

CIVIL REFERENCE.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Mirza.

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, BOMBAY,
REFERROR *v.* F. E. DINSHAW, ASSESSEE.*

1932
March 7.

Indian Income-tax Act (XI of 1922), sections 24, 66 (3)—Assessee, a creditor of company—Bad debt—Claim to deduct debt as bad company must cease to be a going concern.

To constitute moneys due by a joint stock company engaged in business a bad debt or a business loss to the creditor it is necessary that the company should have ceased to be a going concern; if not, a creditor will be assessed to income-tax on the sums advanced to the company.

REFERENCE made by the Commissioner of Income-tax, Bombay, under section 66 (3) of the Indian Income-tax Act, XI of 1922.

Facts were as follows :—

For the financial year 1929-30 the Income-tax Officer levied an assessment under section 23 (3) of the Act on the assessee on a total income of Rs. 2,48,359 derived from interest on securities, house property, agency commission, directors' fees, dividends, etc. Out of the above income the assessee claimed a deduction to the extent of Rs. 1,73,500 on the ground that as he was a partner in the firm of Messrs. H. F. Commissariat & Co., Agents of Asur Virji Mills, Ltd. (hereinafter referred to as the "Company"), he had to contribute this amount during the year 1928-29 (ending 31st March 1929) as his share in the money required by the company to enable it to pay off its creditors and that the financial position of the company was so bad that there was no hope of recovering the said amount. The Income-tax Officer did not allow this amount to be deducted.

The assessee thereupon appealed to the Assistant Commissioner who declined to allow the deduction on the ground that it was somewhat premature to state that the

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said amount was irrecoverable as the company was a going concern. Against this decision the assessee appealed to Commissioner but the Commissioner dismissed the appeal.

The assessee then applied to the Commissioner asking him to make a reference to the High Court under section 66 (3) as a question of law was involved but the Commissioner being of opinion that the question involved was one of fact refused to make the reference.

The assessee then applied to the High Court, and as the High Court was of opinion that there was a point of law raised directed the Commissioner to state a case on the following question :—

“Whether it is necessary to constitute moneys due by a joint stock company a bad debt or a business loss to the creditor that the company should be actually wound up or have ceased to be a going concern.”

To this question the Commissioner added a further part, namely :—

“Whether a debt due by a company cannot be treated as a bad debt or a business loss to the party to whom the moneys are due until the company is wound up or has ceased to be a going concern.”

He also raised the following additional question :—

“Whether for the purposes of assessment for the year 1929-30 the assessee is not entitled to deduct the said sum of Rs. 1,73,500, from his income as a business loss or as a bad debt.”

The Commissioner was of opinion that the Assistant Commissioner based his decision not on an assumption of law, but on his finding of fact on the evidence before him, that the money now regarded as irrecoverable may turn out to be recoverable and answered the first question as to the first part thereof in the affirmative and answered the second question in the negative.

Reference was heard.

Sir Jamshed Kanga, Advocate General, with *A. Kirke Smith*, Government Solicitor, for the Referor.

B. J. Desai, with Messrs. *Payne & Co.*, for the assessee.

BEAUMONT C. J. This is a reference by the Income-tax Commissioner under section 66 (3) of the Indian Income-tax Act, in which rather reluctantly he propounds a question for our consideration. The facts are that the assessee is one of the agents for a certain mill company and in his capacity as such agent he has been called upon to pay a sum of Rs. 1,73,500 in respect of liabilities of the company guaranteed by the agent, and his contention is that under section 24 of the Indian Income-tax Act he is entitled to deduct that payment from his income arising under other heads treating the payment as a loss incurred in respect of his business as an agent. The Income-tax Officer was not satisfied that any loss had been incurred and the matter was then referred by way of appeal on the part of the assessee to the Assistant Commissioner, and he made an order which is Exhibit C, in which he says :—

“ After hearing the learned counsel’s arguments, I am of opinion that so long as the Mill is working it is impossible to say that the money advanced by the assessee therein can be regarded as bad debts.”

The assessee then desired the Commissioner to state a case for the opinion of this Court, but the learned Commissioner was of opinion that the Assistant Commissioner’s finding was purely one of fact and that there was no point of law which he could raise. The matter then came before this Court and we thought that there was a point of law, and we directed the learned Commissioner, therefore, to state a case raising this question :—

“ Whether it is necessary to constitute moneys due by a joint stock company a bad debt or a business loss to the creditor that the company should be actually wound up or have ceased to be a going concern.”

The learned Commissioner has added to that question a further part which seems to state the same proposition over again but in a negative form, and then he has raised a second question :—

“ Whether for the purpose of assessment for the year 1929-30 the assessee is not entitled to deduct the said sum of Rs. 1,73,500 from his income as a business loss or as a bad debt.”

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Now the question which arises, and which I think is a point of law in this sense that it raises a question as to the practice which should prevail in the Commissioner's office, is this : Where you have a company carrying on business as a going concern owing money to the assessee which it is unable to pay, can the assessee go to the Commissioner and say :—
“The debt is a bad debt. I will satisfy you from evidence as to the value of the company's assets and evidence as to the extent of its liabilities that there is no reasonable possibility of this debt being recovered and therefore I claim it as a bad debt.” Or is the Income-tax Officer, faced with a claim of that sort, entitled to say :—“I am not going to consider your evidence at all. Here is a company which is a going concern. It is carrying on a business. I cannot say what the possibilities of the future may be. The debt may be recoverable or it may not. At the present moment it is impossible to say that the debt is irrecoverable.”

I think that is a question of law with which we can deal' and I think that the answer to it is that the Income-tax Officer is entitled to say that he is not going to consider the possibilities of the future. We are dealing in this case with a joint stock company engaged in the business of a cotton mill, and I think our answer to the question ought to be limited to companies carrying on business. Different considerations may apply to an individual. An individual may be a pauper without its being worthwhile for anybody to make him an insolvent, or he may leave the country and it may be difficult or impossible to trace him ; or he may grow old and past the capacity for earning money. None of those considerations apply to a company. The company is always fixed in its domicile in the particular country where it is registered. It is always possible for a creditor who cannot get paid to wind up the company. If the company ceases to carry on business, the Registrar is required to strike it off the register after taking the necessary steps under section 247 of the Indian Companies Act. But as long as

the company is on the register and as long as it is carrying on business as a going concern, it seems to me that it is impossible to say that any debt which it owes is necessarily irrecoverable. That being so, I think the Income-tax Officer was entitled to act on that view and to decline to go into evidence as to the value of the assets or extent of the liabilities of the company. We should, therefore, answer the first question in a slightly amended form by saying: To constitute moneys due by a joint stock company engaged in business a bad debt or a business loss to the creditor it is necessary that the company should have ceased to be a going concern.

The assessee should pay the costs on the Original Side scale.

MIRZA J. I agree with the answer as proposed by the learned Chief Justice.

The point of law which is the subject-matter of this reference does not appear to be covered by any direct authority. Section 24 of the Indian Income-tax Act under which the present loss may be said to be claimable deals with loss which an assessee has actually sustained and not with losses which he might apprehend that he would sustain in the future. The case for the assessee seems to be this, that having regard to the present position of the company there is no likelihood of his recovering the sum of Rs. 1,73,500 which he has advanced to the company during the year for which he is to be assessed. The loss to be sustained by the assessee cannot be ascertained until the company admits that it is unable to pay this debt or on being taken into liquidation is found to be unable to pay its debts. The company is a going concern and the assessee has not even written off this amount as a bad debt, which he does not expect to recover from the company in the future. The finding of fact by the Commissioner is that this amount has not become irrecoverable although its recovery is doubtful.

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The only other provision under the Indian Income-tax Act under which an alleged loss of the kind like the present could be claimed to be deducted, is section 10. Clause 2 of section 10 enumerates the kind of deductions which are to be allowed. The list does not include a bad debt and the list must be held to be exhaustive. See *In re Tata Industrial Bank, Limited.*⁽¹⁾

Answer accordingly.

J. G. R.

⁽¹⁾ (1921) 46 Bom. 567.

ORIGINAL CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Mirza.

JIVRAJ JOHARMAL (ORIGINAL DEFENDANT), APPELLANT *v.* LALCHAND SHREEKISON & CO. (ORIGINAL PLAINTIFFS), RESPONDENTS.*

1932
 March 15.

Transfer of Property Act (IV of 1882), sections 3, 130—Transfer of goods whose price is more than the amount advanced on them—Whether transaction amounts to transfer of actionable claim—Necessity of writing—Novation.

One M had borrowed a sum of money from G. & Co. who held 212 bales of cotton as security for the debt due to them. M was also indebted to the defendant and to another firm in which the defendant was a partner. M, the defendant, and G. & Co. entered into an arrangement by which the 212 bales of cotton were transferred to the defendant who took upon himself the liability for the amount due by M to G. & Co. and M agreed that the defendant should hold the said bales as security for the said debt as well as for the debt due to the defendant personally as also for the debt due to the firm in which the defendant was a partner. The bales of cotton were to continue to remain with G. & Co. who agreed to hold them for the defendant instead of for M. After this arrangement was made M wrote a letter to the defendant saying "our bales 212 which are lying with Gill & Co. are got transferred to your name. When these 212 bales are sold do you please credit the amount of sale-proceeds towards this amount." The plaintiffs who claimed a sum of money from M filed a suit against M to recover that amount and in that suit they obtained an order for attachment before judgment in respect of the said bales subject to the claim of G. & Co. In the said attachment proceedings the defendant took steps to raise the attachment, as a result of which the Court directed the plaintiffs to file a suit

*O. C. J. Appeal No. 37 of 1931 : Suit No. 3256 of 1925.