Maharajadhiraj Sir Kameshwar Singh vs The State Of Bihar on 15 May, 1959

Equivalent citations: 1959 AIR 1303, 1960 SCR (1) 332, AIR 1959 SUPREME COURT 1303, 1960 BLJR 192, 1959 37 ITR 388, 1960 MADLJ(CRI) 83, 1960 (1) SCR 332, 1960 SCJ 145, ILR 38 PAT 702

Author: M. Hidayatullah

Bench: M. Hidayatullah, Natwarlal H. Bhagwati

PETITIONER:
MAHARAJADHIRAJ SIR KAMESHWAR SINGH

Vs.

RESPONDENT:
THE STATE OF BIHAR

DATE OF JUDGMENT:
15/05/1959

BENCH:
HIDAYATULLAH, M.
BENCH:
HIDAYATULLAH, M.
DAS, SUDHI RANJAN (CJ)
BHAGWATI, NATWARLAL H.

CITATION:
1959 AIR 1303 1960 SCR (1) 332

ACT:
Agricultural lncome-tax-Power of Agricultural Income-tax Office -If can revise his own order of exemption--Bihar Agricultural Income-tax Act, 1938 (Bihar Vlf Of 1938) s. 26.

HEADNOTE:
In his return of agricultural income for the assessment year I944-45 the appellant showed a sum of Rs. 2,82,192, which he had paid to the Tekari Rai for two lease-hold properties taken on Zarpeshgi lease, as one of the items of the total amount of deduction claimed by him as capital receipt. The Agricultural Income-tax Officer accepted his claim and exempted the amount from Payment of agricultural income-tax.

The Assistant Commissioner of Agricultural Income-tax affirmed the decision. A demand notice was issued and the assessee paid two instalments. Thereafter, the Agricultural Income-tax Officer served on the assessee a notice under S. 26 of the Bihar Agricultural Incometax Act, 1938, to the effect that income from the said Zarpeshgi lease had escaped assessment and after he appeared, passed a
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supplementary assessment order and assessed Rs. 39,5I2-6-o as tax. The assessee appealed. The Commissioner of Agricultural Income-tax reversed the said decision. The Province of Bihar moved the Board of Revenue and the two questions it referred to the High Court under S. 25(1) Of the Act were, (1) whether in the facts and circumstances of the case, the Agricultural Income-tax Officer had jurisdiction to revise his own order under S. 26 of the Act and (2) if so, whether the income from the Zarpeshgi lease was taxable under the Act. The High Court answered both the questions in favour of the State of Bihar. Hence this appeal by the assessee by special leave.

Held, that under S. 26 of the Bihar Agricultural Income-tax Act, 1938, the Agricultural Income-tax Officer had the power to revise his own order and assess an item of income which, even though shown in the return, he had earlier omitted to tax under a misapprehension that it was not taxable.

The use of the words " any reason " in S. 26 of the Act made the section wider than S. 34 Of the Indian Income-tax Act by dispensing with the conditions which circumscribed the section.

Kamal Singh v. Commissioner of Income-tax, Bihar & Orissa, A.I.R. 1959 S.C. 257, applied.

Messrs. Chatturam Hoyilyam Ltd. v. Commissioner of Income-tax, Bihar and Orissa, [1955] 2 S.C.R. 290, distinguished.

Case-law discussed.

Since the appellant had failed to prove his case that the income in question was income from his money-lending business or that the payment made to the lessor was not by way of premium but as a loan, the income from the lease-hold property which was admittedly agricultural in character, must be held to be liable to tax under the Act, irrespective of the character of the recipient.

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 254 of 1954. Appeal by special leave from the judgment and order dated February 19, 1952, of the Patna High Court in Misc. Judl. Case No. 244 of 1949.

B. Sen, S. K. Majumdar and I. N. Shrojj, for the appellant.

M. C. Setalvad, Attorney-General for India, B. K. Saran and R. C. Prasad, for the respondent.

1959. May 15. The Judgment of the Court was delivered by HIDAYATULLAH J.-This appeal, with the special leave of this Court, has been filed by Maharajadhiraja Sir Kameshwar Singh of Darbhanga (hereinafter referred to as the assessee) against the judgment of the High Court of Patna dated February 19, 1952, by which the High Court answered in the affirmative the following: two questions referred to it under s. 25(1) of the Bihar Agricultural Income-tax Act, 1938:

> (1) " Whether in view of the circumstances of the case, and particularly the manner in which, after due consideration, the learned Agricultural Incometax Officer in his first judgment dated the 5th January, 1946, had held that the assessee was not liable to be assessed for the receipt on account of the zarpeshgi lease, the learned Agricultural Incometax Officer has jurisdiction to revise his own order under s. 26 of the Act; and (2) Whether if he had the jurisdiction to revise his own order, under section 26 of the Act, the income from the zarpeshgi lease of the assessee was taxable under the Act."

The facts of the case lie within a very narrow com. pass. For the assessment year 1944-45 which corresponded to the year of account 1351 Fasli, the assessee returned Rs. 37,43,520 as his agricultural income. He claimed a deduction of Rs. 9,42,137-3-10 1/2 on account of land revenue, rent etc., including a sum of Rs. 2,82,192 shown to have been paid to the Tekari Raj from which two leasehold properties were taken on zarpeshgi lease by indentures dated August 15, 1931, and January 31, 1936, respectively. The amount was sought to be deducted as a capital receipt. The Agricultural Income-tax Officer of Darbhanga by his order dated December 28, 1945 accepted this contention, and exempted the amount from payment of agricultural income-tax. He observed:

> " Out of Rs. 9,42,137-3-10 1/2 claimed on account of Land Revenue and rent, Rs. 2,82,192 is shown as payment to Tekari Raj and then taken towards the realisation of Zarpeshgi Loan to self. I have gone through the bond of Gaya Zarpeshgi Lease. This payment is allowed to the assessee, as it is a capital income according to the terms of the bond. At the same time, I think, this amount of Rs. 2,82,192 should be treated as income to Tekari Raj and assessed in Gaya Circle along with other income of Tekari Raj as it is credited to that Raj by the assessee -and then set off against the Zarpeshgi loan advanced to Tekari Raj."

The assessment was approved by the Assistant Commissioner of Agricultural Income-tax on January 4, 1946, and on the day following, the Income-tax Officer passed his formal order and issued a demand notice.

The assessee paid two instalments out of three, when on March 22, 1946, the Agricultural Income-tax Officer recorded the following order :-

> " It appears that some agricultural income from Gaya Zarpeshgi lease which should have been taxed for the year 1944-45 (1351 Fasli) has escaped assessment. Issue notice under section 26 fixing the 20th May 1947."

After the assessee appeared, a supplementary assessment order was passed and Rs. 39,512-6-0 were assessed as tax on Rs. 2,52,879.

In deciding the matter, the Agricultural Income-tax Officer gave the following reasons:

> According to the terms of the lease the assessee is to remain in possession and enjoy the usufruct of the lands given in lease for a fixed number of years on payment of an annual thica rent of Rs. 1,000 to the lessor and thus satisfy himself for the entire amount of consideration money of the zarpeshgi lease in question. In fact, by this zarpeshgi lease the assessee has been given the grant of lands for a fixed term on a fixed rent. Whatever income is derived from these lands during the tenure of this lease, is the income of the assessee and as such it should be taxed in the hands of the assessee and not in the hands of the lessor."

The Agricultural Income-tax Officer purported to act under s. 26 of the Bihar Agricultural Income-tax Act, 1938 (hereinafter referred to as the Act).

The assessee appealed. The Commissioner of Agricultural Income-tax reversed the decision. He pointed out that the agricultural income from Tekari Raj property was returned by the assessee but was held to be exempt and thus could not be said' to have escaped assessment so as to bring the case within s. 26 of the Act. The Province of Bihar (as it was then called) ,moved the Board of Revenue, Bihar which by a resolution dated February 7, 1948, referred the two questions to the High Court of Patna. The Board did not express any opinion on the two questions. In the High Court, both the questions were answered in favour of the State of Bihar. Leave having been refused by the High Court, the assessee applied for, and obtained special leave from this Court.

Section 26 of the Act, under which the Agricultural Income- tax Officer purported to act is substantially the same as s. 34 of the Indian Income-tax Act, prior to its amendment.

Necessarily, therefore, the rulings on the interpretation of the latter section were freely cited by the contending parties. Section 26 of the Act reads as follows:

> " If for any reason any agricultural income chargeable to agricultural income-tax has escaped assessment for any financial year, or has been assessed at too low a rate, the Agricultural Income-tax Officer may, at any time within one year of the end of that financial year, serve on the person liable to pay agricultural income-tax on such agricultural income or, in the case of a company, on the principal officer thereof, " a notice containing all or any of the requirements which may be included in a notice under subsection (2) of section 17, and may proceed to assess or re-assess such income, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that subsection:

> Provided that the tax shall be charged at the rate at which it would have been charged if such income had not escaped assessment or full assessment, as the case may be. "

For facility of reference, the previous s. 34 before the amendment in 1948 of the Indian Income-tax Act may likewise be quoted here. It read:

> If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or in the case of a company, on the principal officer thereof, -a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:
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> Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment, or full assessment, as the case may be:.....
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> The short question is whether income which was returned but was held to be exempt from tax could be said to have " escaped assessment " so that the Agricultural Income-tax Officer could exercise his powers under s. 26 of the Act to tax it. This question arising under s. 34 of the Indian Income-tax Act has been considered on many an occasion by the High Courts and also by the Privy Council and this Court. The Patna-High Court has correctly pointed out that the preponderance of opinion is in favour of holding that such income can be said to have escaped assessment. The High Court in deciding that the Agricultural Income-tax Officer had jurisdiction to revise his earlier assessment referred to the opening words of s. 26, namely, " for any reason " and observed that it was not necessary to give a restricted meaning to the word "escaped ", and that if an item of income was not charged to tax due to a mistake or oversight on the part of the taxing authorities, that item could well come within the term " escaped ". According to the High Court, the phrase " escaped assessment " was not confined to cases where there had been an inadvertent omission, but in view of the later part of the section "where income ... has been assessed at too low a rate", included a case where there was a deliberate action. Learned counsel for the assessee contends that the generality of the words " any reasonhas no bearing upon the construction of the wordsescaped assessment ", that the word " assessment "does not connote the final determination to tax income but the entire process by which the result is reached, and that inasmuch as the income

was actually returned and held to be exempt, there was no question of an "escaped assessment " because it passed through the processing of income. He also contends that the later part of the section which deals with assessment at too low a rate cannot be called in aid to decide when income can be said to have escaped assessment. He submits that the section has no application to cases where income is returned but is held to be not liable to tax and relied upon the following cases; Maharaja Bikram Kishore v. Province of Assam (1), Commissioner of Income-tax v. Day Brothers (2), Madan Mohan Lal v. Commissioner of Income-tax (3) (per Dalip Singh, J.) and Chimanram Motilal (Gold and Silver), Bombay v. Commissioner Of Income-tax (Central), Bombay (4) (per Kania, J., as he then was).

The learned Attorney-General drew the attention of the Court to other cases in which the view has been taken that even if income is returned and deliberately not charged to tax, the condition required for the application of the section is fulfilled. He cited the following cases in support of his contention: AngloPersian Oil Co. (India) Ltd. v. Commissioner of IncometaX (5), P. C. Mullick and D. 0. Aich, In re('), The (1)[1949] 17 I.T.R. 220.

(2)[1936] 4 I.T.R. 209.

(3)[19351 3 I.T.R. 438.

(4) (1942) I.L.R. 1943 BOM. 206.

(5) [1933] [I.T.R. 129.

(6) [1940] 8 I.T.R. 236.

Commissioner of Income-tax v. Raja of Parlakimedi (1) Chimanram Moti Lal (Gold and Silver), Bombay v. Commissioner of Income-tax (Central), Bombay (2) and Madan Mohan Lal v. Commissioner of Income-tax (3). The learned Attorney- General also relied strongly upon a recent decision of this Court in Kamal Singh v. Commissioner of Income-tax, Bihar and Orissa (4), where Gajendragadkar, J., after a review of all the authorities, held that s. 34 of the Indian Income- tax Act was applicable to a case where an item of income was returned but deliberately and after consideration, was held to be not liable to tax. Learned counsel for the assessee contends that the point was left open in that case, and refers to Messrs. Chatturam Horilram Ltd. v. Commissioner of Income'-tax, Bihar and Orissa(5) as having held the contrary.

Before referring to the other authorities of the High Courts, it will be proper to see if the two cases of the Supreme Court are in point or not, and if so, which of them. In Kamal Singh's case (4), the point arose under the following circumstances. The father of the appellant in that case was assessed to income-tax for the year 1945-46. The total income assessed to incometax was Rs. 1,00,000 which included a sum of RE;. 93,604 received by him on account of interest on arrears of rent due to him after deduction of collection charges. It was urged before the Income-tax Officer that this interest

was not assessable to income-tax being agricultural "income, in view of the decision of the Patna High Court in Kamakshya Narain Singh v. Commissioner of Income-tax(6). The Income-tax Officer did not accept this contention on the ground that an appeal was pending against the Patna High Court's decision, before the Privy Council. On appeal, the Appellate Assistant Commissioner held that the Income-tax Officer was bound to follow the decision of the High Court, and he set aside the order and directed the Income-tax Officer to make a fresh assessment. The Income-tax Officer thereupon deducted the amount (1) (1926) I.L.R. 49 Mad. 22.

(2) (1942) I.L. R. 1943 Bom. 206.

(3) [1935] 3 I.T.R. 438.

(4) A.I.R. 1959 S.C. 257.

(5) [1955] 2 S-C.R. 290.

(6) [I946] 14 I.T.R. 673.

and brought only the remaining income (after some minor adjustments) to tax. His order was passed on August 20, 1946. In the year 1948, the Privy Council reversed the Patna High Court's decision. The judgment of the Privy Council is reported in Commissioner of Income-tax v. Kamakshya Narain Singh('). The Income-tax Officer then issued a notice under s. 34 of the Indian Income-tax Act, and after hearing the party assessed the sum of Rs. 93,604. After sundry procedure which it is not necessary to detail, the matter reached this Court, and the question which was before it was " whether in the circumstances of the case, the assessment order under s. 34 of the Act of the interest on arrears of rent is legal."

Two questions were involved. The first was whether the word " information " was wide enough to include knowledge about the state of the law or about a decision on a point of law. With that point we are., not concerned in this case. The second was, when income could be said to have escaped assessment. Emphasis was laid on the word " assessment " in the arguments, and it was contended that it denoted not merely the order of assessment, but included " all steps taken for the purpose of levying of tax and during the process of taxation. " It was also contended that " escaped " meant that the income must have eluded observation, search etc., or, in other words, eluded the notice of the Income- tax Officer. Gajendragadkar, J., however, did not confine the phrase to such a narrow meaning. He observed;

> " Even if the assesse has submitted a return of his income, cases may well occur where the whole of the income has not been assessed and such part of the income as has not been assessed can well be regarded as having escaped assessment. In the present case, the rents received by the assessee from his agricultural lands were brought to the notice of the Income-tax Officer; the question as to whether the said amount can be assessed in law was considered and it was ultimately held that the relevant decision of the Patna High Court 'Which was binding on (1)[1948) 16 I.T.R.

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the department justified the assessee's claim that the said income was not liable to be assessed to tax. There is no doubt that a part of the assessee's income had not been assessed and, in that sense, it has clearly escaped assessment. Can it be said that, because the matter was considered and decided on' the merits in the light of the binding authority of the decision of the Patna High Court, no income has escaped assessment when the said Patna High Court decision has been subsequently reversed by the Privy Council? We see no justification for holding that cases of income escaping assessment must always be cases where income has not been assessed owing to inadvertence or oversight or owing to the fact that no return has been submitted. In our opinion, even in a case where a return has been ,submitted, if the Income-tax Officer erroneously fails to tax a part of assessable income, it is a case where the said part of the income has escaped assessment. The appellant's attempt to put a very narrow and artificial limitation on the meaning of the word "escape' in s. 34(1)(b) cannot therefore succeed."

The assessee seeks to distinguish that case on the ground that this Court,laid down the law in the special circumstances where' a new interpretation to the law was given, and that it was not a case of the Incometax Officer changing his mind. He contends that there was at least some information which had come to the Income-tax Officer, on which his subsequent action could be rested. The learned counsel argued that Gajendragadkar, J., had expressly left the question open, where there was no information but the Incometax Officer merely changed his mind without any information from an external source. Reference in this connection is made to the following observations in the judgment:

> " It appears that, in construing the scope and effect of the provisions of s. 34, the High Courts have had occasion to decide whether it would be open to the Income-tax Officer to take action under a. 34 on the ground that he thinks that his original decision in making the order of assessment was wrong without any fresh information from an external source or whether the successor of the Income-tax Officer can act under s. 34 on the ground that the order of assessment passed by his predecessor was erroneous, and divergent views have been expressed on this point. Mr. Rajagopala Sastri,
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> -for the respondent, suggested that under the provisions of s. 34 as amended in 1948, it would be open to the Income-tax Officer to act under the said section even if he merely changed his mind without any information from an external source and came to the conclusion that, in a particular case, he had erroneously allowed an assessee's income to escape assessment. We do not propose to express any opinion on this point in the present appeal."

We may say at once that the words of s. 26 of the Act do not involve possessing of or coming by some fresh information. The section says:

> " If for any reason any agricultural income chargeable to agricultural income-tax has escaped assessment for any financial year the Agricultural Income-tax Officer may proceed to assess such income The use of the words "any reason" which are of wide import dispenses with those conditions by which s. 34 of the Indian Income-tax Act is circumscribed. The point which was thus left over by Gajendragadkar, J., cannot arise in the context of the Act we are dealing with.
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> In view of this clear opinion, it is hardly necessary for us to consider again the cases which Preceded the decision of this Court. The most important of them are considered in the judgment of Gajendragadkar, J. Most of the cases are also considered in the judgment of Harries, C. J., and Mukherjea, J. (as he then was) in Maharaja Bikram Kishore v. Province of Assam (1). In all the cases where a contrary view was taken, reliance was placed upon the decision of the Privy Council in Rajendra Nath Mukerjee v. Income-tax Commissioner(') particularly a passage wherein it was observed:
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> (1) [1949] 17 I.T.R. 220, (2) (1933) L.R. 61 I.A. 10, 16.
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> "The fact that s. 34 requires a notice to be served calling for a return of income which had escaped assessment strongly suggests that income which has already been duly returned for assessment cannot be said to have 'escaped' assessment within the statutory meaning."

The facts of the case were entirely different. The income was returned, and was not yet processed when the notice under s. 34 was issued. The key to the case is furnished by the approval by their Lordships of the observations of Rankin, C.J., in In re: Lachhiram Basantlal (1) that:

> " Income has not escaped assessment if there are pending at the time proceedings for the assessment of the assessees' income which have not yet terminated in a final assessment thereof."

Their Lordships held that the expression "has escaped assessment" should not be read as equivalent to "has not been assessed" because so to do "gives too arrow a meaning to the word 'assessment' and too wide a meaning to the word escaped'."

That those observations were related to the facts then before their Lordships is clear from the following passage:

> " To say that the income of Burn & Co., which in January, 1928, was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Co.', has escaped' assessment in 1927-28 seems to their Lordships an inadmissible reading.....

> Their Lordships find it sufficient for the disposal of the appeal to hold, as they do that the income of Burn & Co., did not 'escape assessment' in the year 1927-28 within the meaning of s. 34."

It was in the context of the pendency of assessment proceedings that the remarks were made, and the matter is decisively cleared of any doubt by the following passage:

> " It may be that if no notice calling for a return under s. 22 is issued within the tax year then s. 34 (1)(1930) I.L.R. 58. Cal. 909, 912.

provides the only means available to the Crown of remedying the omission, but that is a different matter." In our opinion, the error in the cases relied upon by the assessee arises in using the dicta in the above case, shorn of the context in which they were made and applying them to facts, where they cannot. The judgment of Gajendragadkar, J., has dealt with the matter, if we may say so respectfully, very adequately and we do not consider it necessary to cover the same ground again. The preponderance of opinion in the High Courts is also to accept the contrary view, and we think rightly.

The learned counsel for the assessee argued that the decision of this Court in Messrs. Chatturam Horilram Ltd. v. Commissioner of Income-tax, Bihar& Orissa (1) discloses a different view, and that we should follow it in preference to the later view of Gajendragadkar, J. We do not think that in the case last cited the point was the same. The same case was relied upon before the Bench of Venkatarama Aiyar, Gajendragadkar and Sarkar, JJ., and Gajondragadkar, J., distinguished it This is what he observed:

> Mr. Sastri has also relied on the decision of this Court in Messrs. Chatturam Horilram Ltd. v. Commissioner of Income- tax, Bihar & Orissa (1) in support of his construction of s.
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> 34. In Chatturam's case (1) the assessee had been assessed to income-tax which was reduced on appeal and was set aside by the Income Tax Appellate Tribunal on the ground that the Indian Finance Act of 1939, was not in force during the assessment year in Chota Nagpur. On a reference the decision of the tribunal was upheld by the High Court.

Subsequently the Governor of Bihar promulgated the Bihar Regulation IV of 1942 and thereby brought into force the Indian Finance Act of 1939, in Chota Nagpur retrospectively as from March 30, 1939. This ordinance was -assented to by the Governor-General. On February 8, 1944, the Income Tax Officer passed an order in pursuance of which proceedings were taken against (1)[1955] 2 S.C.R. 290.

the assessee under the provisions of s. 34 and they resulted in the assessment of the assessee to incometax. The contention which was raised by the assessee in his appeal to this Court was that the notice issued against him under s. 34 was invalid. This Court held that the income, profits or gains

sought to be assessed were chargeable to income-tax and that it was a case of chargeable income escaping assessment within the meaning of s. 34 and was not a case of mere non-assessment of income-tax. So far as the decision is concerned, it is in substance inconsistent with the argument raised by Mr. Sastri. He, however, relies on the observations -made by Jagannadhadas, J., that 'the contention of the learned counsel for the appellant that the escapement from assessment is not to be equated to non- assessment simpliciter is not without force' and he points out that the reason given by the learned Judge in support of the final decisions was that though earlier assessment proceedings had been taken they had failed to result in a valid assessment owing to some lacuna other than that attributable to the assessing authorities notwithstanding the chargeability of income to the tax. Mr. Sastri says that it is only in cases where income can be shown to have escaped assessment owing to some lacuna other than that attributable to the assessing authorities that s. 34 can be invoked. We do not think that a fair reading of the judgment can lead to this conclusion. The observations on which reliance is placed by Mr. Sastri have naturally been made in reference to the facts with which the Court was dealing and they must obviously be read in the context of those facts. It would be unreasonable to suggest that these observations were intended to confine the application of s. 34 only to cases where income escapes assessment owing to reasons other than those attributable to the assessing authorities. Indeed Jagannadbadas J., has taken the precaution of adding that it was unnecessary to lay down what exactly constitutes escapment from assessment and that it would be sufficient to place their decision on 44 the narrow ground to which we have just referred. We are satisfied that this decision is of no assistance to the appellant's case."

For the reasons we have given, we are of opinion that the Agricultural Income-tax Officer was competent under s. 26 of the Act to assess an item of income which he had omitted to tax earlier, even though in the return that income was included and the Agricultural Income-tax Officer then thought that it was exempt. The answer given by the High Court was therefore correct.

This brings us to the second question. The income was received from the leasehold properties, and was agricultural income. The contention of the assessee is that it may be agricultural income in the hands of the Tekari Raj but -in his hands it was capital receipt and in repayment of the loan of about Rs. 17,00,000 paid to Ram Bhuwaneshwari Kuer. The State of Bihar, however, denies that there was a loan or a mortgage at all. The assessee, it is contended, was placed in possession for a number of years on a rent of Rs. 1,000 per year and the amount paid was premium and not a loan.

The documents in question are two. They are plainly indentures of lease between the Rani and the. assessee. From these documents it is clear that in consideration of a payment of Rs. 17,16,000 the lessee was placed in possession of the leasehold property for 28 years. There is no express term which makes the sum a loan returnable either by repayment or by the enjoyment of the usufruct. There is no interest fixed or right of redemption granted. There is no provision for any Personal liability in case any amount remained outstanding at the end of the term of 28 years. These are the tests to apply to find out whether the transaction was one of zarpeshgi lease or a lease with a mortgage. See Mulla's' Transfer of Property Act, 4th Edition, page 352.

The learned counsel for the assessee in his careful argument took us through the two documents and endeavoured to prove that the relation of debtor and creditor subsisted between the parties. He

referred us to cl. 4, which embodies a provision entitling the lessee to deduct 12 1/2 per cent. of the gross aggregate amount payable by the mokarraridars as expenses of collection and other charges incidental thereto after payment of rent reserved to the I lessor' and to appropriate to himself the remainder. He submitted that the payment to the lessor was not a premium but a loan and the intention was that the lessee or creditor would be thus repaid.

The clause by itself may admit of diverse constructions, and possibly one such construction may be the one suggested, but that is not the true purport of the clause read in the context of the rest of the instrument. To interpret this clause the instrument must be read as a whole, and when so viewed, it is found that it provides for an exemption of the lessor from the liability for collection charges. It places beyond doubt that the collection charges were not to be debited to the lessor but were to be borne by the lessee. Unless such a provision was included in the instrument, it might have been a matter of some dispute as to who was to be responsible for this expenditure.

The learned counsel for the assessee next drew our attention to the last clause of the instrument of January 31, 1936. That, however, was a special covenant, and the provision therein was in relation to matters not covered by the instrument.

That the income from this leasehold property which was land, would fall within the definition of " agricultural income "

> was not seriously contested before us. The case of the assessee rests upon the claim that this was a money-lending transaction and the receipts represented a capital return. If, however, the payment to the lessor was premium and not a loan, the income, being agricultural, from these leasehold properties was assessable under the Act. We are of opinion that it was so, and that the Agricultural Income-tax Officer was right when he assessed it to agricultural income-tax. The income was not the income of money-lending, and this does not depend upon the character of the recipient. The Thika profits were clearly agricultural income being actually derived from land. The answer to the question by the High Court was thus correct.
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> The result is that the appeal must fail, and it is accordingly dismissed with costs.
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> Appeal dismissed.