

APPELLATE CIVIL.

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

THE COMMISSIONER OF INCOME-TAX, BOMBAY PRESIDENCY, REFERENCE v.
THE SARASPUR MILLS CO., AHMEDABAD, ASSESSEE.*

1931
August 19.

Indian Income-tax Act (XI of 1922), section 10 (2) (vi)—Assessee succeeding another in business—Assessee claiming deduction in respect of depreciation of machinery—Deduction based on the original cost to the assessee and not to previous owner.

(1) When an assessee succeeds another in business the words "on the original cost thereof to the assessee" in section 10 (2) (vi) of the Indian Income-tax Act, 1922, refer to the original cost to the person who is being actually assessed and not to the previous owner of the business.

(2) Consequently assessees are entitled to have the depreciation allowance under the said section 10 (2) (vi) of the said Act calculated on the original cost to them and not to the previous owner from whom they have purchased the business.

Mussey & Co. v. Commissioner of Income-tax, Madras,⁽¹⁾ not followed.

REFERENCE made by the Commissioner of Income-tax, Bombay, under section 66 (2) of the Indian Income-tax Act (XI of 1922).

The case stated by the Commissioner contained the following statement of facts :—

" 2. The Saraspur Manufacturing Co., Ltd., . . . was carrying on a cotton spinning and weaving business at Ahmedabad. It was taken into liquidation in June 1924 and liquidators were appointed by the District Court at Ahmedabad. The liquidators carried on the business and worked the cotton mill belonging to the Company up to the end of January 1928 when in pursuance of the scheme referred to in the next succeeding paragraph, the assessees purchased all the assets and liabilities of the Company, all the properties belonging to it, all the stock of raw cotton, manufactured cloth and yarn, stores, coal etc., paying Rs. 16 lakhs for machinery and plant, Rs. 6 lakhs for land and buildings used for business purposes, and Rs. 5,49,730 for

* Civil Reference No. 3 of 1931.

⁽¹⁾ (1929) 3 Ind. T. C. 302.

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raw cotton, manufactured cloth and yarn, stores, coal etc. Though the Company had gone into liquidation, its business of working its Cotton Spinning and Weaving Mills and manufacturing cloth and yarn was carried on by the liquidators who made a profit of about Rs. 3 lakhs during the 13 months immediately preceding the date on which the assessee took over the whole concern. From that date, the assessee began to work the Mills, having taken up, as stated above, all its assets and liabilities and stocks of raw material and manufactured goods etc.

“ 3. In August 1927, one Mr. Kasturbhai Lalbhai prepared a scheme for taking over the assets and liabilities of the Company in liquidation and this scheme was approved of by the creditors of the Company and sanctioned by the District Court, Ahmedabad. It was according to this scheme that the assessee took over the concern from February 1, 1928, as the nominee of the said Kasturbhai Lalbhai paying the above sums of money.

“ 4. The assessee having thus taken up the business and assets etc., of the Old Company from February 1, 1928, were, for the 1st time, assessed by the Income-tax Officer, Ahmedabad City, for the financial year 1929-30 which ended on March 31, 1930, on the profits earned by them (and not their predecessor) in the ‘previous year’ as defined in section 2 (11) of the Act. While assessing income under the head ‘business,’ an allowance on account of depreciation of machinery, plant and buildings is to be granted at the prescribed rates as laid down in section 10 (2) (vi) of the Act. . . . According to this section, depreciation is to be allowed at the prescribed rates ‘on the original cost to the assessee’ and at the time of assessment proceedings before the Income-tax Officer, in the matter of this depreciation allowance, a dispute arose. The Income-tax Officer was of opinion that the allowance was to be calculated on the original cost of the machinery, plant, and buildings to the *Old Company* as the assessee had succeeded to its business. The assessee

on the other hand claimed that the allowance should be calculated on the original cost to themselves, viz., Rs. 16 lakhs for machinery and plant and Rs. 6 lakhs for lands and buildings. The Income-tax Officer was of opinion that as the assessee had succeeded to the business of the Old Company, the ruling of the Madras High Court in the case of the *Mussey & Co. v. Commissioner of Income-tax, Madras*⁽¹⁾ applied and that the depreciation admissible was to be calculated on the original cost to the Old Company. He passed an order accordingly granting depreciation on account of machinery on Rs. 3,41,653 only instead of Rs. 16 lakhs as claimed. The total cost of machinery to the old Company was Rs. 16,53,427 but that included Rs. 13,11,774 on account of machinery purchased up to the year 1908, depreciation on which was fully allowed already. Hence as per proviso (c) to the above section 10 (2) (vi) this cost was excluded and depreciation at the prescribed rate of 5 per cent. allowed on the balance of Rs. 3,41,653. As regards buildings, the total cost to the Old Company was Rs. 5,50,834 and depreciation at the prescribed rate of 2½ per cent. was allowed thereon. The assessee was thus assessed on a total income of Rs. 1,03,231 as per the order passed on April 30, 1930, by the Income-tax Officer.

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“ 5. Against the above order of the Income-tax Officer, the assessee appealed to the Assistant Commissioner of Income-tax, Northern Division, Ahmedabad, as per their petition of appeal dated June 4, 1930 . . . The Assistant Commissioner, however, disallowed their contention and confirmed the assessment levied by the Income-tax Officer by his order dated August 28, 1930 . . .

“ 6. The assessee thereupon submitted a petition dated September 23, 1930, requesting me (the Commissioner) to either revise the Assistant Commissioner's order under section 33 of the Act or refer the matter to the High Court under section 66 of the Act.”

⁽¹⁾ (1929) 3 Ind. T. C. 302.

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The Commissioner of Income-tax thereupon referred the following questions for the decision of the High Court :—

“(1) Whether, when an assessee succeeds another in business, the words ‘on the original cost thereof to the assessee’ in section 10 (2) (vi) of the Income-tax Act, 1922, refer to the original cost to the person who is being actually assessed or to the previous owner of the business, and

(2) Whether, in the circumstances of the case, the assessee is entitled to have the depreciation allowance under the said section 10 (2) (vi) of the Act calculated on the original cost to them or to the defunct Company from whose liquidators they purchased the business?”

The opinion of the Commissioner was that the ruling of the Madras High Court referred to by the Income-tax Officer did not apply as it was based upon the English Act the provisions of which differed fundamentally from the provisions of the Indian Income-tax Act. According to him the words “on the original cost thereof to the assessee” in section 10 (2) (vi) of the Income-tax Act, 1922, refer to the original cost to the person who is being actually assessed and not to the previous owner of the business and so in the circumstances of the case the assessee was entitled to have the depreciation allowance under the aforesaid section calculated on the original cost to them.

Sir Jamshed Kanga, Advocate General, with *A. Kirke-Smith*, Government Solicitor, for the Commissioner of Income-tax.

B. J. Desai, with Messrs. *Madhavji & Co.*, for the Assessee.

BEAUMONT, C. J. :—In this reference the facts are simple and not disputed. There was a Company called Saraspur Manufacturing Company, Limited, which I will call the Old Company, which went into liquidation in the year 1924, and in the year 1928 its assets were sold to the Assessee Company,

and a valuation was placed for the purposes of the sale on various assets. The only asset to which reference need be made is the machinery and plant which were valued and purchased at Rs. 16 lakhs. The question which has arisen is this. The assessee has claimed a deduction on their assessment for income-tax in respect of depreciation of machinery, and the question is whether that deduction should be based on the cost of the machinery to the assessee or on the cost to the Old Company. Section 10 (1) of the Indian Income-tax Act provides that the tax shall be payable by an assessee in respect of the profits or gains of any business carried on by him. Section 10 (2) (vi) provides that such profits or gains shall be computed after making the following allowance, namely,

“ in respect of depreciation of such buildings, machinery, plant, or furniture being the property of the assessee, a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed.”

There are certain provisos to section 10 (2) (vi), and under proviso (b) an allowance to which full effect cannot be given in any one year or years may be made up in any subsequent year or years; and then in proviso (c) it is enacted that the aggregate of all such allowances made under the Act shall in no case exceed the original cost to the assessee of the buildings, machinery, plant or furniture as the case may be. Upon the language of the Act, therefore, it seems clear that depreciation of machinery is to be based on a percentage on the original cost to the assessee, and the word “ assessee ” is defined in section 2 (2) as meaning “ a person by whom income-tax is payable.” It is quite plain here that the income-tax is payable by what I may call the New Company and cannot be paid by the Old Company which has ceased to exist. Therefore looking at the plain words of the Act I should have thought that no question could possibly arise and that the depreciation must be based on the sum of Rs. 16 lakhs which was the cost of the machinery to the Assessee Company. The learned Commissioner himself takes that view,

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and the Advocate General has not argued to the contrary. But in the reference which he has submitted the Commissioner points out that a Full Bench of the Madras High Court in a very similar case arrived at the conclusion that the depreciation should be based on the cost of the machinery to the Old Vendor Company. The case to which the Commissioner refers is the case of *Massey & Co. v. Commissioner of Income-tax, Madras.*¹ Certainly the Court in that case did arrive at the decision alleged by the learned Commissioner. But the Judges do not appear to have considered the language of the Indian Income-tax Act. The then learned Chief Justice who gave the leading judgment starts his judgment by saying "The only question I propose to ask myself in this case is whether or no there is anything to distinguish it from the Scottish case of the *Scottish Shire Line, Ltd. v. Lethem*".² The learned Chief Justice of the Madras High Court then says that he has scrutinized the Indian Act and the English Act, and he is quite clearly of the opinion that there is no material difference in the language of both these Acts. With great respect to the learned Chief Justice I do not take that view. The phraseology and the scheme of the Indian Act seem to me to differ widely from the English Act upon this question of deduction on account of depreciation of machinery. Under the English Act depreciation is to be based on the diminished value of the machinery and plant by reason of wear and tear. There is no such thing in the Indian Act, under which deduction for depreciation is based upon a percentage on the cost price. Therefore, a decision on the English Act can have little or no bearing upon the question we have to determine, and certainly cannot justify us in ignoring the plain language of the Indian Act. With all respect to the learned Judges who decided the case, I think that we

¹ (1929) 3 Ind. T. C. 302.

² (1912) 6 T. C. 91.

must refuse to follow the Madras decision, and answer the questions as follows :

(1) When an assessee succeeds another in business, the words "on the original cost thereof to the assessee" in section 10 (2) (vi) of Indian Income-tax Act, 1922, refer to the original cost to the person who is being actually assessed, and not to the previous owner of the business.

(2) Consequently in the present case the assesseees are entitled to have the depreciation allowance under section 10 (2) (vi) of the said Act calculated on the original cost to them and not to the Old Company from whose liquidators they purchased the business.

No order as to costs.

RANGNEKAR, J. :—I agree.

Answers accordingly.

B. G. R.

APPELLATE CIVIL.

Before Mr. Justice Baker and Mr. Justice Nanavati.

CHAGANLAL SAKERLAL (ORIGINAL PLAINTIFF), APPELLANT *v.* THE PRESIDENT, THANA MUNICIPALITY FOR THE CITY MUNICIPALITY OF THANA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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August 28.

Bombay District Municipal Act (Bom. Act III of 1901), section 167—Indian Limitation Act (IX of 1908), section 29—Action against Municipality for malicious prosecution—Acquittal in previous proceedings—Limitation—Cause of action—Malice—Reasonable and probable cause.

(1) That in order to succeed in an action for malicious prosecution the plaintiff must prove that the defendant acted maliciously, i.e., from some indirect motive and that there was no reasonable and probable cause for his action.

*Appeal No. 136 of 1926 from the Original Decree.

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