It would appear, however, from the observations taken as a whole that the consideration as to the age limit would be a matter of recommendation, and not a positive rule of law.

It is quite true that the adoption of a boy who is older than the adoptive father is contrary to the recognised notions of Hindus as to adoptions, and to the fundamental idea of an adopted son. That is the reason why such adoptions are very rare. But having regard to the lines on which these rules relating to adoption have been interpreted by the Courts, it is difficult to hold that the consideration that the adopted boy should not be older than his adoptive father, can be treated as having the force of a prohibitive rule. We think that the learned Assistant Judge has taken a correct view as to the validity of this adoption, and that the contention of defendant No. 1 on this point must be disallowed. [The rest of the judgment is not material for this report.]

Appeal dismissed.

R. R.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice and Mr. Justice Shah.

IN RE THE RAJA GOKALDAS MILLS, LIMITED.*

1924.

January 25.

Indian Income Tax Act (XI of 1922), sections 3, 10 (2) (VI) (c)—Indian Income Tax Act (VII of 1918)—Super Tax Act (XIX of 1920)—Profit and gains of a Company—Assessment based on previous year—Deduction from the profits for obsolete machinery—Basis of taxation.

The respondent company earned a profit of Rs. 3,42,683 odd for the year ending June 30, 1921. From this amount it deducted Rs. 72,460 for obsolescence of machinery and calculated its net profit at Rs. 2,70,223. This

Civil Reference No. 15 of 1923 (with Civil Reference No. 16 of 1923).

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amount furnished the basis of taxation for income tax and super-tax purposes for the year 1921-22 under Indian Income Tax Act, 1918. Under the Indian Income Tax Act, 1922, the income of the previous year, that is, 1921-22, furnished the basis of taxation for the year 1922-23 In assessing the company to income tax for that year the income tax authorities declined to give deduction for obsolescence of machinery on the ground that allowance for the same had already been made in computing the income for the year ending June 30, 1921, and levied the income tax on Rs. 3,42,683. A question having arisen whether the income tax authorities were justified in so assessing the income tax :

Held, that the company was entitled, in making its returns for the year 1922-23 on the basis of its income, profits and gains for the year ending June 30, 1921, to deduct an allowance for obsolescence which it was entitled to do under section 10 (2) (vii) of the Income Tax Act, 1922.

CIVIL Reference No. 15 of 1923 made by L. W. Hartley, Commissioner of Income Tax, Bombay Presidency, under section 66 (2) of the Indian Income Tax Act, 1922.

The Secretaries, Treasurers and Agents of the Raja Gokuldas Mills, Limited, a company assessed to income tax in Bombay City, submitted for the purposes of the income tax and super-tax assessment for the years 1921-22 and 1922-23 a printed copy of its audited balance sheet and profit and loss account for the year ending June 30, 1921, which formed the basis of its final assessment for 1921-22 under the Indian Income Tax Act (VII of 1918) and the Super Tax Act (XIX of 1922) and of its assessment for 1922-23 under the Indian Income Tax Act (XI of 1922).

The balance sheet and profit and loss account submitted disclosed the following :—

	Rs.	a.	p.
Income ...	3,85,275	3	2
Less depreciation of machinery, electric plant, dead stock and buildings.	42,592	0	0
Balance ...	3,42,683	3	2
Less obsolescence of machinery ...	72,460	0	0
	2,70,223	3	2

For the purposes of the income tax and super-tax assessments, the income of the Raja Gokuldas Mills, Limited, was taken to be Rs. 2,70,223-3-2 for 1921-22 and Rs. 3,42,683 for 1922-23.

The Secretaries, Treasurers and Agents of the Mills accepted the assessment for 1921-22 as correct, but contended that for 1922-23 the assessable income should be taken to be Rs. 2,70,223, and not Rs. 3,42,683-3-2 in view of the provisions of sections 3 and 55 of the Act. Their contention was disallowed on the ground that Rs. 72,560 which were allowed as a deduction once for 1921-22 assessments could not be allowed a second time for 1922-23 assessments as the value of the machinery which had become obsolete had been completely allowed for and nothing remained to be allowed on that account.

At the instance of the Secretaries, Treasurers and Agents of the Raja Gokuldas Mills, Limited, the following two questions were referred by the Commissioner to the High Court :—

(1) Whether having regard to section 10 (2) (vi) (c) of the Act of 1922 the Income Tax Officer was not bound to allow the company to deduct the sum of Rs. 72,460 for obsolescence in computing the taxable income of the company for the assessment for 1922-23, and

(2) Whether the Income Tax Officer was entitled to read into section 10 (2) (vii) of the Act of 1922, the proviso that is appended to clause (vi) only of sub-section (2) of section 10 of the Act of 1922 ?

The opinion of the Commissioner on the above questions was as follows :—

" As regards the first question raised by the assessee I am deferentially of the opinion that an allowance on account of obsolescence is to be granted under section 10 (2) (vii) of the Act in order to enable the proprietor of a concern to recoup the capital sunk and lost in its machinery and plant on this account. In this particular case Rs. 72,460 out of the assessee's capital were lost on account of the machinery scrapped. It is but just and fair that an allowance to this extent be granted to them. Hence, while levying the tax

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for the year 1921-22, the taxable profits were reduced by this amount. The tax for the year 1921-22 was levied under the repealed Income Tax Act of 1918. Under it, the company was first made to pay provisionally tax for the year 1921-22 on the income of the year ending June 30, 1920. This payment was purely provisional pending ascertainment of the income for the year ending June 30, 1921, and, under section 19 of that Act, the tax for 1921-22 was to be finally levied on the income for the year ending June 30, 1921. Hence, in accordance with the provisions of this section 19, the tax for 1921-22 was finally levied on the profits of this particular year end and, in levying the tax, the above allowance on account of obsolescence was granted.

From April 1, 1922, the Act of 1918 was repealed and the Income Tax Act (XI of 1922) came into force. Under its sections 3 and 55, income tax and super-tax for the year 1922-23 also became payable finally on the income of the above year of the company's accounts, viz., the year ending June 30, 1921. The profits were Rs. 3,85,275 and out of these under section 10 (2) (vi) and (vii), an allowance for depreciation and obsolescence had to be allowed. As regards depreciation Rs. 42,592 were allowed, as this amount was admissible having regard to proviso (*c*) to section 10 (2) (vi). As regards obsolescence under section 10 (2) (vii), on account of the machinery scrapped the company had lost Rs. 72,460 only and this loss was fully allowed in levying tax for the year 1921-22. Hence there was nothing left to be allowed for the year 1922-23 and so nothing was allowed. When the whole of the original value of the machinery scrapped had been written off in the assessment for the year 1921-22, it is obvious that there is nothing left for which a further allowance was to be granted. If the argument of the company to the effect that obsolescence can be allowed even though it had been once fully allowed be accepted, it will be possible for it to go on claiming it every year which is absurd. The company can justly claim only what it has actually lost and not twice or thrice that amount. In section 10 (2) (vi) (*c*), the Legislature distinctly lays down that an allowance on account of depreciation is to be allowed only to the extent of original cost to the assessee. Once the allowance comes up to the original cost nothing more can be allowed. The same principle obviously applies to obsolescence without any doubt as the difference between an obsolescence and depreciation is one of degree only. In the latter, the wear and tear and the consequent loss is gradual. In the former, it is immediate and sudden. The result of both is loss of capital involved. Where the loss is gradual, the allowance to be made is gradual and is styled depreciation. Where the loss is immediate and sudden, it is styled obsolescence and requires to be allowed for at once. This is the only difference between these two allowances for loss of capital sunk in the plant or machinery of a concern. In both cases, the capital that has been lost is alone to be allowed and nothing more. It is an accident that on account of the repeal of the Act

of 1918 and the passing of the Act of 1922, tax for the years 1921-22 and 1922-23 has to be levied on the profits earned in the same year, viz., the year ending June 30, 1921. This cannot, however, mean that obsolescence should be allowed for twice. The total exemption from tax is to be allowed only on the total capital actually lost, and when once it is allowed, it can never be allowed again.

As regards the second question raised by the company, it does not seem to arise. The answer to the first question will settle the case. Though proviso (c) is specifically added to section 10 (2) (vi) only and not to section 10 (2) (vii), it never would have been intended that an allowance on account of obsolescence should be allowed more than once or that a company be allowed to have it again and again every year. In fact the matter is so obvious that it must have been thought unnecessary by the Legislature to put in any such proviso for this section 10 (2) (vii) too.

The assessments made against the Raja Gokuldas Mills, Limited, for 1922-23 are, in my opinion, therefore, correct."

The reference was argued.

Kanga, Advocate-General, with *A Kirke Smith*, in support of the reference.

G. N. Thakor, instructed by *Thakoredas and Daru*, for the company.

MACLEOD, C. J.:—This is a reference under section 66 (2) of the Indian Income-tax Act XI of 1922 at the instance of the Secretaries, Treasurers and Agents of the Raja Gokuldas Mills, Limited. For the purposes of the income-tax and super-tax assessments for the years 1921-22 and 1922-23 the Company submitted a printed copy of its audited balance sheet and profit and loss account for the year ending 30th June 1921, and that would form the basis of its final assessment for the year 1921-22 under the Indian Income-tax Act VII of 1918 and the Super-tax Act XIX of 1920 and of its assessment for 1922-23 under the Indian Income-tax Act XI of 1922. We are not concerned in this reference with the assessment for the year 1921-22. We are only

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concerned to see on what basis the assessment for 1922-23 has to be levied under the Income-tax Act XI of 1922.

Under section 3 of the Act :—

"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, company, firm and Hindu undivided family."

The term "previous year" is defined by section (2) (11), and it is not disputed that for the assessment of the year 1922-23 the "previous year" within the meaning of section 3 was the year ending 30th June 1921. For the purposes of that assessment the income, profit and gains of the Company were to be ascertained for the year ending 30th June 1921.

Section 10 provides how the profits and gains are to be computed and under sub-section (2) the deduction of certain allowances is permitted. Under sub-section (2), sub-clause (vii), allowance could be made in respect of any machinery or plant which, in consequence of its having become obsolete, had been sold or discarded.

It is admitted that in the year ending 30th June 1921 the Company had discarded obsolete machinery to the extent of Rs. 72,460-0-0. Therefore, in calculating the profit and gains for that year the allowance was permissible, with the result that the profits and gains for that year amounted to Rs. 2,70,223-3-2. The Commissioner of Income Tax was of opinion that the profits and gains for the year ending 30th June 1921 for the purpose of the assessment for 1922-23 should be calculated without making that allowance on the ground

that that allowance had already been made in computing the income for the year ending 30th June 1921, when making an adjustment for the financial year of 1921-22 of the actual income earned by the Company for that year under the provisions of Act VII of 1918. We do not think that the Commissioner of Income Tax was entitled to take that view. He was only concerned with the assessment for 1922-23 and that assessment was to be based on the income, profits and gains of the Company for the previous year, which, as we have said, was the year ending 30th June 1921. He was bound to calculate the profits and gains according to the provisions of Act XI of 1922, and as the Company were entitled to make that allowance for obsolescence under that Act, the Commissioner was bound to accept their estimate of their profits and gains for that particular year, and the fact that under the previous Income Tax Act the profits and gains for the then current year formed the basis of the assessment for that year, was irrelevant when considering how the Company had to be assessed for the year 1922-23 under Act XI of 1922. Assuming for the moment that the Company had earned a profit in the year ending 30th June 1921, which was non-recurring, and in the nature of a wind-fall, undoubtedly the Commissioner would have had no hesitation in taxing it twice over, once under the Act of 1918 and secondly under Act XI of 1922.

The 1st question is—

"Whether having regard to section 10 (2) (vi) (c) of Act of 1922 the Income-tax Officer was not bound to allow the Company to deduct the sum of Rs. 72,460 for obsolescence in computing the taxable income of the Company for the assessment of 1922-23?"

It is difficult to understand this question. Section 10 (2) (vi) (c) deals with depreciation of plant and buildings, not with obsolescence.

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The 2nd question is also unintelligible and unnecessary. It will be simpler for us to state our answer to the reference in the following form :—

This Court is of opinion that the Company were entitled in making their returns for the year 1922-23 on the basis of their income, profits and gains for the year ending 30th June 1921, to deduct an allowance for obsolescence under section 10 (2) (vii).

The Company will be entitled to their costs of the reference.

Costs to be taxed as on the Original Side scale.

Answers Accordingly.

J. G. R.

APPELLATE CIVIL.

1924.

February 1.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

HASHIMBI KOM YAKUBSAHEB BEG NURAJA INAMDAR (ORIGINAL PLAINTIFF), APPELLANT *v.* AJAMATBI KOM MAKTUMSAHEB KALE INAMDAR, AND OTHERS (ORIGINAL DEFENDANTS NOS. 2, 3 AND 6), RESPONDENTS*.

Gift—Possession of part of property delivered—Part of property in possession of mortgagee at donor's death—Condition as to transfer of possession deemed satisfied.

Where possession of a part of the property given by way of gift was transferred to the donee, and as regards the rest, the donee in fact got possession from the mortgagee after the donor's death in pursuance of the gift, the gift as a whole should be accepted as satisfying the essential condition as to the transfer of possession in pursuance of the gift.

SECOND appeal against the decision of G. Davis, Assistant Judge of Bijapur, reversing the decree passed by B. G. Kadkol, Subordinate Judge of Muddebihal.

* Second Appeal No. 666 of 1922.