Saroj Kumar Mazumdar

Vs

The Commissioner of Income-Tax, West Bengal, Calcutta.

Civil Appeal No. 347 of 1955

(N. H. Bhagwati, B. P. Sinha, J. L. Kapur JJ)

04.05.1959

JUDGMENT

SINHA, J. -

The only question for determination in this appeal by special leave, is whether the solitary transaction in respect of about three quarters of an acre of land in the suburbs of Calcutta, was an adventure in the nature of trade and, therefore, liable to income-tax. The assessee is the appellant. He challenges the correctness of the order of the Income-tax Appellate Tribunal, Calcutta Bench, Calcutta, dated March 26, 1954, passed in I.T.A. 5263 of 1953-54, in respect of the Assessment year 1948-49, reversing that of the Appellate Assistant Commissioner of Income-tax, Range "C", Calcutta, dated September 5, 1953.

The facts of this case leading upto this appeal are as follows : The appellant is engaged in various types of business activities, being a share-holder and Director or Managing Director of several limited liability concerns, and is also a partner in the firm known as "Pioneer Engineering Works". In respect of his income during the previous two assessment years, the appellant was assessed to income-tax on the sums of Rs. 53,000/- (1946-47) and Rs. 59,000/- (1947-48). The appellant holds investments in shares of the value of Rs. 2,45,000/-, out of which, according to the assessee, shares of the value of Rs. 1,95,000/-, though standing in his name, belong to other members of his family, including his father and his wife.

The Hindusthan Co-operative Insurance Society Limited of Calcutta, (hereinafter referred to as "the society"), acquired a block of about 578 bighas of land lying between Diamond Harbour Road and Tolly's Nullah, within the Municipal limits of the Corporation of Calcutta, between the years 1940 and 1942. The Society decided to level the land thus acquired and to open out roads and after developing the same, it sub-divided it into small plots and sites in different blocks suitable for residential purposes under its scheme called "The New Alipore Land Development Scheme No. XV". The Society offered such plots for sale. One such plot, being plot No. 77 in block "E" of the said Scheme, was agreed, by an agreement dated January 10, 1946, to be sold to the assessee at the rate of Rs. 2,550/- per katha. In pursuance of the said agreement, the assessee paid to the Society, a sum of Rs. 13,099/- being 10% of the estimated price of the plot with an approximate area of 51 kathas, which subsequently, on exact measurement, was found to be 45.56 kathas. Subsequently, on the acceptance of his offer, the appellant paid another sum of Rs. 19,649 (omitting annas), being 15% of the estimated price. Thus, in all, a sum of Rs. 32,748/- being 25% of the estimated total price of the land, was paid by the assessee to the Society. All this area which the Society has undertaken to develop and sell to different purchasers in small plots, was in occupation of the Government, which had requisitioned it for purposes connected with the prosecution of the Second

World War. Hence, one of the terms of the transaction between the assessee and the Society, was that the transaction of purchase would be completed within six months of the lands being released from Government occupation. It was further stipulated that the assessee would be entitled to apply, within three months of the receipt of the notice of de-requisition, for extension of time not exceeding one year, for the completion of the transaction on the condition that he paid interest at the rate of 7% per annum on the outstanding amount, during the extended period. If the assessee, as purchaser, paid to the Society another sum which, together with Rs. 32,748/-, already paid, would amount to 50% of the total price of the plot in question (within six months of the notice of de-requisition), he could get a conveyance of the property on his executing an English Mortgage for the remaining 50% of the price carrying interest at the rate of 7%, on the expiry of these aforesaid six months. As there was an apprehension that the Government might acquire the whole property for its own purpose, it was further stipulated that in the event of such an acquisition by Government, the agreement for sale would stand rescinded, and the assessee, in that event, would be entitled to re-payment of the amounts paid by him to the Society by way of advance for the completion of the transaction. The assessee's case is that as the terms of the payment of purchase-price in several instalments, as aforesaid, were convenient to him, he agreed to take the plot on the conditions aforesaid, with a view to building a residential hours for himself and constructing a workshop in connection with his business activity. At the end of the Second World War, the assessee's construction activities began to decline, and there was no immediate prospect of the land in question being de-requisitioned by Government. In those circumstances, the assessee negotiated for the assignment of his rights under the agreement with the Society, to Rani Yuddha Rajya Devi of Nepal. The Rani appeared to have taken a fancy to the plot and to have made an attractive offer to the appellant. Hence, after exchange of letters between the parties, it was agreed between them that a sum of Rs. 1,07,000 odd would be deposited by the Rani with the assessee on suspense account until the transaction of sale between the Society as the vendor and the Rani or her nominee, as the vendee, would be executed and the transaction of purchase finalised upon her undertaking to pay the sum of Rs. 98,000 odd to the Society, which was the outstanding amount of the sale-price in respect of the plot agreed by the assessee to be purchased by him from the Society. After a good deal of correspondence, on December 27, 1950, the Society executed a deed of conveyance in respect of the said plot, to the daughter of the said Rani as the vendee. The aforesaid vendee executed a deed of mortgage in favour of the Society for the outstanding amount of Rs. 50,000/-, after payment of Rs. 32,700 odd to the Society. In the result, the assessee received, on April 3, 1947, a sum of Rs. 1,07,000 odd from the Rani, in pursuance of the agreement between her and the assessee. Until the execution of the sale-deed between the Society and the Rani's nominee, as aforesaid, the assessee continued to be liable to the Society in respect of the agreement of January 10, 1946. The assessee, thus, received from the Rani a sum of Rs. 74,000 odd in excess of the amount paid by him to the Society. The property, including the plot in question, was not de-requisitioned until some time in 1949.

In respect of the assessment year 1948-49, the assessee filed a return of his income to the Income-tax Department, showing a loss of Rs. 2,000 odd for the financial year 1947-48. In pursuance of the notice under s. 23(2) of the Income-tax Act, the assessee appeared before the Income-tax Officer, Calcutta, and produced all his books of account, including his bank accounts. The Income-tax Officer, on an examination of the accounts, and after questioning the assessee, came to the conclusion that the assessee had made a profit of Rs. 74,000 odd from the transaction in question, which according to him, was an adventure in the nature of trade. Hence, on an examination of the assessee's accounts, the Income-tax Officer included the sum of Rs. 74,485/- as profit from an "adventure in the nature of trade" - taxable under s. 10 of the Income-tax Act - as one of the items of

income accrued to the assessee during the assessment year 1948-49.

The assessee went up in appeal to the Appellate Assistant Commissioner of Income-tax, and challenged the conclusion of the Income-tax Officer that the sum of Rs. 74,000 odd was profit from an adventure in the nature of trade. It was also taken as one of the grounds of appeal by him that in any event, the receipt accrued to the assessee only in 1950, after the transaction of sale had been completed as between the Rani's nominee and the Society. The Appellate Assistant Commissioner did not agree with the Income-tax Officer that the assessee was not in a position either to complete the transaction of purchase by paying the full amount of consideration, or to erect a building thereon, or to use the land in any other way. He pointed out that under the Scheme, the Society had offered terms of purchase on instalments and on execution of a mortgage in respect of the vended property to the extent of 50% of the consideration money. He also pointed out that the assessee had considerable investments to the extent of Rs. 2,45,000/- in shares of different limited concerns. He, therefore, came to the conclusion that the assessee was a man of means, and that it could not be said that he had not intended to purchase the plot for his own use. He further held that the motive of making a profit at the time of the purchase, had not been established by the Department, and that it was a "solitary transaction". On these findings, he found himself unable to confirm the finding of the Income-tax Officer that the profit was from an adventure in the nature of trade. He took the view that the appellant had made an investment which had appreciated considerably in value, and that it was undoubtedly a case of appreciation of capital. Treating it as a "Capital Gain", he came to the conclusion that as the payment had been made in 1947, the gain occurred in that year and not in the year 1950, as contended on behalf of the assessee. In the result, he made him liable to pay Capital Gains tax.

The Department went up in appeal to the Income-tax Appellate Tribunal, which, by its judgment dated March 26, 1954, allowed the appeal. The Tribunal pointed out that the assessee was not a man of such large means as to think of acquiring the plot for his own residential or business purposes. The admitted shares worth Rs. 2,45,000/- standing in his name, the Tribunal pointed out, were held by the assessee, in respect of the major portion, on behalf of other members of his family. The Tribunal also observed that Rs. 32,748/- paid by the assessee to the Society had been paid out of borrowed money. This conclusion does not appear to have been well-founded in fact. The accounts do show credits in favour of the assessee of a larger amount. The Tribunal also pointed out that undoubtedly the "assessee is a keen businessman and has a number of varied business interests. Admittedly, he is a director of about a dozen concerns and managing director of two or three. He is -/8/- annas partner in an Engineering concern which is carrying out a number of construction and other contract works. He is an Engineer by profession and a resident of Calcutta." The Tribunal based its conclusion that the sale was an adventure in the nature of trade, and that the profits, thus made, were assessable to income-tax, on the following grounds :-

> 1. That the payment by the assessee to the Co-operative Society of Rs. 32,748/- came out of a loan taken for the purpose from a company (which conclusion, as already pointed out, is not borne out by the entries in the books of account of that company);
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> 2. That the assessee could not have paid the balance of Rs. 98,000 odd, the outstanding amount of the purchase-money, to the Insurance Company;
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> 3. That the assessee has no means to construct a house on the land, and lastly,
>
> 4. That the site itself fetched no income, thus, showing that it could not be an

investment but only an excursion into the realm of trade.

Against this decision of the Appellate Tribunal, the assessee moved this Court and obtained special leave to appeal.

Before we deal with the main question in controversy in this appeal, we would like to make some general remarks on the nature of the questions involved in this case. It is not disputed on behalf of the respondent that the question now before us, is a question of law, or a mixed question of fact and law, as has been recently laid down by this Court in the case of G. Venkataswami Naidu and Co. v. The Commissioner of Income-tax (A.I.R. 1959 S.C. 359.]. Speaking for the Court, Gajendragadkar, J., after a detailed discussion of the decisions of this Court Meenakshi Mills, Madurai v. Commissioner of Income-tax, Madras [[1956] S.C.R. 691.] and The Oriental Investment Co., Ltd. v. Commissioner of Income-tax, Bombay [[1958] S.C.R. 49.], and of the House of Lords, in Edwards v. Bairstow [36 T.C. 207], came to the conclusion that the question arising in the case, is a mixed question of law and fact, and, therefore, open to examination by this Court. In G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax (supra), the question raised, was exactly similar to the question now before us, though in a different setting of facts. His conclusion may be stated in his own words as follows :-

> "In other words, in reaching the conclusion that the transaction is an adventure in the nature of trade, the tribunal has to find primary evidentiary facts and then apply the legal principles involved in the expression "adventure in the nature of trade" used by s. 2, sub-s. (4). It is patent that the clause 'in the nature of trade' postulates the existence of certain elements in the adventure which in law would invest it with the character of a trade or business; and that would make the question and its decision one of mixed law and fact."

In that view of the matter, this Court further pointed out that the more proper form of the question is "whether, on the facts and circumstances proved in the case, the inference that the transaction in question is an adventure in the nature of trade is in law justified." The recent decision of this Court has examined almost all the relevant cases decided in Indian as also English and Scotch Courts, and thus, our task in the present case, has been very much simplified. It has further been observed in that case, more than once, that judicial opinion was unanimous that no general principles or universal tests could be laid down, which could govern the decision of all cases in which the question for determination is similar to the one now before us. Each case must be determined on the total impression created on the mind of the Court by all the facts and circumstances disclosed in that particular case. Hence, no decided case can, strictly speaking, be a precedent which could govern the decision of a later case, involving a similar question. Those decisions can be used only by way of illustrations of the different view-points which have a bearing on the decision of the case in hand. It has also not been disputed that in a case where a transaction under examination, is not in the line of the business of the assessee, and is an isolated or a single instance of a transaction like that, the burden lies on the Revenue to bring the case within the words of the statute, namely, that it was an adventure in the nature of trade. That the onus is on the Department, has been clearly laid down by Lord Garmount in the case of Commissioners of Inland Revenue v. Reinhold [34 T.C. 389, 393.]. That was a case in which the respondent, the assessee, was a director of a company carrying on the business of Warehousemen, and had bought four houses in January, 1945, and sold them at a profit in December, 1947. He admitted that he had bought the property with a view to resale, and had instructed his agents to sell the same whenever a suitable purchaser was forthcoming. The assessee was made liable for tax in respect of the profit made by him on the resale. On an appeal by the

assessee before the General Commissioners, it was contended on his behalf that the profit on the resale was not taxable. On behalf of the Crown, it was contended that the transaction of purchase and sale in question, constituted an adventure in the nature of trade, and that, therefore, the profits arising out of the transaction, were chargeable to income-tax. The General Commissioners, being equally divided, allowed the appeal. It was held by the Court of Session (First Division) that the fact that the property was purchased with a view to resale, did not, of itself, establish that the transaction was an adventure in the nature of trade, and that, therefore, the determination by the Commissioners was justifiable in law. The Court, in coming to that conclusion, took into account the considerations that the respondent was not a property agent, and that his business was not, in any way, associated with the purchase and sale of estates. It was an isolated transaction, even though the assessee had purchased a hotel and sold it again ten years previously. The Court made a reference to the following observations of Lord Buckmaster in the case of Leeming v. Jones [(1930) A.C. 415, 420.] :-

> "... an accretion to capital does not become income merely because the original capital was invested in the hope and expectation that it would rise in value; if it does so rise, its realization does not make it income."

Placing that decision along-side of the present case, let us see what its salient feature are. Though the appellant is engaged in various types of business as a share-holder or a director in limited liability concerns, as also in building contracts, dealing in landed estates is not in the line of his business. If such a transaction were in the line of his business, it would not matter much whether, in the assessment year, he had several such transactions or only one. Even a single transaction of dealing in landed estates, being a part of his business, would be liable to income-tax, if a profit is made in that transaction. But, admittedly, the transaction in question is the only one of its kind, out of which the appellant has made a considerable profit which appears to have been in the nature of a windfall. When he entered into the agreement with the Society for the purchase of the plot, in January, 1946, he had expected that at the end of the World War, the Government would release the property from its requisition, and that the Society will develop the land by laying the necessary roads and providing other amenities to the plot-holders. But as the Government did not release the property, and as the appellant was a businessman, who was interested in return from his capital, and as he had already paid Rs. 32,000 odd by way of advance towards the purchase price, and as in 1947, at the end of the Second World War, his business in contracts for building constructions, began to decline, he, naturally, thought of making the best of the bargain. If he did not get out of the transaction, his financial difficulties in meeting his further liabilities under the agreement, as a result of slump in his main line of business, might lead to the forfeiture of the advance of Rs. 32,000 odd, he would naturally be on the lookout for a good purchaser. He was lucky to find a lady with a lot of money to spare, who had, as he alleged, taken a fancy to the plot in question. Thus, he could assign to her the benefit of his agreement with the Society on terms which were highly profitable to him. There is no clear evidence in support of the inference of the Appellate Tribunal that the land was purchased with the sole intention of selling it later at a profit. The Tribunal considered two alternatives in relation to this transaction - one, that the land was purchased in order to build a residential house, and the second, that it was purchased in hope of selling it later for a profit. The first alternative, the Tribunal rejected on the ground that "he does not seem to have very much of means at his disposal." That itself is a statement which does not bear close scrutiny. During the two years previous to the year under assessment, the appellant had been assessed to income-tax on Rs. 53,000/- and Rs. 59,000/-, as already indicated. That does not lend countenance to the surmise that the appellant was not a man of means. Admittedly, he held marketable shares of the value of about 2 1/2 lacs of rupees, though all those shares standing in his name, were not claimed by him as his

own. Apparently, he was carrying on a lucrative business during the immediately preceding years. It is true that in the year of assessment, on his own showing in his income-tax return, he had suffered a loss, but that may have been a turning point in his fortunes, and that would not necessarily lead to the inference that he was not in a sound financial position on the date of the agreement with the Society. It may be that his hopes of flourishing in his business in the years to come, were not realized after the conclusion of the Second Word War. But even assuming that the Tribunal was right in its conclusion as to the second alternative, namely, that the purchase was made in the hope of making a profit after re-sale, the matter is not concluded. In this connection, a reference may be made again to the decision in Commissioners of Inland Revenue v. Reinhold (supra), at p. 392, where it was argued on behalf of the Revenue that a profit made in a transaction which was in the nature of an investment in the hope and expectation of a rise in price, may be an accretion of capital, but that if at the time of the purchase, the purchaser had resolved to sell the property in the event of a profit being made, and instructions had been issued to his agents accordingly, the transaction could not have been treated as an investment, but was truly an adventure in the nature of trade, and the profit thus made, must be treated as income. This argument was not accepted as valid. In that connection, reference was made to the following observations of Lord Dunedin in the case of Jones v. Leeming [(1930) A.C. 415, p. 423] :-

> "..... The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments, but per se it leads to no conclusion whatever."

The decision of the House of Lords in the case aforesaid, which is also reported in 15 T.C. 333, is rather instructives. In that case, the appellant was a member of a syndicate of four persons, formed to acquire an option over a rubber estate, with a view to selling at a profit. The option was secured, but the estate was considered to be too small for re-sale. An option over another joint estate was accordingly secured, and it was decided to resell the two estates to a public company to be formed for the purpose. Another member of the syndicate undertook to arrange for promotion of the company. The syndicate's rights were transferred to a company. This company floated another company to which the properties were sold. The syndicate's profits were divided between the members, and the appellant, as one of the members of the syndicate, was assessed to income-tax in respect of his shares of the profits. The General Commissioners, on appeal, were of the opinion that the interest in the property in question had been acquired with the sole object of making a profit, and that there was no intention of holding it as an investment. Hence, the assessment to income-tax was affirmed. The King's Bench Division, at the first hearing, remitted the case to the General Commissioners for a finding as to whether there was a concern in the nature of trade, and the Commissioners found that the transaction was not such a concern. It was held by the House of Lords that the profits were not liable to tax on the basis that they were income from an adventure in the nature of trade. Viscount Dunedin, in the course of his opinion, referred, with apparent approval, to the dictum in Ryall v. Noare [(1923) 2 K.B. 447, 454.], to the following effect :

> "A casual profit made on an isolated purchase and sale, unless merged with similar transactions in the carrying on of a trade or business is not liable to tax."

He also approved of the following dictum of Lawrence, L.J., in the case of Leeming v. Jones [(1930) 1 K.B. 279, 362.] :-

> "It seems to me in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature

> of trade, or else it is simply a case of sale and re-sale of property."

Lord Warrington of Clyffe, in the course of his opinion in the case of Jones v. Leeming [(1930) A.C. 415, 425.], made the following observations, which apply with full force to the facts and circumstances of the present case :-

> "Here we have a case of the acquisition of an item of property and a profit made by the transfer thereof to another. In this I can find nothing but a profit arising from an accretion in value of the item of property in question and the realization of such enhanced value. There is in this nothing in the nature of revenue or income. The fact that the parties intended from the first to make a profit if they could does not in my opinion affect the question we have to determine."

As already indicated, the line of demarcation between cases of isolated transactions of purchase and sale being ventures in the nature of trade, and those which are not such ventures, if any, is very thin. The cases in which single transactions have been held not to belong to the class of ventures in the nature of trade, have been noticed above, and the considerations which led those courts to hold that such ventures were not liable to income-tax, apply to the case in hand. On the other side of the line, there is a series of cases in which single transactions have been held to have been ventures in the nature of trade, for reasons which do not apply to the present case. We may notice some of the typical cases which illustrate the reasons for which a single transaction was brought within the ambit of a venture in the nature of trade. The case of Californian Copper Syndicate (Limited and Reduced) v. Harris (Surveyor of Taxes) [5 T.C. 159.], related to the purchase and sale of a mining property. In that case, a company had been formed for the purpose, inter alia, of acquiring and re-selling a mining property. That company acquired some mining property and sold the same to a second company, consideration for the sale being paid-up shares of the latter company. It was held by the Court of Exchequer (Scotland) Second Division, that the difference between the purchase price and the value of shares for which the property was exchanged was a profit assessable to income-tax. It was pointed out by the Court that the case involved a deal which was a "proper trading transaction, one within the Company's power under their Articles, and contemplated as well as authorised by their Articles". The ratio of the decision in that case appears to have been that though it was a single transaction in which profit was made, it was an adventure in the nature of trade, being in the line of the business adopted by the company. The next case of Martin v. Lowry [11 T.C. 297.] is another instance of a single transaction of purchase of property being treated as a venture in the nature of trade, on account of the very nature and magnitude of the commodity dealt in by a person whose usual line of business was wholly outside the scope of the new venture. That was a case in which a wholesale agricultural machinery merchant, who never had any dealings in linen trade, purchased from the Government its surplus stock of aeroplane linen (some 44 million yards). In order to dispose of this huge stock of linen purchased by him, the assessee embarked upon an extensive advertising campaign, rented offices and engaged expert staff to organize the sales. The number of transactions of sale of that huge stock of linen, ran into thousands. The House of Lords affirmed the determination of the courts below, holding that the transaction amounted to the carrying on of a trade of which the profits were chargeable to income-tax and Excess Profits Duty. Another case in the same volume, is The Commissioners of Inland Revenue v. Livingston and others [11 T.C. 538.]. In that case, the persons sought to be taxed were, a ship repairer, a blacksmith and a fish salesman's employee, who joined in the venture of purchasing a cargo vessel with a view to converting it into a steam-drifter, and selling it. That was a new line of business for them. Extensive repairs and alterations to the ship were carried out, and the result was a sale of the converted vessel at a profit. It was held that the transaction, though an isolated one, was a venture in the nature of trade, and thus,

liable to income-tax. The ratio of the decision was stated in the following words of the Lord President :

> "If the venture was one consisting simply in an isolated purchase of some article against an expected rise in price and a subsequent sale it might be impossible to say that the venture was 'in the nature of trade'; because the only trade in the nature of which it could participate would be the trade of a dealer in such articles, and a single transaction falls as far short of constituting a dealer's trade, as the appearance of a single swallow does of making a summer. The trade of a dealer necessarily consists of a course of dealing, either actually engaged in or at any rate contemplated and intended to continue."

The case of Rutledge v. The Commissioners of Inland Revenue [14 T.C. 490.], is another illustration of a case in which a single transaction of purchase and sale, was held to be an adventure in the nature of trade for the reason that the commodity purchased was of such a nature and of such a vast magnitude that it could not have possibly been intended for the consumption of the purchaser himself or his family. In that case, the assessee was a money-lender who was also interested in a cinema company. In the interest of his cinema business, he happened to be in Berlin, and there took the opportunity of purchasing, for a very cheap price, a very large quantity (one million rolls) of toilet paper - for pounds 1,000 - and realised pounds 12,000 by sale of that commodity. He was taxed on the net profit of pounds 10,895. It was held by the Court of Session, Scotland (First Division), that it was certainly an adventure, because the assessee made himself liable for the purchase of that vast quantity of toilet paper, obviously for no other conceivable purpose than that of re-selling it for a large profit. As regards the question whether the adventure was in the nature of trade, it was contended on behalf of the assessee that it was essential to the idea of trade that there should be a continuous series of trading operations. The Court rightly pointed out that the question was not whether it was a trade but whether it was a venture in the nature of trade. Hence, though the single transaction of purchase and sale, may not have amounted to what is ordinarily understood by trade in the sense of a series of transactions, it was certainly a venture in the nature of trade, because from the very beginning, the intention was manifest that the purchase was made not with a view to utilizing the commodity for the personal use of the purchaser, but with a view to making profit by a re-sale, which was apparent from the very nature and magnitude of the commodity purchased. Another illustration of the same rule is to be found in the case of The Balgownie Land Trust, Ltd. v. The Commissioners of Inland Revenue [14 T.C. 684.]. That was the case of a landed estate which was left by the owner to trustees with a direction to sell it. The trustees, being unsuccessful in their efforts to sell the estate, formed a company with general powers to deal in real property, and transferred the estate to this company. The company made certain other purchases of property by way of accretions to the original estate. The property was sold in parts during the years 1921, 1924, 1926 and 1927. The company was assessed to income-tax for the profits from the sales of those lands. The Court, confirming the assessment of the company to income-tax on the profits made on those sales, held that the company was doing precisely what it meant to do, namely, carrying on business of a company dealing in a real estate. The case of Commissioners of Inland Revenue v. Fraser [24 T.C. 498.], is another illustration of the rule that if a person enters into a single transaction outside his ordinary avocation of life, with the sole object of making a profit by re-sale, it may amount to an adventure in the nature of trade. In that case, a wood-cutter bought, for re-sale, whisky in large quantities, and without taking delivery of the whisky, sold it at a profit. It was the assessee's sole dealing in whisky, but all the same it was held to be liable to income-tax on the ground that the nature of the transaction, with reference to the commodity dealt in large quantities, which would not ordinarily be meant for personal or family consumption, may indicate that it was

an adventure in the nature of trade.

We have set out the illustrative cases on the two sides of the thin line of demarcation that may possibly be said to distinguish one class of case from the other. The question still remains, on which side of the line, the present case should be placed ? The learned Solicitor-General placed strong reliance on the recent decision of this Court in Venkataswami Naidu & Co. v. The Commissioner of Income-tax (supra). The question, therefore, is whether the present case falls on the same side of the line as the recent decision of this Court, which had to deal with a similar question, as already indicated. In that case, the assessee had purchased four plots under four different deeds. During the time that the assessee was in possession of those plots, he made no efforts to put up any structures, or to utilize them in other ways. The assessee was in a fiduciary position with the Mills contiguous to which the plots purchased were; and it was also found that the assessee was in a position to influence the Mills to purchase those plots at a price favourable to him. It was in that setting of the facts, that this Court made the following observations :-

> "When s. 2, sub-s. (4) refers to an adventure in the nature of trade it clearly suggests that the transaction cannot properly be regarded as trade or business. It is allied to transactions that constitute trade or business but may not be trade or business itself. It is characterised by some of the essential features that make up trade or business but not by all of them; and so, even an isolated transaction can satisfy the description of an adventure in the nature of trade."

Can it be said, in the setting of the facts and circumstances of the present case, set out above, that the transaction in question has such characteristics as to point to the conclusion that it was a venture in the nature of trade ? It was suggested that the area of the land in question, namely, three quarters of an acre in the suburbs of Calcutta, was large enough to indicate that the assessee would not have intended to take it for his own use and occupation. In the first place, the area is not so large as to lead necessarily to the inference that it could not have been meant to be used by him in the way of his business or for his own residence. Certainly, the Society, having acquired more than 500 bighas of land in a lot, could not claim that the land was meant for its own use. On the other side, it was meant to be developed into small building sites, as they actually did. But the Society had, without developing the area, sub-divided it into building sites, one of which was sought to be acquired by the appellant. He was carrying on an engineering concern, and it is not, therefore, unlikely that he may have intended, as he alleged, to put up a small workshop on a portion of the land to be acquired, and to build his own residential house on the other portion. It was not suggested that the appellant had his own house in Calcutta, and was, therefore, not in need of a building site. At the time he entered into the agreement of purchase with the Society, he was doing good business, as is shown by the large amounts on which he was assessed to income-tax. It was not unnatural for him to look forward to continue his business in as prosperous a way as he had been doing in the recent past, and thus, to raise sufficient funds to build his own residential house, or to construct a workshop for his own engineering business. Hence, the possibility or the probability that the site may appreciate in value, would not necessarily lend itself to the inference that the transaction was a venture in the nature of trade, as distinguished from a capital investment. In all the circumstances of this case, the total impression created on our mind, is that it has not been made out by the Department that the dominant intention of the appellant was to embark on a venture in the nature of trade, when he entered into the agreement which resulted in the profits sought to be taxed.

For the aforesaid reasons, we would allow this appeal, and set aside the orders of the Tribunal below with costs.

KAPUR, J. -

I regret I am unable to agree that the appeal in the present case should be allowed and my reasons are these : On the facts which were proved the Income-tax Appellate Tribunal came to the conclusion that the purchase of land by the appellant was an adventure in the nature of trade and profit arising therefrom was assessable to income-tax. In coming to this conclusion the Apellate Tribunal took into consideration certain facts; (1) that the only payment the appellant made for the purchase of the land was of a sum of Rs. 32,748 which he borrowed from his company and he was not in a position to pay the balance of Rs. 98,246; (2) the appellant had no money available at all to pay the part of the purchase price of Rs. 1,30,994 and he had no means to construct the house; (3) that his financial resources were such as not to justify the purchase of the plot of land for the construction of a house; (4) the site itself fetched no income but it was a kind of investment with the hope of making a profit out of it and the land was purchased only for the purpose of sale; (5) that the appellant being a keen businessman had intimate knowledge of the trend of the rise in prices of land and therefore the purpose for which he made the purchase was in order to make profit and not merely an investment.

As against these circumstances various facts were brought to our notice which it has argued militate against the findings of the Tribunal : (1) that the appellant was carrying on an engineering concern and therefore it was not unlikely that he intended, as he alleged, to put up a small workshop on that portion of land; (2) that the appellant did not have his own house in Calcutta and therefore he could have been in need of a piece of land on which he could build a house; and (3) that at the time he entered into an agreement of purchase he had a prosperous business which is shown by the amount of income-tax which he paid for two years and he could legitimately expect that his business would continue to remain prosperous; (4) that his business would continue to remain prosperous; (4) that these facts could not lead to the necessary consequence that the transaction was a venture in the nature of trade and that it was not the dominant intention of the appellant at the time when he entered into the transaction to embark upon a venture in the nature of trade.

Under the Income-tax law it is the exclusive function of the Appellate Tribunal to find facts. Even though the powers of this Court under Art. 136 are very wide yet they have to be exercised within the limits imposed by the decisions of this Court and one such limitation is that this Court will not ordinarily interfere with findings of fact. It has been held by this Court that the question whether an adventure is in the nature of a trade or not is a mixed question of law and fact. The facts have to be found by the fact-finding authority and to those facts the law has to be applied and whenever it is necessary to get a correct finding on a question of fact it is the fact-finding authority which is called upon to consider the evidence and give its finding. (See G. Venkataswami Naidu & Co. v. The Commissioner of Income-tax [A.I.R. (1959) S.C. 359.]. Therefore if there arose a question of law out of the order of the Appellate Tribunal then the appellant could have had the case stated to the High Court under s. 66(1) and if the Appellate Tribunal refused to state the case it was open to the appellant to have the case stated under s. 66(2) of the Indian Income-tax Act. No doubt he did make an application to the Appellate Tribunal to state the case under s. 66(1) but he did not make any application to the High Court till 1957, after he had obtained special leave in this Court and the High Court dismissed the petition on the ground that it was barred by time. The position comes to this that the tribunal refused to state the case under s. 66(1) of the Income-tax Act and the appellant did not apply to the High Court under s. 66(2) till long after the period of limitation had expired. In the circumstances the courses open to this Court would be (1) to set aside the order of the Appellate Tribunal and remit the case to the Tribunal for decision in accordance with the observations made by this Court as was done in the case of Omar Saly Mohammed Sait v. The Commissioner of

Income-tax [C.A. No. 15 of 1958.] or it may be open to this Court to direct a reference as was done in Jagta Coal Company v. The Commissioner of Income-tax [C.A. No. 337 of 1956.]. Then in Dhakeswari Cotton Mills v. The Commissioner of Income-tax [[1955] 1 S.C.R. 941.], this Court only remitted the case to the Appellate Tribunal to proceed in accordance with law on the ground that certain principles of natural justice had been violated and the assessee was not given an opportunity to rebut the evidence against him.

The Income-tax law has prescribed a procedure to have questions of law determined and an assessee cannot byepass the various steps prescribed under that law. The position therefore comes to this that if there is no evidence to support the finding the question is one of law which would fall under ss. 66(1) and 66(2) of the Income-tax Act; (2) if in giving its finding the Appellate Tribunal disregards certain pieces of evidence or proceeds in a manner which is violative of natural justice the finding will be vitiated but if there is evidence to support the finding of fact and these findings are properly arrived at then it will be a pure question of fact which this Court will not ordinarily interfere with; (3) if there is an error of law arising as above or because of misinterpretation of the Income-tax law then the case has to be stated to the High Court in the manner provided in the Income-tax Act and if the assessee does not choose to follow the procedure prescribed then he cannot come to this Court disregarding the remedy provided by the Income-tax law and (4) the legal effect of facts found where the point for determination is a mixed question of law and fact would fall under s. 66(1) & (2) of the Income-tax Act. (See Venkataswami Naidu & Co. v. The Commissioner of Income-tax [A.I.R. (1959) S.C. 359]).

This is a case in which certain essential facts have not been considered by the Appellate Tribunal and therefore it is a case which should be remitted to the Income-tax Appellate Tribunal to determine the facts in accordance with the observations made by this Court and in the light of those findings to determine whether the transaction was an adventure in the nature of a trade or not.

I would order accordingly.

ORDER OF THE COURT

In view of the opinion of the majority, the appeal is allowed with costs.

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