from nimaksair, that is income from the settlement of the right to collect a particular kind of earth in a particular area during a particular season for the purpose of extracting saltpetre, was taxable. It was held that this income was in no way distinguishable from the rents or royalties arising from the letting of coal or other minerals in the earth and was therefore taxable under the heading "other sources" within the meaning of Section 12 of the Act.In Janki Kaur v. Commissioner of Income-tax, B. & O., the assessee was held to be taxable on the income which he received as royalties for preparing bricks as this income is similar to royalties on quarries or coal and it was pointed out that the lessee who was in nature of a licensee had the right to go upon the land to erect brick kilns and make bricks there and to take all the materials that he wants for the making of his bricks from his land and in respect of that licence he is only liable to pay rent which is to be calculated at a specific rate which bears relation to the extent of his user of the licence : and if the brick-maker carries on his business until all the earth is exhausted, the land will still remain in the ownership of the licensor, possibly diminished in value according to the special circumstances which may be prevail at the termination of the period and it is in no sense a capital sale of the land itself. So here. The lessee of the coal mine has a right to go upon the land to search for and extract coals from there and in respect of that licence he pays rent or royalty which is to be calculated at a specific rate which bears relation to the extent of the user of the licnece and it may be that during the course of the licence all the coals may be exhausted. But this is what the parties have actually contemplated.

Lastly, reference should be made to the well-known Tikari case of this Court which was affirmed by their Lordships of the Judicial Committee in Gopal Saran Narain Singh v. Commissioner of Income-tax, B. & O. In that case the assessee had transferred his zamindar to Rani Bhubaneshwari Kaur fin consideration of the payment of a lump sum, the discharge of certain debts, and the payment to him for life of an annuity of Rs. 2,40,000, the annuity being made a charge on the lands transferred. It was contended on behalf of the assessee that the substance of the transaction and not the mere form in which it was dressed should be looked at, and that the assessee had expressly sold the zamindar and, therefore, what he was receiving in return was nothing more than the purchase price which, he had agreed with the vendee, should be paid to him in return for his zamindari. Lord Russell who delivered the judgment of their Lordships decided the case upon the construction of the indenture of the sale dated 29th March 1930 and refused to ignore its plain language and held that the transaction clearly shows that the owner of the estate had exchanged a capital asset for (inter alia) a life annuity which is income in his hands and that it is not all case in which he has exchanged his estate for a capital sum payable in installments. From the judgment at page 599 (of 14 Pat.) it appears that reference was made before the Board to various decisions upon the taxing Acts of other countries which are couched in different terms and framed upon different lines but it was observed their Lordships "content

themselves with repeating the view expressed in the judgment of the Board above referred to, namely the case in Commissioner of Income-tax, Bengal v. Shaw Wallace & Co., that little can be gained by trying to construe an Income-tax Act of one country in the light of decision upon the meaning of the income-tax legislation of another."Having considered the case anxiously I am satisfied that what the assessee receives as royalty from his lessees is not the purchase price of his coal but is rent paid by the lessees under the covenant of the leases. For these reasons, I am of opinion that the first question should be answered in the way suggested by the Commissioner of Income-tax. I would allow the Commissioner twenty gold mohurs as the costs of this Court. The Commissioner will be entitled to retain the sum of Rs. 100 which had been deposited with him by the assessee.By the Court. - The questions are answered as follows : (1) The royalties received by the assessee in this case constitute income and were rightly assessed to income-tax by the taxing authorities. (2) This question raises no point of law, and we answer it in the manner suggested by the Commissioner. The costs of this reference will be paid by the assessee, and we assess the same at twenty gold mohurs. In addition the Commissioner will retain the sum of Rs. 100 which has been deposited in the case.

Reference answered accordingly.