VENKATA-SOMESWARA RAO v. LAKSHMANA-SWAMI.

proposed guardian-ad-litem was herself the executant of the document. It may be that he failed to exercise a judicial discretion in coming to the conclusion that it was a proper step to appoint her, and that an Appellate Court might have so found, if invoked on the ground that, on the materials before the learned Judge who appointed her, there was everything to show that she was unfit and nothing to show that she was fit. That has not been done. In these circumstances, we cannot see our way to answer the second question, any more than the first, as involving a mere point of law.

Still less is it possible at this stage to deal with the third question put up, whether objection could be taken in execution that the decree is void, because that would depend on the determination of the other two questions which we have held not to be questions of law but to require decisions of fact, which do not exist.

K.R.

SPECIAL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Beasley and Mr. Justice Madhavan Nair.*

1928, April 19.

A. L. A. R. ARUNACHALAM CHETTY & Co., ASSESSEES,

v.

COMMISSIONER OF INCOME-TAX, REFERRING OFFICER.*

Sec. 10 (2) (*iii*), *Indian Income-tax Act* (*XI of* 1922)—*Trader carrying on two businesses, each with borrowed capital—Loss in one and closing of that business—Payment of interest on capital lost in closed business, in year of assessment—Right of assessee to claim deduction for interest.*

A trader having two branches in his trade (viz., a cloth business and a banking business) carried on both, each with borrowed capital; and as the cloth business ended in a loss, he had to close it in 1924; and all that portion of the borrowed

* Referred Case 19 of 1927.

capital which was sunk in the cloth business was lost before 1924. The trader having had to pay interest on that lost capital in 1924–25, the year of assessment, claimed deduction therefor from the assessable profits of his remaining banking business for the year 1924–25.

Held, that though the branches were distinct, the trade was one and though the lost capital was not available for use in the trade, viz., the banking business, in the year of assessment, the interest paid on it should be deducted under section 10 (2) (iii) of the Indian Income-tax Act.

CASE referred under section 66 (3) of Act XI of 1922 by the Commissioner of Income-Tax, Madras, to the High Court, for its opinion on the following question, viz.,

"If a person who is carrying on a banking business borrows money and invests it in a separate piece-goods business and that business subsequently fails and the sum invested is lost, can interest on the borrowed money be lawfully *claimed* as a deduction under section 10 (2) (iii), in computing the profits and gains of the banking business for the year of account following the year of the loss?"

The facts appear from the Judgment.

K. V. Krishnaswami Ayyar (with *V. Rajagopala Ayyar*) for assessee.—The question propounded is not in accordance with the findings and is misleading. On the facts found, A.L.A.R. Brothers and Ramaswami & Co. were not distinct firms carrying on distinct businesses but they were one and the same firm carrying on two branches of their business, viz., banking and cloth trade under different names. Both branches of the business were carried on with borrowed capital and a portion of the capital sunk in cloth trade was lost, but interest on it had to be paid even after that branch was closed. The business being one, the interest paid on the lost capital is an allowable deduction under section 10 (2) (iii) of the Act.

M. Patanjali Sastri for Referring Officer.—The finding is that the two businesses are distinct; hence loss in one cannot be set off against the gains in the other; *Commissioner of Income-tax* v. *Govindaswami Naidu*(1).

[BEASLEY, J.—That is under the Excess Profits Duty Act, which is different.]

(1) (1922) Indian Income-tax Cases, Vol. I, 174.

ARUNACHALAM CHETTY v. COMMISSIONER OF INCOME-TAX.

It is only loss or expenditure in "the business", that can be allowed. Supposing the two businesses are carried on separately in two rented buildings, the rent which might have been continued to be paid for the building in which the closed business was once carried on, cannot be deducted. Money "borrowed" means "money borrowed and used" for the business. This lost capital was not used in the year in question either for the cloth business or for the banking business. If this is allowed, then the losses of the previous years will have to be allowed. It is not the intention with which the capital was borrowed that is material but its actual use.

[BEASLEY, J.—You want to add "as it is" after the words "for the purpose of the business" in section 10 (2) (iii).]

OPINION.

The assessees here are a Nattukottai Chetti firm who trade under the vilasam of A.L.A.R. and their primary business is the usual Nattukottai Chetti business of banking and money-lending. They also trade in other ways, and under the style of Ramaswami & Co., did a considerable piece-goods business in Madras, which was opened in 1910. A.L.A.R. traded almost entirely on borrowed capital. The question is whether they are entitled to deduct from their income-tax assessment, interest paid on that part of the borrowed capital which they had put into Ramaswami & Co. That branch of their business was unsuccessful. It had to be closed in 1924, and it was found to have sustained a loss of Rs. 11,00,000 odd. Substantially two points were put forward against the claim of the assessees to make the present deduction. It was said first that the business of Ramaswami & Co. was quite separate and distinct from that of A.L.A.R. and that interest paid on money devoted to the purpose of providing trading capital for Ramaswami & Co. was not a deduction that could be allowed in the assessment of A.L.A.R. For this, on the findings, we can see no warrant. There is nothing in a

name; Ramaswami & Co. in effect was A.L.A.R. and the case does not seem to us to be different from that of two departments of one big store. Spencer & Co., Limited, to take a familiar instance, carry on the business of chemists and druggists at one end of their buildings and that of haberdashers at the other end, and, for all I know, they may, for their own purpose, keep the accounts of these two branches of their activities separate. It is obviously important for a modern multiple store, like Whiteley's or Harrod's in London or Spencer's here, to know how each branch of their business is doing, whether it is making a profit or a loss, so that, if one particular activity is shown to be carried on at a loss, it would be open to them to close down that branch of their general business. Nor does it seem to matter that the piece-goods business conducted under the name of Ramaswami & Co. was carried on in a separate building in another part of Madras. In our opinion the findings preclude any inference that these were two separate and distinct businesses.

The second point taken was that, as the piece-goods business had been shut down in the year 1924 and did not function in the year of assessment, 1924–25, it cannot be said that the capital which had been borrowed was employed in the business during the year of assessment. The money was borrowed for the purposes of the business and was employed in the business for its purposes until it was lost. Nevertheless interest had to be paid on it and the test seems to us to be, not whether it continued to be available for the purposes of the business during the year of assessment, but whether it was in its origin money borrowed as capital for the assessees' business and whether interest was in fact paid on that borrowed capital (existing or lost) during the year of assessment. We therefore answer the

ARUNACHALAM CHETTY v. COMMISSIONER OF INCOME-TAX.

question propounded in the affirmative, safeguarding ourselves by saying that the word "separate" in the question framed is perhaps an unfortunate ambiguity, and on the facts of this case, means no more than that the business was carried on by A.L.A.R. in separate departments of which the unfortunate piece-goods department conducted under the style of Ramaswami & Co. was one. Costs fixed at Rs. 250 will be paid to the assessees by the Commissioner of Income-tax.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Ramesam and Mr. Justice Reilly.

1928, September 18.

TIRUMALA CHETTY RANGAYYA CHETTI (PLAINTIFF), APPELLANT,

v.

KANDALA SRINIVASA RAGHAVACHARLU AND OTHERS (DEFENDANTS), RESPONDENTS.*

Mortgage—Agreement to sell to mortgagee at a concession rate, six days after mortgage—Agreement, whether part of the same transaction—Subsequent agreement to sell to another with notice of prior agreement—Sale to mortgagee—Suit by former for specific performance of his agreement—Agreement to sell to mortgagee, whether void as a clog on equity of redemption—Contract of pre-emption—Indefiniteness of contract.

A executed a mortgage to *B*, and six days thereafter executed an agreement to him that, in case *A* should happen to sell the property, he would sell it to *B* at a concession rate; in pursuance of the agreement *A* sold the lands to *B* under a registered sale deed. A few days prior to the sale, *A* had executed an unregistered agreement to sell the lands to *C*, who had notice of the prior agreement to sell to *B*, and received a part of the consideration. On a suit instituted by *C* against

* Appeal No. 292 of 1923.