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COMMISSIONER OF
INCOME-TAX,
BOMBAY
v.
MESSRS.
JAGANNATH
KISONLAL

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though it may be said that the case does not fall under s. 10 (2) (xv), it would certainly be a trading loss.

One further argument that was advanced by the Advocate General which need not detain us very long is that in any view of the case the expenditure incurred by the assessee was a capital expenditure and not a revenue expenditure. It is difficult to understand this contention. It is said that a man who borrows capital should not be put in a better position than a man who invests his own capital and it is said that if the man who invested his capital lost part of the capital he could not claim that loss as a business expenditure, similarly a man who borrows capital and loses part of that capital should not be permitted to claim the loss as a business loss. We are in entire agreement with that proposition, but the question is whether in this case the assessee has lost any part of his borrowed capital. He wanted to borrow only Rs. 50,000, that money he obtained, he put it in his business, and he has not claimed any loss with regard to that capital. The loss that he is claiming is the loss which was caused to him by reason of the fact that he could only get the sum of Rs. 50,000 by undertaking joint and several liability for Rs. 1,00,000, Rs. 50,000 of which went to Kishorilal and with which the assessee had nothing whatever to do. Therefore, on the facts of this case it is an entirely untenable position to take up that the assessee is claiming the sum as representing loss of borrowed capital.

We will, therefore, answer both the questions in the affirmative. The Commissioner to pay the costs.

Attorneys for Applicant: *N. K. Petigara.*

Attorneys for Respondent: *Manilal Kher Ambalal & Co.*

Answer accordingly.

P. M. P.

APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

KIKABHAI ABDULALI BOHARI, PETITIONER v. THE INCOME-TAX APPELLATE TRIBUNAL, BOMBAY AND OTHERS, RESPONDENTS.*

Indian Income-tax Act (XI of 1922), ss. 2 (2), 33, 66 (1)—Who can apply for reference under s. 66 (1)—Who can appeal under s. 33—Practice and Procedure of Reference.

A firm G. D. was assessed to Income-tax as an unregistered firm. G a partner appealed to the Appellate Assistant Commissioner contending that he alone was the proprietor and that he should be taxed as an individual and not as an unregistered firm. The appeal was dismissed. Upon attachment of K's property for recovery of tax on the ground that K was a partner of the firm, K appealed to the Tribunal contending that he was not a partner in the firm. The Tribunal held that K was not a partner. G applied for reference to the Tribunal under s. 66 to refer the question of law as to whether the appeal preferred by K was

* Special Civil Application No. 2722 of 1955.

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competent. The Tribunal referred the question under s. 66. Upon a petition by K under Arts. 226 and 227 of the Constitution challenging the Tribunal's order of reference;

Held, dismissing the petition, that G being liable to pay tax assessed upon the firm was entitled to apply under section 66 (1) notwithstanding the fact that G had not appealed against the Order of the Appellate Assistant Commissioner. Any person by whom income-tax or any other sum of money is payable has the right to make an application for a reference under s. 66 (1) and the right to appeal under s. 33.

SPECIAL Civil Application under arts. 226 and 227 of the Constitution of India praying for a writ in the nature of *certiorari* or other writ, direction or order.

The material facts are stated in the Judgment.

N. A. Palkhivala instructed by *Payne & Co.* for the Applicant.

G. N. Joshi with *N. K. Petigara* for the Respondents Nos. 1 to 3.

V. H. Gumaste with *G. B. Terdalkar* for Respondent No. 4.

Chagla C. J.—A firm by the name of Gokaldas Dayalji was assessed to tax as an unregistered firm and Gokaldas, the 4th respondent before us, appealed to the Appellate Assistant Commissioner contending that the assessment should have been on himself as an individual and not on the firm, the contention being based on his allegation that the firm was a proprietary firm and not a partnership firm. The appeal preferred by Gokaldas was dismissed. On March 3, 1948, the property of the petitioner was attached, it appearing that the petitioner was shown as a partner along with Gokaldas and others in a partnership deed which constituted the firm, and the Income-tax Authorities were proceeding against the petitioner as a partner in that firm. The petitioner thereupon preferred an appeal to the Tribunal denying his liability to be assessed and contending that he was not a partner in the firm. The Tribunal considered the preliminary question whether the appeal of the petitioner was competent and held in his favour. On merits the Tribunal held that the petitioner was not a partner. The Commissioner then made an application for a reference to this Court, and the question of law he suggested was whether there was any evidence before the Tribunal to hold that the petitioner was not a partner. That application of the Commissioner was rejected. Then Gokaldas, the respondent No. 4, applied for a reference to the Tribunal to refer the question of law as to whether the appeal preferred by the petitioner was competent. The Tribunal granted that application, and the petitioner has come before us under arts. 226 and 227 of the Constitution urging that it was not competent to the Tribunal in law to make this reference.

Now, the provision with regard to the making of the reference is contained in s. 66 and sub-s. (1) of that section provides that within sixty days of the date upon which he is served with notice of an order under sub-s. (4) of s. 33 the assessee or the

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Commissioner may, by application in the prescribed form, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order, and Mr. Palkhivala's argument is that the assessee contemplated by s. 66 (1) is the assessee who has preferred the appeal before the Tribunal and inasmuch as the respondent No. 4 preferred no appeal against the order of the Appellate Assistant Commissioner, it was not competent to him to apply for a reference under s. 66 (1). The only person who could have applied for a reference was the petitioner, he being the assessee within the meaning of s. 66 (1), and he alone having appealed against the order of the Appellate Assistant Commissioner. "Assessee" is defined in the Act under s. 2 (2) as meaning a person by whom income-tax or any other sum of money is payable under this Act and includes every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him. Therefore, giving to the expression "assessee" in s. 66 (1) the meaning ascribed to it by the Act itself, it is clear that any person by whom income-tax or any other sum of money is payable has the right to make an application for a reference.

Now, there can be no doubt that the respondent No. 4 as a partner or as the proprietor of the firm is liable to pay tax assessed upon the firm. What is more, the effect of the judgment of the Tribunal is that whereas by reason of the decision of the Appellate Assistant Commissioner income-tax was payable by all the partners of the firm, the finding of the Tribunal relieves the petitioner of his liability and to that extent increases the liability of the respondent No. 4. It is difficult to understand how the contention can be put forward, as has been done, that because Gokaldas did not appeal to the Tribunal from the decision of the Appellate Assistant Commissioner, he is debarred from applying for a reference under s. 66 (1). Gokaldas accepted the decision of the Appellate Assistant Commissioner that the firm was a partnership firm. It is only when the Tribunal gave a contrary decision that he felt aggrieved, and to suggest that although his rights were vitally affected and although he was liable to pay tax, he should not be given the right of applying for a reference under s. 66 (1) merely because he was not a party to the appeal is not only to ignore the definition of the expression "assessee", but to deprive an aggrieved party of the important right of coming to this Court on a question of law. It is indeed curious that this argument should be put forward by the petitioner because if this argument were sound, then he is denying himself his own right to go to the Tribunal, because he did not appeal against the order of assessment to the Appellate Assistant Commissioner. Only Gokaldas appealed and yet the petitioner did prefer an appeal to the Tribunal from the decision of the Appellate Assistant Commissioner precisely because he

was an assessee in the sense of a person being liable to pay tax and, therefore, competent to prefer an appeal. In this petition he is trying to deny the right to the respondent No. 4 which he himself successfully exercised by preferring an appeal to the Tribunal against the decision of the Appellate Assistant Commissioner.

It will be noticed that in s. 33 also the right of appeal against orders of the Appellate Assistant Commissioner is given to any assessee objecting to an order passed by the Appellate Assistant Commissioner. Therefore, the right of appeal to the Tribunal or the right to apply for a reference is not confined technically to the party who is a party to the appeal, but is a much wider right which can be exercised by any person who becomes liable to pay tax by any order against which the appeal is preferred.

Some difficulty was suggested by Mr. Palkhivala with regard to the proper procedure to be followed in cases like this. Undoubtedly this is rather an unusual matter. Ordinarily the application is made either by the Commissioner or by the party to the appeal and when the reference comes before us, the only parties are the Commissioner on the one side and the assessee on the other, in the sense of a person who was a party to the appeal before the Tribunal. But in this case complication is caused by the fact that the appellant before the Tribunal was the petitioner, and the respondent No. 4 has made an application for reference. In our opinion, the reference should be made at the instance of the respondent No. 4 who would be the applicant. The petitioner who would also have the right to be heard would be the respondent No. 2 and as we are told that there are other partners in the firm besides the petitioner and the respondent No. 4, the proper thing would be to make the unregistered firm as the respondent No. 3 to the application.

The result is that the petition fails and is dismissed with costs.

Income-tax Commissioner to bear his own costs.

Rule discharged.

G. N. V.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Gokhale.

VINAYAK GOPAL LIMAYE, PETITIONER (ORIGINAL APPLICANT) v.
LAXMAN KASHINATH ATHAVALE, OPPONENT (ORIGINAL OPPONENT).*

Bombay Rents, Hotel and Lodging House Rates Control Act (Bom. Act LVII of 1947), ss. 5 (8), 6 (1) and s. 10C—Whether a building lease, that is, lease of an open plot for building purposes attracts the provi-

* Civil Revision Application No. 695 of 1955 with Civil Revision Application No. 941 of 1955.

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